



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO 260 OF 2014**

**FRANCIS MUTUA MASAVU ..... CLAIMANT**

*Versus*

**WHITE ROSE DRY CLEANERS LIMITED ..... RESPONDENT**

Mr. Gichure for the claimant

Mr Dickens Ouma for the respondent

**JUDGMENT**

1. The claimant seeks payment of Ksh. 191,853.86 being;
  - a. gratuity calculated on 22 days salary for each completed year of service in the sum of Kshs.170,559.01; and
  - b. unpaid prorata leave for eight (8) months in the sum of Kshs.13,672.607.
2. The claim is premised on clause 27 of a Collective Bargaining Agreement (CBA) between Kenya Union of Commercial Food and Allied Workers and the Respondent.
3. It is not in dispute that the claimant was a unionsable employee of the respondent until he resigned from employment giving three (3) months notice on 21<sup>st</sup> August 2013. It is also not contested that the claimant was employed on 1<sup>st</sup> January 1998 and worked continuously for the respondent until the date of resignation. The claimant therefore served the respondent for a period of fifteen (15) years. The claimant earned a salary of Kshs.15,509 per month at the time of resignation.
4. Clause 27 of the CBA reads;
  - a. an employee on completion of five years' continuous service with the respondent shall be entitled to twenty one days' and employees in service for over six (6) years shall be entitled to twenty two (22) days pay for every completed year of service by way of gratuity to be based on the employees' wages at the time of the termination of his / her service.
  - b. an employee who resigns or is dismissed for misconduct shall not be entitled to gratuity.
5. The resignation of the claimant was in terms of clause 11(a)iii of the CBA which provides that an employee who had served the respondent for over 10 years will give three (3) months notice or be

paid in lieu of three (3) months salary on termination of employment.

6. The letter of termination dated 15<sup>th</sup> May 2013 and the acceptance of termination by the respondent which is undated were produced as annexures to the memorandum of claim and marked '4' and '5' respectively. The contents of the letter have not been contested.

### **Response**

7. The respondent filed a memorandum of response on 30<sup>th</sup> September 2015 in which the respondent admits all the particulars of employment of the claimant including that the terms of service of the claimant were governed by the CBA, he being unionsable employee.
8. The respondent admits that the claimant terminated his employment in terms of clause 11(a) (iii) of the CBA .

The respondent avers in the memorandum of response and submits in the written submissions filed on 30<sup>th</sup> March 2016, that the claimant was not entitled to payment of gratuity as claimed or at all by dint of clause 27(b) of the CBA aforesaid which provides that, an employee who resigns or is dismissed for misconduct shall not be entitled to gratuity.

9. The respondent relies on the decision of Mbaru J. in **KUCFAW Vs. B. S. Mohindra & Co. (K) Ltd. – ELRC cause no. 1198 of 2013**, where the Hon. Lady Justice observed;

*“paragraph 20, parties enter into collective agreements so as to agree on the terms and conditions of employment. In this regard the claimant for and on behalf of its members negotiated a collective agreement with the respondent so as to outline the terms and conditions of work applicable to their members. Such terms and conditions are to be respected by the court unless the same are shown to be contrary to written law, constitution or fair labour relations.”* (Emphasis mine)

10. The court has carefully read the termination notice given by the claimant to the respondent and nowhere in it did the claimant use the term ‘*resigning on resignation.*’ the respondent accepted the termination notice by the claimant in the following terms “*your three months notice of termination effective from 1<sup>st</sup> June 2013 is hereby accepted.*”
11. The respondent submitted that the claimant terminated his employment in terms of clause 11 (a)iii of the CBA. That clause does not deal with resignation at all.
12. The employment of the claimant was therefore brought to an end by the joint action by the claimant and the respondent as stated above.
13. It was therefore erroneous for the respondent to invoke clause 27(b) of the CBA to deny the claimant gratuity to which the claimant was entitled in terms of clause 27(a) having served the respondent diligently for a continuous period of fifteen (15) years.
14. Furthermore, the court notes that clause 27(b) tends to penalise an employee who voluntarily terminates his employment. This clause violates Article 30 and 41 of the constitution.

Article 30 provides;

*“(1) a person shall not be held in slavery or servitude.”*

15. A contract that intends to punish an employee for freely contracting out of employment by denying him substantial benefits accumulated for a period of 15 years subjects the employee to servitude. This clause is also contrary to fair labour practice as provided under Article 41 of the

constitution thus;

“41(1) *Every person has the right to fair labour practices;*” and

41(2) which provides;

“*Every worker has the right -*

*(b) to reasonable working conditions.*”

Clause 27 of the CBA in question does not provide ‘*reasonable working conditions*’ to the extent it punishes an employee who freely contracts out of employment. It is therefore unfair labour practice, null and void.

16. In the final analysis, the claimant has proved his case on a balance of probabilities and is entitled to the payment of gratuity in terms of clause 27(a) of the CBA.

17. The claimant has not proved the claim for payment in lieu of leave and same is dismissed.

18. In penning off, the court notes that the language used by the counsel for the respondent in the written submissions filed on 30<sup>th</sup> March 2016 paragraph 14 is not befitting of an officer of this court and is highly discouraged.

19. In the final analysis, the court makes the following orders;

- i. The claimant is awarded Kshs.170,599.01 being gratuity calculated in terms of clause 27(a) of the CBA and as set out in the statement of claim.
- ii. The award is payable with interest at court rates from date of filing suit till payment in full.
- iii. The respondent to pay the costs of the suit.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**