



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 6 OF 2016**

**NYUNDO KATEMBOH .....CLAIMANT**

**VERSUS**

**KWALE WATER & SEWAGE COMPANY .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for gratuity by the claimant accruing under fixed term contract that lapsed after effluxion of time. In total the claimant seeks to recover ksh.1,953,000 plus costs and interest. The respondent denies the claim for gratuity and avers that the claimant was disqualified from claiming the same under the contract because he had committed acts of gross misconduct during his tenure of office. Additionally, the respondent counterclaims against the claimant for declaration that the claimant is not entitled to gratuity due to his gross misconduct during his tenure as the MD for the respondent. The claimant has not filed any defence to the counterclaim.

2. When the matter came up for pretrial directions on 14/11/2016, the parties agreed to dispense with the hearing of witnesses but agreed to dispose of the suit by written submissions on the strength of their respective records. The claimant filed his submissions on 13/1/2017 while the respondent filed on 7/3/2017.

**CLAIMANT'S CASE**

3. The claimant stated in his written statement that he was employed by the respondent as her Managing Director under 3 year fixed term contract starting 17/11/2008. He was given another term of 3 years which also lapsed after effluxion of time.

4. From 16/11/2014, he was given an extension of the contract for 6 months pending the recruitment of his successor. On 13/2/15 he was given leave pending expiry of the 6 months extension period. During the said terminal leave, he was not paid salary on due date which forced him to file suit to get the same. He now claims gratuity pay for the second contract term plus 6 months extension period at the rate of 31% of the annual basic salary. Under his contract of employment, the gross salary was ksh.250000 inclusive of basic pay of ksh150,000. He calculated the gratuity payable to as ksh.1,953,000.

**DEFENCE CASE**

5. Francis Mjera Nzai, the respondent's chairman stated in his written statement that the clamant was the

respondent's Managing Director until 30/5/2015. He further stated that on 9/2/2015, the respondent's Board of Directors resolved to send the claimant on a compulsory leave pending the expiry of his contract on 30/5/2015. The leave was effective 13/2/2015 and it was to pave way to investigations on the claimant's tenure as the Managing Director for the respondent. The claimant however filed suit No. ELRC 59/15 and obtained injunction to stop the said compulsory leave and/or termination of his contract.

6. The investigation were never the less done and revealed that the claimant had committed serious malpractices including delaying staff salaries and failure to remit PAYE after deductions, failure to inform the Board of accumulated debt of Ksh.97,779,225.33, failure to cooperated with other institutions in the water sector and gross mismanagement of water services. Mr. Nzai further stated that the investigations into the said misconduct is still being investigated by the Ethics and Anti-Corruptions Commission.

### ANALYSIS AND DETERMINATION

7. After careful consideration of the evidence and the submissions there is no dispute that the claimant was employed by the respondent between November 2008 and 30/5/2015 under fixed term contracts of 3 years each with the last being extended by 6 months. The only issues for determination is whether the claimant is entitled to the payment of service gratuity of ksh.1,953,00 as prayed.

### GRATUITY

8. The claimant contends that he is entitled to gratuity for the last contract of 3 years between November 2011 and November 2014 plus the extension period of 6 months between November 2014 and 30/5/2015. The respondent refutes the claim for gratuity on grounds that during his tenure at the helm of the respondent, the claimant committed gross misconduct and maladministration which justify summary dismissal under Section 44(4) of the Act.

9. I have carefully considered evidence and submissions and found that employment contract between the parties herein provided for gratuity in favour of the claimant. Clause 13 provided thus:

***“upon successful completion of each contract term, you will qualify to a one of gratuity calculated at the rate of 31% of your annual basic salary. This gratuity shall not be paid if your separation from the company is due to gross misconduct as provided in the Employment Act. If you are a member of some other retirement benefits scheme, you may opt to continue with the retirement benefits to which you are already a member”.***

10. From the foregoing clause, the claimant was entitled to automatic payment of gratuity upon successful completion of each contract term. The only time he was not entitled to the gratuity is only if he was terminated before the expiry of his contract term, on ground of gross misconduct as provided in the Employment Act. In this case, the claimant served his full contract term and at no time was it terminated on account of gross misconduct.

11. The respondent's evidence and submissions to the effect that the claimant committed gross misconduct is not enough ground to deny the claimant his earned gratuity because the respondent never terminated the claimant's contract before the expiry. She let him serve the whole 3 years from November 2011 to November 2014 and thereafter extended the contract by 6 months, which he also served to the end. I therefore dismiss the respondent's counterclaim and award the claimant  $ksh.150,000 \times 31/100 \times 12/3 = 1,674,000$  as gratuity for the period from November 2011 to November 2014. He will also get  $ksh150,000 \times 31/100 \times 6 = 279000$  for the 6 months period from November 2014 to 30/5/2015.

### DISPOSITION

12. For the reasons that the claimant successfully completed his contract of 3 years and 6 months successfully, I enter judgment for him in the sum of ksh.1,953,000 plus costs and interest.

Dated, signed and delivered this 9<sup>th</sup> June 2017

**O. N. Makau**

**Judge**