



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.40 OF 2015**

**KUDHEIHA WORKERS..... CLAIMANT**

**VERSUS**

**NG'ARARIA GIRLS SECONDARY SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 4<sup>th</sup> December, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 12.03.2015 claiming the unfair termination of its five members, the grievants, being Boniface Ndung'u Gichu, Joseph Mwai Mwangi, Peter Nduati Kariuki, Susan Njoki, Patrick Gathaiya Njiiri, and Gabriel Miako Mwangi. The claimant prayed for orders that the termination was unfair and that the grievants were entitled to terminal benefits.

The respondent opposed the suit by filing the memorandum of response on 16.04.2015 through F.O.Makori, Litigation Counsel, for Attorney General. The respondent prayed that the suit be dismissed with costs. The reply to the response was filed on 30.04.2015.

On 17.07.2015, by consent of the parties, partial judgment was entered for the claimant that the respondent to pay the grievants as follows:

- a. 6 months salaries' compensation for unfair termination.
- b. Pay in lieu of notice per the CBA.
- c. Issue of gratuity under CBA and the claim for underpayment to go on full trial.
- d. Hearing of the suit on 27.10.2015 at 9.00am for 1.5 hours.

On 27.10.2015 the parties agreed that the 2 issues for determination were whether the circulars by the Directorate of Personnel Management as they applied to civil servants applied to the grievants in which event the grievants would be entitled to prayer for underpayment; and whether the grievants were entitled to NSSF and payment of pension under the CBA. The parties further agreed that the issues be determined on the basis of the pleadings, documents and the final submissions to be filed for the parties. The parties filed the submissions and the two issues are for determination by the court.

The two issues in dispute were resolved by the court in the recent judgment delivered on 20.11.2015 in **Kudheiha Workers –Versus- The Board Of Management , Ng'araria Girls Secondary School [2015]eKLR**. In that judgment between the same parties the court held the circular in issue did not apply to the parties and thus the grievants were not entitled to the prayer for underpayment as based on the circulars. Secondly, the court found that the Employment Act, 2007 provided for a floor and not a ceiling for payment of the retirement benefits and the parties were entitled to agree as they did in the CBA to payment of NSSF and further gratuity or pension or further retirement benefits. The court upholds its opinion in that case thus, **“While making that finding the court holds that the provisions of section 35(5) entitled the parties to agree as was done in the collective agreement to fix the gratuity or service pay as was done in clause 31. Further the court holds that section 35(6) that provides that provisions of section 35 will not apply where employees are members of NSSF or registered pension or provident fund scheme or gratuity under collective agreement or favourable terms in place simply shows that the parties were entitled to agree as was done in the said clause 31; the clause was such gratuity envisaged in section 35(6) (b) of the Act and it was an agreement over and above the grievant's entitlement to NSSF which was expressly provided for in clause 29 of the collective**

**agreement. The court further holds that the provisions of the Act are not a ceiling but are a floor and the parties are entitled to agree upon more favourable terms and conditions of service including service pay or gratuity or pension or such other retirement or otherwise separation benefits that may be paid to an employee. The court upholds the holding in the ruling of 21.02.2014 in Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers-Versus-Leshau Boys' High School [2014]eKLR that section 35(6) of the Employment Act, 2007 does not preclude parties from entering an agreement for retirement benefits or gratuity over and above the statutory NSSF arrangement.”**

In conclusion judgment is entered for the claimant against the respondent for:

1. The respondent to pay the grievants gratuity per clause 31 of the CBA by 31.12.2015 and in default interest at court rates to be payable thereon from the date of retirement on 31.12.2012 till full payment.
2. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 4<sup>th</sup> December, 2015.**

**BYRAM ONGAYA**

**JUDGE**