



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1625 OF 2018**

(Before Hon. Lady Justice Maureen Onyango)

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

**VERSUS**

**KENYA MEAT COMMISSION.....RESPONDENT**

**JUDGMENT**

The Claimant instituted this claim on behalf of 9 grievants for their unlawful termination, and seeks the following orders-

1. The Court declares the Respondents' action unfair and unlawful.
2. The Court do direct the Respondent to reinstate the grievants back to employment unconditionally and without loss of benefits and seniority.
3. The Court do order the Respondent to apologize to the Claimant for the unfair labour practice exhibited.
4. Whereas the Court may order reinstatement, the Claimant prays as follows-
  - a. Payment for days worked in March 2018.
  - b. Payment of three months in lieu of notice.
  - c. Long service depending on each employee's years of service.
  - d. Annual leave.
  - e. Overtime
  - f. Gratuity at 45 days for every complete year of service with interest at court rate.
  - g. 12 months' compensation for unfair loss of service.
  - h. Any other order the Court deems fit to address the cause of justice.
  - i. Costs of the suit to the Claimant.

[Emphasis added]

There is no record of the Respondent's response to the claim in the court file.

On 5<sup>th</sup> March 2019, the parties informed the court that they had entered into a consent agreement on the following terms-

“By consent

1. Prayers a, b, c, d, e and f as contained on the Memorandum of Claim dated and filed on 19<sup>th</sup> December 2018, be allowed as prayed.

2. The Respondent do compute and pay the said sum less any statutory dues, rents due from the Claimants within 30 *days from the date therein*.

3. The Claimants do move out of the Respondent’s houses on or before the expiry of 14 days or receipt of the above payments.

4. Mention on 29<sup>th</sup> April 2019, to confirm compliance of the above terms.”

[Emphasis added]

On 24<sup>th</sup> April 2019, the parties further informed the court that they had entered into another consent agreement whose terms was as follows-

“By consent

1. The charge on house rent be waived.

2. The Respondent to pay grievants 7 months’ salary as compensation for unfair termination.

3. The matter be mentioned on 8<sup>th</sup> July 2019 for the parties to agree on the quantum payable for each grievant.

The parties however disagreed on the tabulation of the **31%** gratuity payment hence this judgment.

In the Claimant’s additional documents filed on 26<sup>th</sup> November 2019, it submits that it was the Respondent’s tradition to make gratuity payments **calculated at 31% of the basic** monthly salary for the months worked, a fact which was reinforced by the Respondent’s documents filed at pages 22 to 18 and rules 3.2.3.2 and 15.5.1 of the Human Resource Policy Manual.

The Respondent in its calculations filed on 13<sup>th</sup> November 2019, submitted that at the time of termination, all the grievants save for David Otieno Anyong’a had been employed on permanent and pensionable terms. Prior to these permanent and pensionable contracts, all the grievants save for Nasako Gitonga Ngurwe, had been employed on fixed term contract whose durations varied between 1 and 2 years.

The Respondent submitted that upon the termination of the contracts by effluxion of time, each grievant was paid their respective dues including the gratuity earned under the said fixed term contracts. The Respondent further submitted that though the grievants’ contracts of employment provided for pension; the scheme had not yet been established at the time of termination.

It is submitted that the parties had agreed to the payment of salary for the days worked in March 2018, payment in lieu of notice, gratuity, long service, payment in lieu of accrued leave (if any), overtime (if any) and 7 months’ salary compensation for unlawful termination.

It is the Respondent’s position that its HR Policy Manual and the grievants contracts of employment did not make provisions for payment of gratuity. However, the CBA signed on 16<sup>th</sup> February 2011 made provisions for payment of gratuity at the rate of 45 days applicable at the date of payment for each completed year of service.

The Respondent submitted that the computations did not include David Otieno Anyong’a as his last fixed term contract, expired on 10<sup>th</sup> November 2016.

### **Analysis and Determination**

I have carefully considered the tabulations presented by both parties, their evidence and the submissions filed and find that the issues for determination before this Court are whether the grievants are entitled to gratuity payment and the basis of tabulating the gratuity.

However, before making a determination on the said issues, it is important to make a finding on base used for computing the grievants’ claims as raised by the Claimant in their submissions. It is the claimant’s submission that the parties agreed to base their computations on the basic pay and house allowance hence the Respondent’s calculations based on basic pay alone are discriminative and bad in law.

I have examined the final computations produced by the Respondent. Though the Respondent gives the impression that the tabulations have been made using the basic pay and house allowance as the basis, the rate per day stipulated for each of the grievants has been based on basic pay.

The Respondent has not disputed the Claimant’s assertion that the computations were supposed to be based on basic pay together with house allowance. As such, the correct basis for gratuity tabulations is basic pay plus house allowance as had been agreed.

Since the Claimant has not disputed the actual figures for basic pay and house allowance used in tabulating the grievants’ gratuity, the same

shall form the basis for calculation of gratuity for each of the grievants.

## **Gratuity**

On the issue for gratuity, I have examined the documents adduced

by both parties and established that all the grievants herein had initially been employed on fixed term contracts. The evidence reveals that all the grievants save for David Otieno Anyong'a and Reginelta Khaoma Musungo annexed the contracts which converted their employment to permanent and pensionable.

The Respondent submitted that all save for David Otieno were permanent and pensionable. No evidence was adduced by the Claimant to controvert this assertion. The evidence reveals that David's employment was terminated on 5<sup>th</sup> March 2018, in reference to his employment letter of 2010 whose terms were fixed.

As such, his gratuity ought to be calculated at the rate of 31% of the prevailing rate of the basic salary over the period worked; as provided for in rule 3.2.3.2 of the Human Resource Manual. The gratuity is payable for the period 2015 to 2018, as no evidence has been adduced to show that gratuity payments were made to him after 17<sup>th</sup> December 2014 which is the date of the gratuity payment schedule annexed by the Respondent.

The rest of the grievants are entitled to payment of gratuity at the rate of 45 days' salary applicable at the date of payment for each completed year of service, as provided for under clause 15 of the CBA since they were permanent and pensionable employees.

**All the grievants save for Nasalio Gitonga Ngurwe** are entitled to gratuity payment from 2015 to 2018 as no evidence has been adduced to show that gratuity payments were made to them after 17<sup>th</sup> December 2014 which is the date of the gratuity payment schedule annexed by the Respondent.

With regard to **Nasalio Gitonga Ngurwe**, he is entitled to payment of gratuity at the rate of 31% from 2010 to October 2012. His employment terms were changed to permanent and pensionable terms on 1<sup>st</sup> October 2012 and the records reveal that he was not in the gratuity payment schedule for 2010 – 2014. The Respondent did not adduce any evidence to prove that he had been paid the same.

He is also entitled to payment of gratuity at the rate of 45 days' salary, from November 2012 to March 2018 being the period he served as a permanent and pensionable employee.

Parties are directed to jointly compute the gratuity in the forgoing terms and come back to court on **30<sup>th</sup> July 2020** for adoption of the calculations. Should they not agree, each of them should file its tabulation on or before that date for court's assessment of the same.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**