

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E033 OF 2025

JACQUELINE NJERI (Suing on behalf of the Estate of
EVERLYNE NYAMBURA NDUNGU.....APPELLANT

-VERSUS

UNIVERSITY OF NAIROBIRESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. A. Ajwang (SRM) delivered
on 3rd December 2024 in Nairobi MCELRC E886 of 2023)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. A. Ajwang (SRM) delivered on 3rd December 2024 in Nairobi MCELRC E886 of 2023 between the parties filed a Memorandum of Appeal dated the 5th of February 2025 seeking the following orders: -

- a) **A declaration that the deliberate refusal to pay full gratuity pay upon retirement was irregular, wrongful and unlawful.**

- b) The Appellant be paid her unpaid gratuity arrears as set out in paragraph 12 of the Statement of Claim amounting to Kshs 2,988,147,24.**
- c) The Honorable Court do issue such Orders and give such directions as it may deem fit to meet the ends of justice.**
- d) The Respondent to pay the costs of this Appeal.**
- e) Interest on the above at Court rates.**

GROUNDS OF THE APPEAL

- 2. The Honourable Magistrate erred in fact and law by finding that upholding the express terms in the active Collective Bargaining Agreement would be to act retrospectively.
- 3. The Honourable Magistrate erred in holding that a myriad of Collective Bargaining Agreements can operate/ be used to calculate gratuity of an employee.
- 4. The Honourable Magistrate erred in law and fact in failing to find and hold that the Appellant having retired on 30th June 2020, the applicable CBA was the one for 2013-2017 which was the one in force when the cause of action arose.
- 5. The Honourable Magistrate erred in fact and in law in adopting an alien mode of computing gratuity not known in law.
- 6. The Honourable Magistrate erred in fact and in law by disregarding the claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.

7. The Honourable Magistrate erred in fact and in law by finding that the appellant is entitled to Kshs. 173,717/- as gratuity for 41 years worked.

BACKGROUND TO THE APPEAL

8. The Claimant/Appellant filed a claim against the Respondent vide a statement of claim dated the 15th of May 2023 seeking the following orders: -

- a) A finding that the deliberate and continued withholding of unpaid gratuity is irregular, wrongful and unlawful.
- b) The Claimant be paid her full gratuity pay as set out in paragraph 12 hereinabove amounting to Kshs 2,988,147.24
- c) The Honourable Court do issue such Orders and give such directions as it may deem fit to meet the ends of justice.
- d) The Respondent to pay the costs of this claim in any event.
- e) Interest on the above at Court rates.

(pages 6-8 of Appellant's ROA dated 28th August 2025).

9. The Claimant filed her list of witnesses dated 15th May 2023; witness statement of even date; and list of documents with the bundle of documents attached also of even date (see pages 10-41 of ROA).

10. The claim was opposed by the Respondent who entered appearance and filed a memorandum of response and counterclaim dated 9th August 2023 seeking the following orders:

- a) A declaration that the gratuity payable to the Respondent by the Claimant is Kshs. 537,279/-
- b) The overpaid sum of Kshs. 327,154/-
- c) Interest on (b) above at court rates from December 2020 until payment in full
- d) Costs of the suit.

(pages 44-50 of ROA).

11. The Respondent also filed a witness statement of KENNETH K. SAWE dated 9th August 2023; a witness statement of EDWIN WAITHKA of even date; and a list of documents of even date with the bundle of documents attached (pages 52-98 of ROA).
12. To counter the Respondent's response and counterclaim, the Claimant/Appellant filed a Reply dated 15th August 2023 (pages 158-159 of ROA).
13. Both parties were heard by way of written submissions, which they highlighted on 15th October 2024 (pages 177-179 of ROA).
14. The Trial Magistrate Court delivered its judgment on the 3rd of December 2024, allowing the Appellant's claim to the extent that the Respondent shall pay the Claimant gratuity from 9th March 1979 to 1st July 2013 and from 1st July 2013 to 30th June 2020 less Kshs. 861,000/- with interest at court rates from the date of judgment until payment in full, plus costs of the suit (judgment at pages 182-185 of Appellant's ROA).

DETERMINATION

15. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

16. In her submissions dated 30th September 2025, the Appellant submitted on the grounds of appeal generally.

17. On their part, the Respondents submitted generally on the appeal in their submissions dated 13th October 2025.

18. The court finds the issue for determination in the appeal was whether the appeal was merited.

The appellant's submissions

19. Ground 1: *Error in finding that upholding express CBA terms would be retrospective. The learned trial magistrate fundamentally erred in law and fact by finding that upholding the express terms in the active Collective Bargaining Agreement would constitute retrospective application.* This finding demonstrates a misunderstanding of the crystallization principle governing gratuity entitlements. Gratuity rights crystallize at the precise point of retirement or termination of employment. This well-established principle dictates that gratuity must be calculated based on the Collective Bargaining Agreement in force at the time of retirement, applied to the entire service period, and computed using the last basic pay applicable to the employee. In Reuben Ondigu Orodó v University of Nairobi (2023) eKLR, the Court held:

"Gratuity is calculated in terms of the contract/law applicable at the time of separation for the entire period of service. "Similarly, in ELRC Appeal No. E15 of 2021 Ali Buule Isaack vs

University of Nairobi, the Court stated: "The parties therefore agreed on the modalities of payment of gratuity. Such benefit is due based on the number of years of service... for the period of entire service from 1989 to 2018 a total of 29 years, gratuity is due at the rate of 31% based on the subsisting CBA for the period 2013-2017." Your Ladyship, the late Everlyne Nyambura Ndungu retired on 30th June 2020. At that time, the applicable and subsisting CBA was the 2013-2017 CBA, which provided for gratuity at the rate of 31% of basic salary for every complete year of service. The application of this CBA to calculate gratuity for the entire 41 years of service is not retrospective application but rather the proper and lawful implementation of the crystallization principle. The learned magistrate's conclusion that applying the 2013-2017 CBA would be retrospective fundamentally misapprehends the nature of gratuity entitlements. Gratuity does not accrue incrementally during service; rather, it becomes a complete, enforceable right only upon retirement. Therefore, applying the terms of the CBA in force at retirement to the entire service period is not retrospective but prospective application of the law as it stood at the crystallization point. The application of the 2013-2017 CBA does not constitute retrospective application of new terms but rather represents a legitimate amendment of existing gratuity provisions. This amendment serves to: a. Improve welfare benefits for continuing employees b. Fulfill contractual obligations that crystallize at the point of retirement c. Honor the full scope of contractual obligations as they exist when employment concludes. The distinction is crucial because amendments that enhance employee benefits at the crystallization point are permissible and indeed required to give effect to the parties' intentions and the employee's accrued rights over a period of time (by extension cushioning on inflation too).

20. Ground 2: *Error in holding that multiple CBAs can be used to calculate gratuity. The learned magistrate erred in law by holding that a myriad of Collective Bargaining Agreements can operate concurrently or be used to calculate gratuity of an employee.* This approach violates fundamental principles of contract law and creates legal uncertainty. Upon registration of a new CBA, the previous CBA ceases to operate. This principle of CBA succession ensures contractual certainty and requires that only one CBA governs the employment relationship at any given time. Section 59 of the Labour Relations Act provides the legal framework for CBA application: a. Section 59(1): CBAs bind parties who executed them b. Section 59(2): CBAs bind employees who are members of the trade union c. Section 59(3): CBA terms are automatically incorporated into individual contracts. It is a fundamental principle of contract law that once a CBA is ratified and signed, it replaces the expired agreement and its terms and conditions (new/ better/ enhanced) govern the relationship moving forward. The Court of Appeal decision in *Bamburi Cement Limited vs William Kilonzi* (2016) eKLR established a binding precedent rejecting split-rate calculations of gratuity. The Court (Makhandia, Ouko & M'noti, JJ.A) emphasized that negotiated CBA terms must be respected and applied as agreed, and that gratuity should be calculated at a single rate applicable at retirement for the entire period of service. This precedent has been consistently followed in subsequent ELRC decisions and represents the settled position of law. The learned magistrate's departure from this binding precedent constitutes an error of law. The learned magistrate's approach of applying multiple CBAs to different segments of service creates insurmountable legal problems: a. It violates the doctrine of contractual certainty. b. It creates arbitrary divisions of service periods with no basis in law. c. It defeats the purpose of collective bargaining by fragmenting negotiated terms. d. It undermines the principle that improved terms should benefit continuing employees. The fundamental principle of *pacta sunt servanda* (agreements

must be kept) requires that the parties' negotiated terms in the 2013-2017 CBA be honored and applied in their entirety.

21. Ground 3: failure to find that the 2013-2017 CBA was applicable. The learned magistrate erred in law and fact in failing to find and hold that the Appellant, having retired on 30th June 2020, was governed by the 2013-2017 CBA, which was the CBA in force when the cause of action arose. The critical question in this appeal is: When did the Appellant's gratuity entitlement crystallize? The answer is unequivocal: the gratuity entitlement crystallized on 30th June 2020, the date of retirement. At that precise moment, the 2013-2017 CBA was the operative, valid, and subsisting agreement governing the employment relationship. This claim for gratuity could not have arose in the pendency of the older CBA's, there is a set qualifier as to whom and when gratuity is payable. The learned magistrate may have been influenced by considerations from Mukiria Farmers Co-operative Society Ltd vs Jacob Rukaria & 5 Others (2017) eKLR decision. However, that case is distinguishable and actually supports the Appellant's position. In the Mukiria case, the CBA had a clear sunset clause expiring on 31st December 2010, yet the employees sought to invoke its provisions in 2015-some four years after expiry. The Court of Appeal rightly held that expired CBAs cannot be used as the basis for claiming employment benefits or rights. The critical distinction lies in the temporal application of the respective CBAs: a. In Mukiria: CBA expired in 2010; claim made in 2015 (after expiry) b. In the present case: The Appellant retired in 2020 while the 2013-2017 CBA was still active and subsisting. The Mukiria precedent therefore supports, rather than undermines, the Appellant's entitlement to gratuity under the active 2013-2017 CBA. The Court of Appeal's ratio decidendi specifically prohibits reliance on expired CBAs while implicitly affirming the binding nature of active, unexpired agreements. The Mukiria judgment's emphasis that "a collective agreement binds for the

period of the agreement" reinforces that during the CBA's validity period, its terms remain fully enforceable and binding on all parties. In this matter, gratuity becomes due only upon retirement and could not have been claimed at any other time. A single event triggers the payment obligation-the retirement of the deceased on 30th June 2020. At that moment, the applicable law and contract was the 2013-2017 CBA providing for 31% gratuity rate.

22. Ground 4: Adoption of alien mode of computing gratuity. The trial magistrate erred in fact and law in adopting an alien mode of computing gratuity not known in law. The computation method adopted by the learned magistrate lacks any foundation in: a. The applicable CBA provisions b. Established legal precedents c. The parties' contractual intentions. Mathematical or logical justification. The evidence contradicting the learned magistrate's computation can be found in the clear and unambiguous terms of the 2013-2017 CBA: Clause 40(a)(vi) of the CBA uses the mandatory word "shall" with no temporal limitations and no segmentation of service periods. The use of mandatory language indicates that the 31% rate must apply comprehensively. Clause 40(h) of the CBA provides for clear application to "every" completed year. There is no distinction between pre-CBA and post-CBA service. The comprehensive coverage is the clear intention of the parties. There is no otherwise/alternate mode for computing gratuity contained in the CBA. There is no legal basis for split calculations. The Respondent has failed to provide any mathematical justification for the calculation method adopted and which the learned magistrate partly approved. A court cannot base its decision on computation methods that have no contractual basis, lack mathematical transparency, cannot be replicated or verified and arbitrarily segment service period. The adoption of such an alien calculation method constitutes a fundamental error that undermines

the integrity of the judgment and deprives the Appellant of her constitutional and contractual rights.

23. Ground 5: disregarding claimant's evidence, submissions and authorities 33. The trial magistrate erred in fact and law by disregarding the Claimant's evidence, submissions, and authorities relied upon, thus arriving at an erroneous decision. The duty to consider all relevant evidence represents a cornerstone of procedural fairness. Courts are obligated to examine and weigh the probative value of all material evidence placed before them, whether documentary, testimonial, or circumstantial. The failure to properly consider relevant evidence constitutes a breach of this fundamental duty and may render any resulting judgment defective. Furthermore, the obligation to address substantive submissions requires that courts engage meaningfully with the legal arguments and factual contentions advanced by the parties. This obligation extends beyond mere acknowledgment to encompass substantive analysis and reasoned response to material submissions that bear upon the issues for determination. Evidence was disregarded in this case. The learned magistrate failed to properly consider and give weight to the following critical evidence: a. The express terms of Clause 40(a)(vi) and Clause 40(h) of the 2013-2017 CBA b. Documentary evidence establishing the deceased's retirement date. C. Discriminative nature of gratuity payments exhibited in the internal memos at pages 33-36 of the Record of Appeal. d. Binding precedents from the Court of Appeal and ELRC e. The contractual framework governing the employment relationship f. Submissions on the crystallization principle and the amounts payable as due gratuity. This failure to engage with the material facts and legal arguments advanced by the Appellant undermines the integrity of the judicial process and violates the Appellant's right to a fair hearing.

24. Ground 6: Error in finding entitlement of ksh. 173,717/= for 41 years' service. The learned magistrate erred in fact and law by finding that the Appellant is entitled to Ksh. 173,717/= as gratuity for 41 years worked. This finding is manifestly erroneous and constitutes a gross undervaluation of the deceased's service and entitlements. The learned magistrate's arbitrary reduction of the gratuity entitlement violates Article 40 of the Constitution where Article 40(1) guarantees every person the right to property and Article 40(3) prohibits arbitrary deprivation of property. The deceased's accrued gratuity rights constitute property protected by the Constitution. The arbitrary reduction from the rightful entitlement of Ksh. 2,988,147.24 to a mere Ksh. 173,717/= represents a deprivation of property without due process and without legal justification. The disparity between the amount awarded (Ksh. 173,717/=) and the rightful entitlement (Ksh. 2,988,147.24) reveals the magnitude of the injustice perpetrated by the impugned judgment. This amounts to a loss of approximately Ksh. 2,814,430.24, representing more than 94% of the lawful entitlement of a retiree. For 41 years of dedicated service to the Respondent, the deceased deserves recognition commensurate with her contribution and in accordance with the negotiated terms of the applicable CBA. The amount awarded by the learned magistrate fails to meet this standard and constitutes a grave injustice to the deceased's estate and her beneficiaries. The deceased, having served 41 years with the Respondent, had a legitimate expectation of property rights protection in gratuity calculation. The principles governing legitimate expectation are well established: In *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, the court held that performance constitutes acceptance. In the present matter: a. The deceased rendered 41 years of continuous service b. She relied on the promised benefits throughout her service period he improved gratuity terms in the 2013-2017 CBA represented enhanced benefits for continuing

employees d. The Respondent cannot now resile from these obligations. In *Kenya Kazi Services Ltd. vs. Dickson Onjwaya Wasike* [2021] eKLR, the Court recognized that: "Gratuity becomes due provided any applicable conditions are present. In other words, where a contract provides for gratuity, it is payable as a general rule." All applicable conditions are present in this case. The deceased completed 41 years of service, retired during the currency of the 2013-2017 CBA, and fulfilled all contractual obligations. The gratuity is therefore due and payable at the rate of 31% of last basic salary for the entire service period. The learned magistrate failed to consider the parties' right to freely negotiate contractual terms as embodied in the 2013-2017 CBA. This represents a fundamental breach of the principle of party autonomy in contract law. The fundamental principles of contract law require; *Pacta sunt servanda* where agreements must be kept. Courts should not rewrite contracts between competent parties and that negotiated terms must be respected and enforced as agreed. The 2013-2017 CBA represents the culmination of negotiations between the Respondent and the employees' representatives. The terms agreed upon, including the 31% gratuity rate, reflect the parties' mutual understanding and commitment. Courts must respect this autonomy and enforce the agreed terms. It is our humble submission that the intention behind the CBA was to provide better terms for all permanent employees covered by the agreement, and this intention should be honored by applying the improved gratuity rate to all years of service. There is no creation of new obligations since the original employer-employee relationship established the obligation to pay gratuity at the point of retirement. Clause 40(a) and (h) of the CBA confirm this existing obligation. The employer cannot now say that it's an expensive bargain. Any new provisions or improvements in the CBA merely provide mechanisms for:

- a. Calculating the extent of an existing liability
- b. Clarifying the scope of pre-existing obligations
- c. Implementing established rights.

This represents merely the quantification of

an existing right. The obligation to pay gratuity was always established in law; the new provisions only provide the mathematical formula to be used in arriving at the quantum payable owing to the passage of time. The quantum was always implicit, just not explicitly defined until the 2013-2017 CBA. The learned magistrate erred in the application of the burden of proof. Under Section 107 of the Evidence Act, the burden lies on the party asserting a fact. This principle requires the Respondent to justify any deviation from agreed contractual terms. How did the employer come up with Kshs. 861,000/= as the amount payable to the Appellant in 31st December 2020? The Appellant established a prima facie case through documentary evidence of the 2013- 2017 CBA, respondent's admission that the appellant had 41 years of continuous service, she was paying union dues as a member of KUDHEIHA, and the fact that other members of staff had been paid gratuity at the rate of 31% for each completed year of service. Having established this prima facie case, the evidential burden shifted to the Respondent to justify any departure from the express CBA terms. The Respondent failed to discharge this burden, yet the learned magistrate improperly made a finding adverse to the Appellant.

Respondent's submissions

25. The Council of the University of Nairobi and Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (KUDHEIHA) signed the 2013-2017 Collective Bargaining Agreement on 24th February 2016 which provides that the gratuity payable under the aforesaid CBA shall be "at the rate of 31% of basic salary." However, as the aforesaid 2013-2017 CBA provides at Clause 43 of the 2013-2017 CBA that the effective date of the 2013-2017 CBA is 1st July 2013, it automatically translates to the position that payment of gratuity at the rate of 31% of the basic salary referred to at Clause 40 (h) of the 2013-2017

CBA is with effect from 1st July 2013. Hence the contractual entitlement to gratuity at the rate of 31% of basic salary referred to at Clause 40 (h) of the 2013-2017 is due to the Claimant with effect from 1st July 2013. Prior to the signing of the 2013-2017 CBA, the applicable CBA to the KUDHEIHA's members including the Appellant was the 2012-2013 CBA which provided that gratuity payable would be payable at the rate of 28 days wages for every completed year of service, which rate would suffice until the Collective Bargaining Agreement was mutually amended. The aforesaid rate of 28 days wages was also applicable for the periods covered by the CBAs which were in force prior to 1st July 2013 which is the effective date of the 2013-2017 CBA inter alia the 2006-2008, 2008-2010, 2010-2012 CBAs whilst the 2000-2002 CBA provided for gratuity at the rate of 27 days wages for every completed year of service. It is necessary to bring to the attention of this Honourable Court that the Appellant has not been denied her entitlement to gratuity in any way. She was duly paid gratuity in the sum of KShs. 861,000/= in December 2020 based on the criteria below; a) Gratuity payable for the period prior to 1st July 2013 [From 9th March 1979 to 30th June 2013]; At the rate of 28 days wages for every completed year of service. This is pursuant to the CBAs that were in force prior to the 2013-2017 CBA. Gratuity payable for the period commencing 1st July 2013 | From 1st July 2013 to 30th June 2020]; At the rate of 31% basic salary for every completed year of service. This is pursuant to the 2013-2017 CBA which has an effective date of 1st July 2013. Suffice to state that the University of Nairobi Council and KUDHEIHA who are the parties to the 2013-2017 CBA mutually agreed that the CBA would be "effective from 1st July 2013 to 30th June 2022" but would "continue to be in force until revised jointly in writing by the parties or another is signed." This is provided for at Clause 43 of the 2013-2017 CBA. No agreement was reached by the parties to the CBA to the effect that the 2013-2017 CBA would be applied retrospectively. Whereas no retrospective

application of the 2013-2017 CBA was agreed to by the parties to the 2013-2017 CBA, the Appellant's argument is that payment of gratuity at the rate stipulated in the 2013-2017 CBA (i.e at 31% of basic salary) should be applied to her with effect from 9th March 1979 when she was employed at the Respondent. As the effective date of the 2013-2017 CBA is clearly provided for i.e 1st July 2013, the computation of the gratuity payable to the Claimant at the rate of 31% of the basic salary for every completed year of service should be with effect from 1st July 2013. In addition thereto, the "completed years of service" which is one of the factors to be taken into account while computing the gratuity, ought to be the completed years of service effective from 1st July 2013. Despite having been paid the gratuity due to her by the Respondent (which has been computed based on the criteria set out in Clause 1.4 above), the Appellant alleges underpayment of her gratuity. Her contention is that the rate prescribed at Clause 40 (h) of the 2013-2017 CBA is applicable from when she was employed on 9th March 1979 and not from the 1st July 2013. In essence, the Appellant is seeking a retrospective application of the 2013-2017 CBA. It is critical to state that the issue as to whether the 2013-2017 CBA entered into between University of Nairobi and KUDHEIHA can be applied retrospectively so as to have the gratuity due to the employees of University of Nairobi who are members of KUDHEIHA computed at the rate stipulated in the 2013 -2017 CBA for the entire period that an employee has been in employment irrespective of whether the date of employment is prior to the effective date of the 2013-2017 CBA i.e 1st July 2013 has been the subject of determination by the Employment and Labour Relations Court as follows; i. EMPLOYMENT AND LABOUR RELATIONS CAUSE NO. E722 OF 2022, UNIVERSITY OF NAIROBI –VS- KUDHEIHA. Arising from the several claims made by several employees of the University of Nairobi to the effect that the 2013-2017 CBA should be applied retrospectively from the dates that they were employed irrespective of whether the

date of employment is prior the effective date of the CBA i.e 1st July 2013, the University of Nairobi filed suit before the ELRC "seeking interpretation of the 2013-2017 CBA entered into between UoN and KUDHEIHA. Specifically, UoN applied for the court's interpretation regarding whether the 2013-2017 CBA and more so Clause 40 (h) on payment of gratuity can apply retrospectively." In a judgment delivered on 16th November 2023, the Employment and Labour Relations Court [Hon. Lady Justice Linet Ndolo] issued; "a declaration that the provision of gratuity in the CBA for 2013-2017 shall not apply retrospectively." ELRCA/E047/2022, UNIVERSITY OF NAIROBI -VS- NYAMAI ILEVE BERNARD This was a consolidated Appeal whereat the Employment and Labour Relations Court directed that the various Appeals filed before this Honourable Court arising from the judgments of the Chief Magistrates Court rendered on diverse dates in respect to various claims by employees of the University of Nairobi on account of computation of gratuity under the various CBAs entered into between the University of Nairobi and the Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (KUDHEIHA) be consolidated and the lead file be ELRC Appeal No. E047 of 2022. In a judgement delivered on 17th November 2023, the Employment and Labour Relations Court [Hon. Justice Mr. Nelson Abuodha] held that the 2013-2017 CBA did not provide for retrospective application hence cannot apply to the period prior to July 1, 2013 as it would amount to rewriting the Collective Bargaining agreement which was binding the two parties as a contract. ELRCA NO. E014/2021, CALLEN N. MOSETI -VS- UNIVERSITY OF NAIROBI The Employment and Labour Relations Court (Hon. Justice Dr. Jacob Gakeri) whilst dealing with an Appeal whereat an employee of the University of Nairobi challenged the decision of the Magistrates Court which had found that the 2013- 2017 CBA cannot be applied retrospectively upheld the decision of the Magistrates Court. In upholding the said decision, the ELRC delivered

judgment on 1st February 2023 and held as follows; "50 the "sunrise date of the CBA was 1st July 2013 and not 1st July 2015." Backdating the gratuity to 1988 when the Appellant was employed by the Respondent as suggested by the Appellant's counsel has no contractual justification and had not been agreed upon by the parties.

DECISION

26. The court found a persuasive decision exists on whether the 2013-2017 CBA applied to entire service of the said university employees retrospectively in University of Nairobi v Kenya Union of Domestic Hotels Educational Institutions & Hospital Workers & another; Iminti & 72 others (Interested Parties) where Justice Ndolo held as follows- '**Retrospectivity of the CBA (2013-2017)**

38. *In urging its case against retrospectivity of the CBA, the Claimant relied on Section 59 of the Labour Relations Act which provides that a CBA is binding for the period of the Agreement and shall be effective from the date agreed upon by the parties.*

39. *In his letter dated 7th October 2021, the 2nd Respondent stated as follows: "the issue of paying gratuity at 31% for a certain period and 28% for the remaining period is incorrect and should not be allowed at all otherwise it will negate the purpose of negotiating collective bargaining agreements periodically".*

40. *The Interested Parties support the position taken by the 1st and 2nd Respondents. They state that they are entitled to pursue payment of their gratuity based on the 2013-2017 CBA which embodies superior terms compared to the retired CBAs.*

41. On its part, the Claimant faults the 2nd Respondent for misconstruing the CBA for 2013-2017. The Claimant cites the Court of Appeal decision in Mukira Farmers Co-operative Society Ltd v Jacob Rukaria & 5 others [2017] eKLR to support this proposition.

42. The Claimant's case is that gratuity payable to the 1st Respondent's members ought to be computed on the basis of successive CBAs and that retrospective application can only be upon mutual agreement between the parties.

43. In this regard, the Claimant relied on the decision in Kenya Union of Sugar Plantation and Allied Workers v West Kenya Sugar Company Limited (Cause 14 of 2021) [2022] KEELRC 1394 (KLR) (13 July 2022) (Ruling) where it was affirmed that a CBA is applicable during its valid period and is not retrospective unless the parties agree as such.

44. The Claimant further relied on the decision in Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 Others [2015] eKLR where the Court of Appeal affirmed its earlier holding in National Bank of Kenya Limited v Pipeplastic Samkokit (K) Ltd & another [2001] eKLR 112 that the law frowns upon retrospectivity in contracts unless it is by consent of the parties.

45. In this case, I find nothing to suggest that the parties had agreed to a retrospective application of the CBA for 2013-2017. It follows therefore that computation of gratuity accrued prior to the coming into effect of the CBA for 2013-2017 could not benefit from the CBA that is the subject of this dispute.

46. In the end, I make a declaration that the provision for gratuity in the CBA for 2013-2017 shall not apply retrospectively.' The appellant relied on the decision of Court of Appeal in Mukiria Farmers Co-operative Society Ltd vs Jacob Rukaria & 5 Others (2017)

eKLR which was considered by the Court in the said persuasive decision. No appeal has been preferred on the decision. I uphold the decision to apply in the instant case and hold the issue as determined that the provision for gratuity in the CBA for 2013-2017 shall not apply retrospectively with respect to the services of the employees of Respondent. The court noted different position taken in Orodo v University of Nairobi (2023)e KLR where Justice Nduma said the 2023-2017 CBA was applicable for entire period of service and retrospectively. The court was not persuaded. The trial court relied on the decision by Ndolo J. The court could not disturb the award it was held in- Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

27. The appeal was hinged on the application of 2013-2017 CBA on gratuity. The appellant did not demonstrate any error in the computation outside the said CBA. The court, having upheld the decision by Ndolo J, applied by the trial court, that the 2013-2017 CBA was not applicable retrospectively, I find no merit in the appeal, and the same is dismissed with costs to the respondent. The judgment and Decree of the Hon. A. Ajwang (SRM) delivered on 3rd December 2024 in Nairobi MCELRC E886 of 2023 is upheld.

28. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY
OF DECEMBER, 2025.**

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Onenga

Respondent- absent

ORIGINAL