



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.193 OF 2015**

**JOSEPHAT KIHIA MUTHOKA.....CLAIMANT**

**VS**

**KALU WORKS LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENYA ENGINEERING WORKS UNION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the first respondent for over ten years until 15.4.2014 when he resigned. During his employment, he was a member of the second respondent union. His employment was governed by the Collective Bargaining Agreement (CBA) negotiated by the respondent's herein. The CBA in force at the time of the claimant's resignation came into effect on 1.9.2012 and was to last until 31.8.2014. After the resignation the claimant was not paid his accumulated gratuities and he reported to his union who served a demand letter which was not honoured. The claimant then sued the employer claiming gratuities and the 2<sup>nd</sup> respondent claiming damages for breach of duty of care.
2. The respondent's have denied liability and averred that clause 26A of the CBA disqualified the claimant from payment of gratuity because he resigned from employment. The issue for determination is whether the claimant is entitled to the gratuity and damages as prayed. The suit was disposed of by way of written submissions based on the pleading as filed.

**Analysis and Determination**

3. There is no dispute that the claimant resigned from his job voluntarily. There is also no dispute that the claimant's employment contract was governed by the CBA between the respondent's herein. The said CBA froze the respondent's gratuity scheme for workers and replaced it with a Pension scheme under its clause 26(A) and (B). Under clause 26A of the CBA, the employee's accumulated gratuities were to be payable at the time of retirement or termination. The gratuity was however not to be paid to any employee who lost his job on disciplinary grounds or resignation. Clause 26 A (a) of the CBA stated that:

**“An employee who resigns or loses his job on disciplinary grounds  
will not be entitled to benefit from this scheme”.**

4. The foregoing term of the CBA is not ambiguous in any way. It is a valid term of contract mutually agreed between the parties. It is binding on the claimant as it is on all unionisable employees of the 1<sup>st</sup> respondent. It is a well settled principle of law that the court has no jurisdiction to invalidate contract unless there exists any or all of the vitiating factor known in Law including mistake, misrepresentation, undue influence and duress. In this case, the claimant neither pleaded nor adduced any evidence to prove that the CBA was vitiated by any of the said factors. For the foregoing reasons, the court finds and holds that the claimant is disqualified from claiming gratuity for the years he served the 1<sup>st</sup> respondent.
5. As regards the claim for damages for breach of duty of care by the second respondent, the court finds no merits in the same. It is trite that once an employee joins a union, he is presumed to have surrendered to the union his right to bargain for terms and conditions of his employment. He is therefore disqualified from alleging that his union has made a bad bargain for him. In this case the court has noted that the CBA in issue took effect on 1.9.2012 and the claimant enjoyed its benefits until he resigned. he knew that he would lose his gratuity when he decided to resign as it is indicated in the resignation letter dated 15.4.2014, thus :-

**“I am not intending to serve any notice because I believe the years**

**I worked for Kalu works won’t be compensated to me...**

**Kindly prepare my pension because that is the only benefit I**

**have.”**

6. From the foregoing excerpt from the resignation letter the court finds on a balance of probability that the claimant knew the consequences of resigning from his employment, being loss of his accumulated gratuity. Consequently, the claim for damages for breach of duty of care is also dismissed.
7. The court was referred to the decision by Rika J in **ELC 76 OG 2012 Katembe Kirongo Mtuwa and Another vs Steel Makers Ltd (2005) eKLR** where the Learned Judge awarded gratuity to an employee who had been dismissed for misconduct and declared a provision in the CBA, that barred an employee from getting gratuity if terminated for misconduct, unlawful. This court however is not persuaded by the foregoing precedent in consideration of the express term of the CBA which was never challenged by the claimant from the time the CBA came into force until the time he resigned.

### **Disposition**

8. For the reason stated above the suit is dismissed. Each party to bear his or her own costs.

**Signed, dated and delivered this 13<sup>th</sup> day of May 2016.**

**ONESUMUS MAKAU**

**JUDGE**