



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF EKNYA**

**AT NAIROBI**

**PETITION NO.145 OF 2016**

**PETER LUBALE LUBULLELLAH.....CLAIMANT**

**VERSUS**

**KENYA NATIONAL UNION OF TEACHERS.....RESPONDENT**

**JUDGEMENT**

1. The petitioner, Peter Lubale Lubullellah filed his Petition on 5<sup>th</sup> December, 2016 and served upon the respondent on equal dated. Such service has been acknowledged and an Affidavit of Service filed by Josephat Kutekha Khatikwi to confirm the same. There was no appearance by the respondent and no defence or reply to the petition has been done.

2. On 6<sup>th</sup> June, 2017 the petitioner was given directions with regard to the hearing of the petition. Written submissions have been filed.

**Petition**

3. The petitioner is seeking for orders that;

*a) A declaration that the respondent's continued refusal to pay the petitioner's terminal benefits including gratuity is a violation of the petitioner's constitutional and statutory rights.*

*b) An order that the respondent pays the petitioner his lump sum gratuity for his service to the respondent on the basis of forty three (43) years.*

*c) An order that the respondent pays the petitioner his pension and other benefits in accordance to the union's constitution (rules and regulations) 2003.*

*d) An award of compensation and general damages for violation of the petitioner's constitutional and statutory rights.*

*e) An order that the respondent issues a certificate of service tot eh petitioner.*

*f) Any other relief that the court may deem just and fair to award.*

*g) Interest on prayer two (2) and three (3) from the 1<sup>st</sup> March 2003.*

*h) Costs of the petition.*

4. The facts leading to the petition are that the petitioner served the respondent union in various capacities since 1957 including as an elected Branch Secretary of the North Nyanza KNNUT branch from 1960 to 1964. On 14<sup>th</sup> June, 1964 the petitioner joined the respondent secretariat and rose to the position of Principal Executive Officer. The petitioner retired in February, 2000 upon which he was paid 3 months' salary and premised transport to rural home and 3 months in lieu of leave.

5. The petitioner as a founding member of the respondent was dedicated to the service of the respondent after giving up a promising career in the teaching profession to dedicate his entire working life to serve teachers under the respondent union. The petitioner has since retired and found it extremely difficult to secure his retirement benefits from the respondent.

6. The respondent has failed to pay the petitioner his lump sum gratuity computed for the 43 years of service contrary to article 41 of the constitution read with section 35 and 51 of the Employment Act, 2007. The failure to pay the petitioner his gratuity as due while others similarly situated were paid is discriminatory.

7. The petitioner is aged 85 years and a resident of Kakamega and continuous to suffer due to failing health as the respondent has failed to pay the due gratuity.

8. The petitioner filed submissions and submits that his constitutional and statutory rights have been breached by the respondent and there is no challenge to the petition as filed. Where a petition is not challenged, the facts therein are true and correct as held in **Okiya Omtatah Okoiti & another versus Cabinet Secretary Ministry of Education & 5 others [2017]**.

9. In this case the petitioner's rights have been violated under article 41 of the constitution. By failing to pay gratuity due, the right to social security rights and dignity of the person have been violated. Terminal benefits of an employee constitute part of social security rights which the court is enjoined to protect. The petitioner worked for the respondent until February, 2003 when he retired. Under the respondent constitution, the rules and regulations, the petitioner was entitled to a lump sum gratuity and other terminal benefits. Such was to provide for a lump sum payment in gratuity upon retirement which was not done for the petitioner.

10. Having retired from employment in February 2003 after working for 43 years, the petitioner was entitled to gratuity payment. Other employees of the respondent were paid gratuity and refusal to pay the petitioner is discriminatory and thus the petitioner is entitled to damages as held in **Henry Kamau Ngare versus Teachers Service Commission & another [2016] eKLR**. Where the petitioner was paid notice pay and leave due such was the bare statutory minimum and gratuity due should be paid as held in **Elijah Kipkoros Totui versus Ngara Opticians t/a Bright Eyes Limited [2014] eKLR**.

### **Determination**

11. The petition is not opposed. However it is imperative the orders sought based on constitutional and statutory provisions be assessed on their merits.

12. The petition is premised on the provisions of article 41 and 27 of the constitution on the grounds that the respondent by failing to pay the petitioner his gratuity upon retirement and paying other employees was undertaking an unfair labour practice and that this was discriminatory against the petitioner. Failing to pay the gratuity is in breach of constitutional and statutory rights of the petitioner and orders sought in the petition should issue.

13. The petitioner confirms that he worked for the respondent until he retired in February, 2000 and was paid 3 months' notice salary and 3 months in lieu of leave.

In submits the petitioner's case is that he retired in February, 2003. Whichever the year of retirement,

whether 2000 or 2003 the filing of the petition instead of a memorandum of claim cannot cure the lapse in time for a claim premised on employment and benefit out of an employment relationship.

14. To name the matter herein as a *Petition* and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the Employment Act, 2007.

15. Where the upper limit to the date of retirement is applied as February, 2003 the alleged constitutional violations with regard to article 41 or 27 of the constitution, 2010 did not apply to the petitioner at the time. The constitution, 2010 does not apply retroactively.

16. Where the alleged breaches tot eh constitution arose at the time to the petitioners retirement, regard must be given to the applicable statutory and constitutional provisions at the time.

17. To allow claims that arose period to the constitution, 2010 or prior to the Employment Act, 2007 would be in my view to open the Pandora's Box to infinity. Such is not the purpose of litigation which should be within a time where a party can reasonably be able to secure his rights and allow the other party is response a fair chance to argue their case.

18. The averment by the petitioner that there was a promise to pay gratuity is not supported by any evidence. There is no written undertaking by the respondent to pay gratuity to the petitioner and thus have a basis to extend time to file the petition and seek to claim an employment benefits.

19. Where the petitioner seek to rely on the case of **Okiya Omtatah Okoiti & another versus Cabinet Secretary Ministry of Education & 5 others [2017]**, my reading of the facts leading to this petition were fundamentally different from the petitioner's case. The petitioner above filed a petitioner premised under matters that arose within the tem period of the constitution, 2010. This is not the case for the petitioner herein who retired in 2000 or 2003 and has not urged his case under the applicable constitution to warrant the declarations sought.

**Accordingly, I find no merit in the petition; the same is hereby dismissed in its entirety. As there was no appearance by the respondent, no orders to costs.**

Dated and delivered in open court at Nairobi this 27<sup>th</sup> day of July, 2017.

**M. MBARU JUDGE**

In the presence of:

Lilian Njenga and David Muturi – Court Assistants

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