



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1376 OF 2011**

*(Before Hon. Lady Justice Maureen Onyango)*

**JAMES MAGENDA NJAGA.....CLAIMANT**

**VERSUS**

**THE BOARD OF GOVERNORS**

**KAMUNE SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

The claimant was employed by the respondent on 1<sup>st</sup> October 1991 as a Laboratory Technician Assistant. He retired from service on 31<sup>st</sup> May 2011 after serving notice issued to him on 30<sup>th</sup> November 2010. His last salary at the time of retirement was Kshs.5,400 per month. Upon retirement, the claimant was not paid any terminal dues. He prays for the following remedies in his statement of claim dated 11<sup>th</sup> August 2011 –

- (a.) Employee and terminal benefits
- (b.) Cost of the suit.
- (c.) Interest

The respondent did not file any defence and the case proceeded as an undefended suit after the respondent's defence filed on the hearing date without leave was expunged from the record. The respondent's counsel was however in court and was allowed to cross-examine the claimant. The parties thereafter filed and exchanged written submissions.

In his evidence the claimant reiterated the facts as set out in his statement of claim.

Under cross-examination, the claimant stated he was a member of KUDHEIHA union from January 1982 and was covered by a collective bargaining agreement. He stated he never took annual leave during the period he worked.

**Determination**

There is no dispute that the claimant was an employee of the respondent or that he retired on 30<sup>th</sup> May 2012 after serving 6 months' notice served upon him by the respondent on 30<sup>th</sup> November 2011. These facts are supported by the documents in the claimant's bundle. The respondent's submission that there is no evidence of the date the claimant commenced service is irrelevant as in the first case the claimant's averments are not controverted by any statement of defence or evidence from a witness.

Secondly, under Section 10 and Section 74 of the Employment Act it is the respondent who is duty bound to keep employment records and produce evidence of date of employment failing which it is the burden of the respondent to controvert the averments of the claimant. This burden cannot be shifted in submissions that are not supported by any evidence.

The same position applies to the submissions by the respondent that the claimant failed to produce records of the union membership of KUDHEIHA and proof of salary.

The reference to Sections 107 and 109 of the Evidence Act by the respondent does not shift the burden as provided in Sections 10(6) and (7), Section 47(5) and Section 74 of the Employment Act.

The only issue for determination is therefore if the claimant is entitled to the prayers sought in the statement of claim. I agree with submissions by counsel for the respondent that this court cannot grant any prayers not sought in the claim. For this reason, any claims made through the claimant's witness statement are not for consideration of the court.

The only prayers in the statement of claim are terminal benefits, costs and interest.

According to the Employment Act, terminal benefits would constitute notice, salary up to last day worked, any leave due, any retirement benefits or gratuity provided for in the employee's terms of employment.

In this case the claimant has confirmed payment of his May 2011 salary. He has produced leave applications for 2010 and 2011, which are endorsed "*approved*". He further produced a letter informing him that he will go on leave from 9<sup>th</sup> April 2010 to 4<sup>th</sup> May 2010. The leave for 2010 was approved from 1<sup>st</sup> December 2010 to 10<sup>th</sup> January 2011. The fact that he did not mention any leave not taken previously in both applications for leave dated 29<sup>th</sup> November 2010 and 10<sup>th</sup> April 2010 and further that he did not specifically pray for leave in his claim means that the claimant did not have any outstanding leave, and I find accordingly.

I find that the only benefit the claimant is entitled to is gratuity which according to the collective agreement attached to his bundle of documents is payable at the rate of one twelfth of his salary for each completed month of service based on the last salary. The claimant's last salary was Kshs.5,400. Having worked for 19 years, 8 months (236 months) he is entitled to

$$5,400 \times 236 = \text{Kshs.}106,200$$

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I award the claimant the said sum of **Kshs.106,200/=**

The respondent shall pay the claimant's costs and the decretal sum shall attract interest from date of filing suit as it was supposed to be paid upon retirement.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**