



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.265 OF 2018

NELSON KESHEL.....CLAIMANT

VERSUS

NAROK COUNTY GOVERNMENT.....1ST RESPONDENT

NAROK COUNTY PUBLIC SERVICE BOARD.....2ND RRESPONDENT

JUDGEMENT

The claimant was an employee of the 1st respondent upon appointment with effect from 14th May, 2013 whereas the 1st respondent is a County Government under the constitution and the 2nd respondent a statutory body in charge of all employees of the 1st respondent.

The claim is that on 7th February, 2017 the claimant resigned from office while earning ksh.281, 250.00 per month and is claiming gratuity pursuant to the Salaries and Remuneration Commission (SRC) Gazette Notice dated 1st March, 2013 and circular to governors sated 5th September, 2017. The claimant has made demand for the payment of his terminal dues without success.

The claim is for gratuity at Ksh.2, 354,062.50 being the basic salary for 60% for total number of years worked at 31% rate in the SRC Notice being Ksh.281, 250 x 60% x 3 years and 9 months x 31%.

The claimant is also seeking to be issued with a certificate of service, costs and interests on the owing dues.

The claimant testified that he was appointed by the 1st respondent and issued with letter of appointment with his terms and conditions of service. he worked for 3 years and 9 months and then issued notice to resign dated 8th November, 2015 and taking effect on February, 2017. The resignation was voluntary. at the time the respondent had no human resource manual and the one produced in defence came into effect in May, 2016 after his employment.

The claimant also testified that upon terminating his employment with the respondent he was entitled to a gratuity on condition such was as a result of retirement, ill-health or resignation. At the time he was 50 years having been born in the year 1968.

Vide the SRC Circular and Gazette Notice of 1st March, 2013 he was entitled to 31% gratuity pay for the term served. For every year served, the due gratuity is payable.

Defence

The respondents admit the claimant was an employee but deny the claims made for the payment of gratuity is not due. without prejudice, the defence is also that by letter dated 16th May, 2013 the claimant was appointed County Executive Committee (CEC) Member for a 5 years contract and vide letter and notice dated 8th November, 2016 he resigned from his employment.

The letter of appointment specifically had a condition that gratuity was payable at the end of 5 years at 31% of the annual basic pay for every year served. The Human Resource Manual for the public service, 2016 provided that an officer is only eligible for pension or gratuity under the Pensions Act only upon retirement from service at 50 years retirement, upon abolition of office and due to ill-health. But an officer who resigned from the service forfeited all claims due to retirement.

The SRC Notice of 1st March, 2013 provides for payment of gratuity only for retirement benefits of county officers who serve on contract and paid at the end of the contract term. The claimant terminated employment before the end of term.

The defence is also that without prejudice, the claimant was registered as a member of a non-contributory scheme, the Lap Fund a secured

retirement Scheme to which the respondent remitted payments;

June, 2013 Ksh, 66,150.00;

July, 2013 – June, 2014 Ksh.509, 175.00;

July, 2014 – June, 2015 Ksh.624, 862.50;

July, 2015 – January, 2016 Ksh.398, 737.50

Total Ksh.1, 616,925.00.

The claims thus made are without merit and should be dismissed.

Queen Kimorgo the deputy director human resources of the 1st respondent testified that for the duration of employment, the claimant was on appointment for a term of 5 years vide letter dated 16th May, 2013 but resigned before contract ended on 8th November, 2016 which the 1st respondent governor accepted on 7th January, 2017.

The claimant is not entitled to the gratuity as claimed as he failed to complete his contract term. To be eligible for such pay one had to complete the contract term at 5 years, or retire on age grounds at 50 years or the office be abolished or due to ill-health but in his case the claimant resigned and lost gratuity. For the period worked the claimant was covered under the non-contributory pension fund which the respondents remitted.

At the close of the hearing both parties filed written submissions.

The claimant relied on SRC Notice of 1st March, 2013 and the case of **Cecilia Wangechi Ndung'u versus the County Government of Nyeri & others ELRC No.122 of 2015** and that the court held that an employee whose contract term ended before the due date was entitled to the gratuity for the period of service.

The respondent submitted that the claimant is not entitled to any gratuity as under letter of appointment dated 16th May, 2013 he was the CEC for a fixed term of 5 years and by his notice of 8th number, 2016 he resigned from his position. The due gratuity was only payable at the end of the contract term but the claimant only served for 3 years and 9 months and thus not entitled to gratuity but the non-contributory funds. The claimant did not abide the express terms of his contract to enjoy the full benefits therefrom as held in **Tom Otieno Odongo versus Cabinet Secretary Ministry of Labour Social Services & another [2013] eKLR** that contracts give the intentions of parties and the court is bound to uphold those intentions when disputes arise.

The SRC Gazette Notice of 7th July, 2017 and amended by Notice dated 1st March, 2013 providing for 31% gratuity pay for every year served but the claimant did not earn such gratuity as he did not complete his term.

The respondents also submitted that the officers in the cadre of the claimant was regulated under the Human Resource Policy, 2016 which made provision for retirement, ill-health and where one reigns there are no benefits. The claimant should be dismissed with costs.

Determination

The twin issues which emerge for determination in this case are that;

Whether the claimant is entitled to the claim for gratuity and

Whether costs are due.

The Employment Act, 2007 does not make it mandatory for employers to pay gratuity to employees. The payment of gratuity must be a term of contract, a provision under a private treaty, a provision under a Collective Agreement or a provision under a term and practice of the employer.

By letter dated 16th May, 2013 the claimant was appointed to the post of Executive Committee Member by the 1st respondent and which included the following terms;

... you will serve on contract for a period of five years.

You will be paid a service gratuity at the end of the term at the rate of 31% of annual basic pay for every year served.

While as an employee of the County, you will be bound by the terms and conditions of service of the Public Service Commission of Kenya. ...

The claimant accepted the employment offered by the respondents.

By letter dated 8th November, 2016 the claimant resigned from his employment with the respondents with effect from 7th February, 2017 and on the reasons of section 43(5) of the Election Act, 2011 and which required a public officer who intended to contest in the election to resign from such office at least 6 months before the election date.

The claimant's appointment was also regulated by the Public Service Commission of Kenya human resource policy (the Policy). The respondents has submitted the Policy of 2016. In the preamble the Policy, 2016 provides that;

The current Code of Regulations was last reviewed in 2006. Since then there have been fundamental changes both in the structure of the Public Service and the management of the Human Resource. These changes include the promulgation of the Constitution and reforms in various aspects of Public Service Management. ...

The respondents have not submitted the previous policy prior to the one for May, 2016.

Under the May, 2016 policy, under clause D.32(1) and (2) the payment of gratuity/pension was on the conditions that an employee who retires at not less than 50 years; there is abolition of office; due to ill-health and that an employees who voluntarily resigns from the service of government or is dismissed forfeited all claims for the retirement benefits.

The court reading of the May, 2016 policy in whole and in context is that Clause D thereof and under which clause D.32 fall is that it covers the payment of benefits in the nature of pensions. Even where Clause D.32 covers *pension/gratuity* these two aspects of the law are foundationally different as the payment of *gratuity* is set out above.

The payment of *gratuity* by an employee is gratis. Its basis is on the practice of an employer or as agreed under the contract of service. In **Bamburi Cement Limited versus William Kilonzi [2016] eKLR**, it was held;

Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer.

And in **Bamburi Cement Ltd versus Farid Aboud Mohammed [2016] eKLR** it was held that;

[gratuity] denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement.

Also in the case of **Republic versus The Transition Authority & Another ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) & 2 others High Court of Kenya at Nairobi JR No. 317 of 2013** it was held that;

Under article 1(3) (b) of the Constitution of Kenya, 2010, there was only one state organ known as the executive with structures at national level and in the county governments. Accordingly, it could not mean that the devolution of health services ipso facto had to lead to loss of jobs or disadvantageous terms of employment, salaries, remuneration, pensions and gratuities which terms were to be determined by the Salaries and Remuneration Commission

In this regard, under the claimant's contract of employment, where the payment of gratuity was a term of the contract, and without any other record taking away the right of such benefit, the SRC in the Gazette Notice No.2888 of 1st March, 2013 published the *Remuneration and Benefits of State Officers Serving in the County Government* and made provision under Notes (vi) for the payment of a 31% gratuity for a County Executive in the following terms;

Retirement benefits: a County State Officer shall serve on contract and be paid a service gratuity at the end of the term at the rate of 31% of annual basic pay for every year served.

A fixed term contract being regulated under section 10(3) (c) and where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end; the parties to such contract are bound by its terms. However, the Employment Act, 2007 allow parties under section 35 read together with section 36 of the Act to terminate contract upon issuance of notice or payment in lieu thereof. Where such notice is issued and accepted by the other party, the end of the term contract terminates on such terms. To assert as the respondent has done that the claimant could only earn gratuity after 5 years of the fixed term contract is to defeat the very essence of the law at sections 35 and 36 of the Employment Act, 2007 and fundamentally section 5 of the Act which prohibits servitude. To put the claimant under the shackles of a contract he no longer wished to serve under and for the reasons which he gave that he was abiding the provisions of section 45 of the Election Act, 2011 and his resignation having been accepted by the respondents, he was thus removed from the entire period envisaged under his letter of appointment.

The claim for the due gratuity is for the period served only. This claim related to 3 years and 9 months save that under the set regulations and the terms published by SRC as the constitutional body mandated to address the terms and conditions of remuneration for County State Officers, the claimant is only eligible for gratuity at 31% of the annual basic pay for every full year served.

The claimant served for 3 full years. the published notice only covers this period. The only legitimate claim the court can award is for 3 years and nothing more.

On the salary of Ksh.281, 260 x 60% x 3 years x 31 = 281,250 x 60/100 x 36 x 31/100 = 1,883,250.00.

Out of the other benefits the claimant earned from his employment with the respondents is the non-contributory pension. With the pension dues admitted, the benefit of gratuity available for payment under his term contract is as set out above at ksh.1, 883,250.00.

As the claimant has partly succeeded on his claim, having voluntarily resigned from his employment and under section 12(3) of the Employment And Labour Relations Court Act, 2011 costs being discretionary, each party should meet own costs.

The respondents accepted the resignation of the claimant. A certificate of service should issue for the period of employment.

Accordingly, the claimant is hereby awarded ksh.1, 883,250.00 in gratuity. A Certificate of Service shall issue under the provisions of section 51 of the Employment Act, 2007 and the dues paid shall be subject to the provisions of section 49(2) of the Act. Each party to pay own costs. Judgement entered accordingly.

Delivered at Nakuru this 27th day of September, 2019.

M. MBARU JUDGE

In the presence of:

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