

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**CAUSE NO E 803 OF 2023**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED  
WORKERS.....**  
**.....CLAIMANT**

**VERSUS**

**TEXT BOOK CENTRE LIMITED.....**  
**RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant is a Trade Union registered and having its operations in Kenya. It has instituted these proceedings on behalf of Kenneth Karangi (the Grievant) seeking to recover terminal benefits from the Respondent.
2. The Claimant contends that the Grievant was an employee of the Respondent until he resigned sometime in the year 2022. It contends that the Grievant was initially hired in the position of Assistant Manager, Web Design and Maintenance before he was assigned the role of Assistant Marketing Manager.
3. The Claimant avers that the Grievant tendered his resignation from employment on 9<sup>th</sup> February 2022. It contends that the Respondent however requested the

Grievant to extend his stay at the workplace as it (the Respondent) sought his replacement on the understanding that it (the Respondent) was to pay him service gratuity.

4. The Claimant contends that in a turn of events, the Respondent subsequently informed the Grievant that it (the Respondent) was not going to pay him gratuity in terms of the Collective Bargaining Agreement (CBA) between the Claimant and the Respondent allegedly because he was not a unionisable employee rendering the CBA inapplicable to him. The Claimant further avers that the Respondent refused to pay the Grievant service pay.
5. The Claimant contends that in view of the position that was taken by the Respondent on the matter, it reported a trade dispute to the Ministry of Labour and Social Protection which appointed a Conciliator to resolve the matter. It avers that despite the Conciliator rendering her decision on the dispute, the Respondent refused to implement it (the decision) thus necessitating these proceedings.
6. The Claimant asserts that the Grievant was its member and was a unionisable employee. As such, it avers that he is entitled to benefit from the CBA between it and the Respondent. Consequently, it avers that the Grievant ought to be paid gratuity as prescribed by the CBA and service pay as prescribed by *the Employment Act*.
7. In response, the Respondent affirms that it had a subsisting Recognition Agreement and CBA with the Claimant. It

however asserts that the CBA only applied to unionisable employees.

8. The Respondent contends that the Grievant was a member of management and was therefore not unionisable. As such, it avers that the CBA did not cover him. Consequently, the Respondent takes the position that the Grievant is not entitled to claim gratuity under the CBA or service pay.
9. The Respondent, inter alia, relies on *the Industrial Relations Charter* to anchor its case. It contends that the Charter excludes members of management from being members of a Trade Union. As such, it contends that such persons cannot claim benefits under a CBA as it (the CBA) does not cover them.
10. In response, the Claimant avers that the Grievant has a constitutional right to join a Trade Union. As such, it contends that to purport to exclude him from drawing benefits under the impugned CBA is to discriminate against him.

### **Issues for Determination**

11. The issues that arise for resolution in the dispute are the following:-
  - a) Whether the Grievant was a unionisable employee and whether he is entitled to draw benefits from the impugned CBA.
  - b) Whether the Grievant is entitled to the reliefs which are sought in the suit.

## Analysis

12. Section 2 of *the Labour Relations Act* defines the term “unionisable employee” as follows:-

*“ "unionisable employee" in relation to any trade union means the employees eligible for membership of that trade union.”*

13. It is clear from this provision that one can only qualify to be unionisable if he is eligible to join a Trade Union. However, *the Labour Relations Act* does not specify who is eligible to join a Trade Union and who does not. As such, one has to look elsewhere to determine this. The *Industrial Relations Charter* comes in handy in this endeavor.

14. The Charter excludes members of management of an enterprise from being members of a workers’ Trade Union. Alluding to this, the Court of Appeal in the case of ***Kenya Chemical and Allied Workers’ Union v Bamburi Cement Limited [2017] KECA 20 (KLR)***, observed as follows:-

*“Clause B (10) and Appendix C of the Charter provide for the level of unionisation of employees while prohibiting certain categories of employees, who by virtue of their positions in the organization, having authority to hire, transfer, appraise, suspend, promote, reward, discipline or handle grievances, from being represented in the union. It must follow from this that*

*those in the management of an organization cannot form or belong to a trade union.”*

15. The Grievant held the position of Assistant Manager in the Respondent organization. He was therefore part of the management of the Respondent and could not, by virtue of the provisions in *the Industrial Relations Charter*, be a member of the Claimant. As such, he cannot claim for gratuity on the basis of the CBA between the Claimant and the Respondent.
16. The Claimant contends that the Grievant was entitled to belong to a Trade Union as a matter of right. It contends that to deny him this right constitutes discriminatory treatment against him.
17. The right of an employee to join a Trade Union is recognized under article 41 of *the Constitution*. Similarly, the right to freedom of association is guaranteed by article 36 of *the Constitution*.
18. However, these rights are not absolute. They do not form part of the rights which cannot be limited (see article 25 of *the Constitution*). As such, their enjoyment can be limited so long as such limitation is justifiable in an open and democratic society.
19. The effect of the provisions in the *Industrial Relations Charter* is to limit enjoyment of the right to join a Trade Union by members of management of an enterprise. What

the court is required to address is whether this limitation is justifiable in an open and democratic society.

20. Employees in management usually represent the employer's interest during tripartite negotiations. As such, they cannot be expected to be members of a workers' Trade Union at the same time since this will result in conflict of interest on their part. It is for this reason that their right to join a workers' Trade Union is usually limited and the limitation is considered reasonable in an open and democratic society (see ***Kenya Union of Sugar Plantation and Allied Workers v Mumias Sugar Company Limited & 6 others [2016] KEELRC 452 (KLR)***).
21. Having regard to the foregoing, I find no merit in the Claimant's assertion that the Respondent's contention that the Grievant could not be a member of the Claimant infringes on his right to belong to a Trade Union of his choice. The fact that the Grievant was in the Respondent's management means that he could not legitimately join the Claimant. As such, he cannot seek to benefit from the CBA that was negotiated between the Claimant and the Respondent.
22. As indicated above, the Grievant did not qualify to be a unionisable employee of the Respondent. Consequently, he did not qualify for membership of the Claimant Trade Union. As such, he cannot seek to draw a benefit from the CBA

between the Claimant and the Respondent including gratuity.

23. Although the Grievant is not entitled to claim gratuity from the Respondent on the basis of the impugned CBA, he can claim this benefit if it was incorporated in the contract of service that was executed between the parties. However, a perusal of the contract does not suggest that the parties agreed that the Grievant will be paid gratuity on exit from his employment. As such, he cannot claim gratuity on the basis of the contract.
24. As regards service gratuity under section 35 of *the Employment Act*, the law is that an employee who is a member of, inter alia, the National Social Security Fund (the NSSF) is not eligible to claim this benefit (see section 35(6) of the Act). The Grievant tendered in evidence his pay slip for May 2021 which shows that he was a contributor to the NSSF. As such, he is not eligible to claim service pay.

### **Determination**

25. The upshot is that the Claimant's suit lacks merit.
26. Accordingly, the cause is dismissed.
27. Each party to bear own costs.

**Dated, signed and delivered on the 30<sup>th</sup> day of October,  
2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**