



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2099 OF 2014**  
**JOTHAM KANJAH MWAI.....1<sup>ST</sup> CLAIMANT**  
**JOSEPH KISANYA INDIAZI.....2<sup>ND</sup> CLAIMANT**  
*VERSUS*  
**MUSIARA LTD (GOVERNOR'S CAMP).....RESPONDENT**

Claimants in person

M/s Guserwa for respondent

**JUDGMENT**

1. Suit was brought vide a memorandum of claim dated 21<sup>st</sup> November 2014 on the even date.

**Facts not in Dispute**

2. The 1<sup>st</sup> claimant was employed by the respondent as an accountant on 1<sup>st</sup> December 1995 and he worked continuously until he retired at the retirement age of 60 years on 20<sup>th</sup> September 2011.

3. The 1<sup>st</sup> claimant earned Kshs.68,058/= per month at the time of retirement. The claimant was registered with NSSF and statutory dues were remitted by the employer. The respondent had a pension scheme under Jubilee Insurance through which retirement benefits were paid.

4. The 1<sup>st</sup> claimant served one month's notice before retirement and was given an exgratia payment of Kshs.180,000/= to thank him for the long service in addition to a farewell party.

5. The 1<sup>st</sup> claimant now seeks payment;

(a.) In lieu of 4 months' notice due to unionsable employees in terms of the CBA in the sum of Kshs.252,232/=

(b.) Monthly travelling allowance for the 4 months' notice period in the sum of Kshs.20,000/=

(c.) Gratuity for each completed years of service in terms of the CBA in the sum of Kshs.1,008,928/=.

(d.) Travelling allowance for the long service period in the sum of Kshs.80,000/=

(e.) Leave travelling allowance of Kshs.6,340/=

(f.) Untaken 10.25 leave days in the sum of Kshs.30,778,81/=.

(g.) 9 months' pension from Jubilee (Employee and Employer contribution) in the sum of Kshs.34,038/=

6. With regard to the 2<sup>nd</sup> claimant, he was employed as a driver on 3<sup>rd</sup> March 2002 and worked continuously till retirement on 30<sup>th</sup> September 2014 upon attaining the age of 60 years. The 2<sup>nd</sup> claimant was also registered with NSSF and his dues were remitted. He earned a monthly salary of Kshs.30,668/=. He served one month's notice before retirement and was given gratuitous repayment of Kshs.55,000/= in appreciation of the 10 years' service during the farewell party.

7. The 2<sup>nd</sup> claimant was offered a cheque of Kshs.49,544.60/= in full and final payment of terminal benefits but he declined to take.

8. The 2<sup>nd</sup> claimant seeks payment;

(a.) In lieu of 4 months' notice in terms of the CBA in the sum of Kshs.122,672/=

(b.) Service gratuity for the 12 years served in the sum of Kshs.294,412.80/=

(c.) Leave travel allowance Kshs.6,340/=

(d.) Payment in lieu of 15 days' leave in the sum of Kshs.21,905.71/=

(e.) Jubilee pension for 9 months (Employee and Employer contribution) Kshs.16,560/=

(f.) Overtime for 4 years for 6 extra hours worked daily in the sum of Kshs.1,104,022.80/=

## **Response**

9. The claims by the 1<sup>st</sup> and 2<sup>nd</sup> claimants are opposed vide a memorandum of response dated 1<sup>st</sup> December 2014 filed on 3<sup>rd</sup> December 2014.

10. The respondent states that the claimants reached retirement age and were lawfully retired. They were paid a token of appreciation in the sum of Kshs.180,000/= and Kshs.55,000/= respectively which they received during their farewell party.

11. Their terminal dues were computed and cheques written for their collection which they declined to take claiming more payment on the basis that they ought to be paid terminal dues payable to union members and unionsable employees of the respondent.

12. The respondent denies that the claimants were members of the union and therefore were not entitled to;

(i.) 4 months' salary in lieu of notice upon retirement and

(ii.) To service gratuity at the ration of 24 days' salary for each completed year of service as per the CBA.

13. The respondent denies owing all other terminal benefits claimed by the claimants except those in respect of which computation was done and cheques drawn which cheques may still be re-drawn in

favour of the claimants.

### **Issues for Determination**

- (a.) Were the claimants unionsable employees and therefore entitled to
  - (i.) Payment in lieu of 4 months' notice
  - (ii.) Gratuity calculated at 24 days' salary for each completed year of service.
- (b.) Have the claimants proved any of the other terminal benefits claimed?

### **Issue I**

14. The general rule of evidence is to the effect that he who alleges must prove.

15. The claimants allege that they were unionsable employees of the respondent and therefore the terms and conditions with regard to retirement provided in the CBA between the respondent and the recognised union apply to them. The material averments to support this claim must first be made in the statement of claim and subsequently supported by oral or documentary evidence at a hearing before court.

16. The respondent in the memorandum of response denied all the claims made by the claimants except the terminal benefits in respect of which it had drawn cheques in favour of the two employees.

17. The respondent went ahead to aver that the claimants were duly registered with NSSF and ought to collect their pension dues from the NSSF Fund and that all their lawful dues were computed and await collection.

18. In the joint claimants' response to the memorandum of response, the claimants introduced the CBA as the basis of their claims since they allege were unionsable members. They insisted that the token payment made to them could not therefore be substitute for the terminal dues provided in the CBA.

19. The claimants also insist on refund of their contributions to Jubilee Insurance for 9 months, which contributions were not remitted to the insurance pension fund.

### **Oral Testimony**

20. The claimants testified under oath whereas the respondent called RW1 Peter Mwangi Kihara, the Human Resource Manager to testify on the disputed issues.

21. The claimants told the court that they base the claims for notice pay and long service payment on the CBA and were entitled to the same.

22. RW1 on the other hand testified that the claimants were not members of the union and therefore were not entitled to the terms contained in the CBA.

23. The effect of the collective agreements is provided under Section 59 (1) of the Labour Relations Act, No. 14 of 2007 as follows;

**“A collective agreement binds for the period of the agreement-**

**(a) The parties to the agreement**

**(b) All unionsable employees employed by the employer, group of employers or members of the employer's organisation party to the agreement;”**

24. Furthermore, subsection 59 (3) provides;

**“The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”**

25. The claimants produced an extract of the CBA and in particular clause 37 (a) (i) and (ii) which provide;

*(a) Retirement Gratuity*

*An employee who has attained the age of 55 years may retire or be retired. On retirement the employee shall be entitled to be paid by the employer a sum equal to;-*

*(i.) .....*

*(ii.) Employee with over ten years of service – 24 days’ salary and 24 days’ house allowance, for each completed year of service at the rate of pay applicable at the date of retirement”*

26. Accordingly, the claimants have adduced prima facie evidence that they were unionsable employees of the respondent and were entitled upon retirement to the terms set out under clause 27 (a) (ii) of the CBA.

27. The respondent did not provide any evidence in rebuttal of this evidence and the court finds that the claimants have established on a balance of probability that indeed are entitled to payment in terms of the CBA, being unionsable employees.

28. The court finds that the correct position of the law is that an employee need not be a member of a union to be entitled to the terms and conditions of service negotiated by the union and provided in a registered CBA. It is sufficient that an employee is unionsable. Where an employee states that they are unionsable, the burden shifts to the employer to show otherwise, in terms of a demarcation clause in the recognition agreement between the employer and the union.

29. The court awards;

(i.) Four (4) months’ notice pay to the claimants

(ii.) Service gratuity calculated at 24 days salary for each completed year of service to the claimants.

## **Issue II**

30. With regard to the payment of terminal benefits, the court is satisfied that the respondent correctly computed the terminal dues in respect to the 1<sup>st</sup> and 2<sup>nd</sup> claimants as it stated in a letter dated 17<sup>th</sup> November 2014, to the claimants written by RW1 Mr. Peter Kihara, produced before court by the claimants themselves and is confirmed by the oral testimony of RW1 in court.

31. The court therefore awards;

(i.) The 1<sup>st</sup> claimant Kshs.27,450.40/= terminal benefits and

(ii.) 2<sup>nd</sup> claimant Kshs.49,544.60/= terminal benefits.

32. These comprise of payment in lieu of leave days not taken and Jubilee pension scheme refund.

33. The rest of the claims by the claimants set out in the joint statement of claim have no merit and are dismissed.

34. The final orders of the court are as follows;

**1<sup>st</sup> Claimant**

(a.) Kshs.252,232/= in lieu of notice.

(b.) Kshs.1,008,928/= being service gratuity calculated at 24 days salary for each completed 20 years of service.

(c.) Kshs.27,450.40/= in lieu of leave and pension refund.

**Total Kshs.1,288,610.40/=.**

**2<sup>nd</sup> Claimant**

(a.) Kshs.122,672/= in lieu of notice.

(b.) Kshs.294,412.80/= being service gratuity calculated at 24 days salary for each completed 12 years of service.

(c.) Kshs.49,544.60/= in lieu of leave and pension refund.

**Total Kshs.466,629.40/=**

35. Interests at court rates from date of filing suit till payment in full.

36. Costs to follow the outcome.

**Dated and delivered at Nairobi this 28<sup>th</sup> Day of April 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**