



Maina & another (Suing as legal representatives of Lawrence Njagi Mwaura) v East African Portland Cement Company Limited (Cause E260 of 2022) [2025] KEELRC 3065 (KLR) (22 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 3065 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E260 OF 2022
DKN MARETE, J
OCTOBER 22, 2025**

BETWEEN

GRACE MUTHONI MAINA & JOHN NDUATI MAINA (SUING AS LEGAL REPRESENTATIVES OF LAWRENCE NJAGI MWAURA) CLAIMANT

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED . RESPONDENT

JUDGMENT

- 1 This matter was originated by way of Statement of Claim dated 27th April, 2022. It does not disclose any issue in dispute on its face.
- 2 The Respondent in her Statement of Response dated 6th September, 2022 denies the Claim and prays that it be dismissed with costs.
- 3 The claimant in a Reply to the Statement of Response dated 22nd September, 2022 rubbishes the Response and reiterates their claim as set-out.
- 4 The Claimant's case is that being legal representatives of the estate of the deceased they have taken out letter of administration ad litem for purposes of filing this suit.
- 5 The Claimants' further case is that on 2nd February, 1991 the Respondent offered the deceased employment as a laboratory assistant on casual basis. He was thereafter engaged on contract that would be renewed from time to time ending up with a twenty-eight (28) years diligent and faithful stint of service spanning 2nd February, 1991 until 3rd May, 2019 when he passed on in the course of this employment. At the time of his demise, he earned a basic salary of Kshs. 80,487.75 without house allowance. This was in job group F and ought to have been earning a basic salary of Kshs.107.317.00 plus a house allowance of Kshs.21,463.00 and therefore a gross salary of Kshs.128,781.00 as per the Collective Bargaining Agreement between the deceased's union and the Respondent.



6 The claimants other case is that on the claimant's demise, his wife Grace Muthoni Maina who had taken up letters of Administration and is legal representative in this cause wrote to the Respondent a letter dated 5th August, 2019 demanding payment of the deceased service gratuity according to Clause 21 of the CBA inter partes involving Kenya Chemical and Allied Workers Union which provided for service gratuity at the rates of 72 days for each completed year of service at its job group and salary at the time of lapse of contract.

7 The Claimant's avers that upon his demise, the claimant's legal representatives were not paid the full-service gratuity as per the provisions of Clause 21(c) of the CBA and the deceased was paid gratuity totalling Kshs.120,000.00. A demand letter of the deceased's full-service gratuity dated 24th November, 2021 did not bear any fruits. The claimant's claim full-service gratuity particularized as follows;

128,781/30x72x28 years.....8,654,083.2/=

Less amount paid off.....120,000/=

TOTAL AMOUNT DUE.....8,534,083.2/=

They pray as follows;

- i. A declaration that refusal to pay his full-service gratuity by the Respondent is unfair and unlawful.
- ii. The Deceased Claimant be paid his full service gratuity through his legal representatives as set out in paragraph 10 herein above totalling to Kshs.8.534.083.2/=.
- iii. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- iv. The Respondent to pay the costs of this suit.
- v. Interest on the above of court rates.

8 The Respondent's case is a denial of the claim.

9 It is the Respondent's case that it engaged the services of the claimant vide a contract agreement dated 19th March, 2007 and this continued until 3rd May, 2019. The claimant's salary was paid in according with contractual terms entered inter partes vide their respective contracts of employment. They deny having received a letter of demand dated 5th August, 2019 and put the claimants in strict proof thereof.

10 The Respondent further case is a denial of paragraph 10 of the claim. They aver that the CBA was inapplicable as this had lapsed. Again, the Claimants are not entitled to any further gratuity payment as these are statute barred pursuant to section 90 of the *Employment Act*, 2007. Further the Respondent posits as follows;

- a. The Claimants were employed under fixed time contracts pursuant to section 9 and 10 of the *Employment Act*.
- b. Each fixed term contract is independent of the other and subject so the limitation period from the date its expiry.
- c. Therefore, pursuant to Section 90 of the *Employment Act*, the claims herein are statute barred as the same have been filed outside limitation period of three (3) years



- 11 Again, the Respondent posits there is no cause of action against it and reiterates the contents of paragraphs 12 and 13 of this response. The Respondent further states that the Claimant does not have any reasonable cause of action against it as they were paid all their terminal dues.
- 12 The Claimant in a Reply to Statement of Response dated 21st September, 2022 reiterates their case and denies allegation of time bar of this suit in that whereas the deceased passed on 3rd May, 2019, this suit was filed on 28th April, 2022.
- 13 The issues for determination therefore are;
1. Whether the claimant's claim for unpaid service gratuity for contract performed pre-2016 are time barred.
 2. Whether the CBA converted the terms of the union employees under fixed term contracts to permanent employees'
 3. Whether the terms of the CBA apply retrogressively.
 4. Whether the Claimants can claim for gratuity not expressly provided in their contracts or BCA.
 5. Whether the Claimants have proved their cases.
- 14 All these issues in disputes touch on only one thing; the entitlement of the Claimants to an award of service gratuity in terms of Clause 21 of the CBA. The Claimant in their written submission dated 9th May, 2025 submits a case of such entitlement which is denied by the Respondent.
- 15 The Claimants in their written submissions dated 9th May, 2025 support their case by arguing that since the Claimant was working in job group F, he ought to have been earning a basic salary of Kshs.107,317.00 with a house allowance of Kshs.21,463.00 cumulating to a gross salary of Kshs.128,781.00 in accordance with the CBA entered into between the Claimants' Union and the Respondent.
- 16 Upon his demise, his spouse and legal representative by a letter dated 5th August, 2019 sought payment of the deceased's service gratuity. It is the Claimants' submission that the issue of interpretation and applicability of the CBA and the Respondent has been the subject of various litigation in this court and the Court of Appeal in the authority of Kenya Chemical and Allied Workers Union vs East African Portland Cement Company Limited, ELRC Cause No. 2119 of 2014 and the Court of Appeal in Civil Appeal No. 14 of 2016 between the same parties where this court observed that by conceding that they are paying staff on contract less than those on permanent basis the Respondents have breached the terms of the CBA particularly on a term the parties wanted included as a term of contract though not negotiated in the CBA. Anything less than this would amount to discrimination in the treatment of workers on contract vis-à-vis other employees in breach of section 5 of the Employment Act, 2007 which provides thus;
- “(1) It shall be the duty of the Minister, labour officers and the Industrial Court: to promote equality of opportunity in employment in order to eliminate discrimination in employment; and to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
 - (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.



- (3) No employer shall discriminate directly or indirectly, against an Employee or prospective employee or harass an employee or prospective employee: on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

17 At appellate level of the same matter, the Court of Appeal upheld the thinking of the court by establishing sections 57, 59(1)(b) and 59(3) all dictate a situation of equal and non-discriminatory remuneration for all workers for work of equal value as would be applicable in the circumstance of this case. The Claimants' are therefore entitled to seventy-two (72) days for each computed year of service per his job group or grade. This was not the case as he was only paid Kshs.120,000.00.

18 The contentious clause 21 of the CBA provides that gratuity shall be paid to the eligible employees including non unionisable staff in accordance with the following rules;

- a. Qualifying period of admission to the scheme
- b. For 1-10 completed years of service 25 day's pay per year of service
- c. Above 10 completed years of service – 72 day's pay per year of service
- d. The gratuity will be based on the rate of monthly pay due to the employee on the date of his/her resignation or retirement.

19 Again, section 59(1) of the CBA 2007 provides as follows;

“A collective bargaining agreement binds for the period of the agreement;

- a. The parties to the agreement:
 - b. All unionsable employees employed by the employer, group of employers or members of the employer's organization party to the agreement; or
 - c. The employers who are or become members of an employers' organization a party to the agreement, to the extent that the agreement relates to their employee.
3. The terms of the CBA shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

20 This was echoed in the authorities of Paul Billy Nyagilo vs East African Portland & Cement United (2018) KEELRC 1812 (KLR) and Musa Mohamed Kaleve & 2 others v East African Portland and Cement Limited (2020) KEELRC 1606 (KLR) which restate that the terms of CBA become part of contract of employment for all who are covered by the CBA and these are enjoyed even after the lapsed of the CBA. These terms cannot be altered downwards as the same are protected by section 10(5) of Employment Act, 2007 and amplified by section 59(2) of the Labour Relations Act, 2007 which includes even members who are resigned from the trade union or employer's association.

21 The Claimant in the penultimate claims an amount of Ksh.8,534,083.20 computed as follows;

128.781/30X72X2 years 8,654.083.20/=

Less amount paid off 120,000.00/=



Total Amount Due 8,534,083.20/=

- 22 The Respondent submits that the claimant was employed in the year 2007 as a lab assistant until his demise in 2019. His last contract served was 1st April, 2016 to 31st March, 2019. Any claim on payment of gratuity prior to 2016 and therefore time barred vide section 90 of *Employment Act*, 2007. This is because the claimant was employed under fixed term contracts which are independent of each other and bear limitation from the date of expiry. Besides, having paid gratuity after every fixed terms contract period, this claim is without merit and that the suit should be dismissed for lack of merit. The only gratuity paid in 2019 was for the contract period serviced in the last contract. This is supported by the authority of Emmanuel Oshumu Partieye vs East African Portland Cement PLC, Cause No. 574 of 2019 where the court in similar circumstances found that claims of contract before 2016 were statute barred per section 90 of the *Employment Act*, 2007.
- 23 The Respondent further submits that the CBA entered into inter partes on 19th December, 2013 did not obliterate the provision of Clause 1.2. of Human Resource Manual on categorization of employees nor did it convert the terms of fixed term contracts to permanent employees and therefore their terms remained as such: fixed term contracts. This is not so. The clear-cut provision of the law and precedent submitted by the claimant ostracises this thinking.
- 24 The Respondent again submits that the term of the CBA applies retrogressively. Therefore, the claimant cannot be heard or seem to wish to rely on contracts that had been performed and expired. These were performed, dues paid and contract extinguished as is well established by documentation furnished by the parties. A CBA only applies to existing terms of employment and cannot apply to past performed contract. Section 59 of the *Labour Relations Act*, 2007 provides that the effective date of CBA is the one agreed on between the parties. This is enforced upon registration and therefore the CBA between 2012 and 2015 cannot be enforced to contracts performed after the effect.
- 25 The Claimants' cannot also claim gratuity not expressly provided for in the contracts or CBA, this has to be provided for in these or the Human Resource Policy Manual as was held in authority of Bamburi Cement Limited vs William Kilonzi [2016] eKLR which defined gratuity as a reward given as the optional of the employer. This therefore ousted the payment of gratuity prior to 2011 when it was not provided for as a term of employment.
- 26 The Respondent's case overwhelms that of the Claimant. It would appear that the fixed term contract entered into between the claimant and the Respondent were conditional upon payment of service gratuity upon termination. It is not in dispute, at least by the parties list of documents that the deceased was paid and received all his gratuities as and when these were due at the expiry of the respective contracts. These contracts cannot therefore be revisited for purposes of repayment of gratuity. This would amount to double jeopardy and unjust enrichment on the part of the claimant. This leaves us squarely at the beginning point. A case of the claimant not getting anything out of this. A case of entitlement to service gratuity on their part is not due or warranted. This is because no such payment is deserving in the circumstances. This answers all the issues for determination.
- 27 I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF OCTOBER 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:



Miss Kimani instructed by Nyabena Alfred & Company Advocates for the Claimant.

Miss Nkatha Nturibi instructed by Mwaniki & Gacoka Advocates for the Respondent.

