REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. E091 OF 2023

(Before D. K. N. Marete)

SIMON EKAI…….....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT CO. LTD.....RESPONDENT

JUDGMENT

This matter came to court by way of Statement of Claim dated 8th February, 2023. It does not disclose any issue in dispute on its face.

The Respondent in a Statement of Response dated 30th October, 2022 denies the claim and prays that it be dismissed with costs.

The Claimant case is that on 24th March, 1999, he was offered employment by the Respondent as a security guard at a salary of Ksh.11,336.00. This employment was effective on 1st April, 1999 and he was offered a letter of appointment.

The Claimant further case is that he worked in this position until 23rd March, 2010 when he was made a welder in the production operations section. This was at Grade B with a monthly salary of Kshs.43,308.00 with effect from 1st April, 2010. He thereon developed health issues and had counselling sections to enable him cope.

The Claimant's other case is that on 10th December, 2009 he was issued with a show cause letter

requiring him to show cause as to why disciplinary action should not be taken against him for coming to work late. He answered in explanation and cited his health issues and the need for counselling to enable him cope. He also produced medical reports but this notwithstanding, he was summarily dismissed. He appealed against dismissal but this was disregarded and a termination letter dated 15th June, 2020 issued instead. His gross pay at the time of termination was Ksh.99,648.00.

The Claimant further avers that prior to the summary dismissal he was not subjected to any disciplinary hearing to explain why his services should not be terminated and was not given any notice of termination as is required of the Employment Act, 2007. He had a twenty-one (21) year stint of service as at this time. He also cleared and was paid an amount of Ksh.2,922,742.00 which is a gross underpayment and not reflective of his legal entitlement and clause 21 of CBA 2012 to 2015 between the Respondent and the Claimant's union. This stipulates a payment of gratuity at the rates of 72 days for every completed year of service based on salary at the time of termination. A demand for payment to this extend fell on deaf ears.

He claims as follows;

a) *One month's salary in lieu of notice ……...99,648/=*

b) *Leave (20/30x99,648/=)……..66,432/=*

c) *12 months' salary compensation for unfair termination (12x99,648)……....1,195,776/=*

d) *Service Gratuity (99,648/26x72 days x21 years)……..5,794,914/=*

Less amount paid of ……2,922,742/=

Amount due ……..2,872,172/=

Total amount due……..…….....4,234,028/=

He prays as follows;

(i) *A declaration that refusal to pay his full-service gratuity by the Respondent is unfair and unlawful.*

(ii) *The Claimant be paid his full-service gratuity as set out in paragraph 11 herein above totalling to Kshs.4,234,028/=.*

(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 at court rates.*

The Respondent admits paragraphs 1, 2, 3, 4, 6, 19 and 20 of the claims and denies every other allegation of the Statement of Claim.

In Response to paragraph 6 of the claim, the Respondent avers as follows;

i. On 10th December 2019, the Claimant was accorded an opportunity to show cause why disciplinary action should not be taken against him.

ii. The notice to show cause indicated the circumstances leading to the Respondent company requiring the Claimant to show cause.

iii. The Claimant was informed of the offence that he had committed which was contrary to the Company's Human Resource Policy Manual and breached the terms of employment.

iv. The Claimant responded to the show cause letter vide the letter dated 12th December 2019 and the reasons therefore were not sufficient.

v. The Respondent invited the Claimant to a disciplinary hearing before the disciplinary committee.

vi. The Clamant failed to attend the disciplinary hearing despite being granted an opportunity to make his presentation before the disciplinary committee.

vii. The Respondent considered the written submissions by the Claimant which were found to be inadmissible and on 25th February 2020 summarily dismissed the Claimant.

It is the Respondent's further case that upon receipt of the claimant request for appeal on 5th March, 2020 she considered the Claimant's oral and written representations which were found to be inadmissible which decision was communicated to the Claimant vide a letter dated 15th June, 2020

Having subjected the Claimant to substantive and procedural fairness through an articulate disciplinary process, the Respondent in toto denies unfair termination of the Claimant's employment and put him in strict proof thereof.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
2. Whether the Respondent paid the Claimant his full-service gratuity as per clause 21 of the CBA inter partes.
3. Whether the Claimant is entitled to the relief sought.
4. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.

The Claimant in his written submission dated 14th February, 2025 brings out a case of unfair and unlawful termination of employment. He employs section 45 of the Employment Act, 2007 which

requires that for a termination to be considered fair it must be based on valid reasons besides being conducted in accordance with fair procedure. Again, section 41(1) of the said Act provides that;

> *"an employer shall, before terminating the employment of an employee, on the grounds of misconduct poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."*

The Claimant denies having been given valid reasons or even afforded an opportunity to be heard on his accusations. It is his case that he responded to the show cause letter highlighting his health issues and presented documentation on this. This notwithstanding, the Respondent went on to summarily dismiss him from employment and further dismissed his appeal against such dismissal. This is an indicator of a set mind on the part of the Respondent notwithstanding his twenty-one-year stint of satisfactory service.

The Claimant further avers that he was not invited for any disciplinary hearing with a view to airing his stance on termination. He seeks to rely on authority of **Elizabeth Washeke and others versus Airtel [k] Ltd and another Cause No. 1972 of 2012** where the court observed that the provisions of section 41 are mandatory and any deviation or disregard of the same deems a termination of employment unfair.

The Claimant in further support of his case critically produce the following documents in evidence;

(i) Letters of appointment dated 24th March, 1999 and 23rd March, 2010.

(ii) Show cause letter dated 10th December, 2019.

(iii) Response to show cause letter dated 12th December, 2019.

(iv) Medical documents at appendix SE5 and SE6

(v) Summary dismissal letter dated 25th February, 2020.

(vi) Termination letter dated 15th June, 2020.

(vii) 2020 pay advice slip.

(viii) Clearance forms and payment documents

The Respondent's case is that the Notice to Show Cause issued to the Claimant explained in detail the consequences of his conduct. This was in compliance with section 41 of the Employment Act, 2007 and wish to rely on authority of **Hosea Akunga Ombwori v Bidco Oil Refineries Limited [2017] eKLR** where the court held as such. It is their case that the Claimant was invited to a disciplinary hearing which he failed to attend forcing the disciplinary committee to rely on his written response and documentary evidence to pass a case of dismissal from employment. The Claimant raised an appeal against termination of employment but this was also dismissed upon consideration of its merits.

The letter of show cause agreeably was explicit on the reasons for show cause. These were repeated reporting to work late without permission and also failure to satisfactorily perform his duties. The Claimant was awarded seven days to respond to the letter as well as warned of the consequences of failure so to do. This letter did not invite the Claimant to a disciplinary hearing. There is also no indication or evidence by the Respondent that the Claimant was invited to any disciplinary hearing on any date, or at all. The Respondent only comes out to claim that he failed to attend a disciplinary hearing forcing a determination of his case on the basis of his response to the show cause letter.

The Response to the show cause letter and the other two documents comes out as evidence of the Claimant's medical woes. This comprises of persistence mental instability beside a case of food poisoning whereby the Claimant was admitted in hospital for eight (8) days. This should have prompted the Respondent to be more cautious in handling the disciplinary case of the Claimant. Successive dismissal of his employment and appeal against dismissal without a hearing does not amount to fairness as known in law. Besides, the Respondent has not adduced any evidence in support of a disciplinary process for the Claimant. It has not tendered or produced the minutes of the disciplinary committee meeting, or at all.

In this determination, the court find itself drawn into the web of the morality of termination of employment. The claimant's case was one of mental instability that was forthrightly notified and explained to the Respondent. Despite this information, the claimant was terminated for getting to work late and failing to perform his duties to the expectation of the Respondent. An appeal against such termination of employment was not taken seriously by the Respondent. If this is not high handedness, let us be told what it is. This was a case of good riddance and *in toto* a brutally unfair labour practice on the part of the Respondent

The Respondent was aware or ought to have been aware of the provisions of termination on medical ground but was callous enough not to employ the same or any other method of accommodating such a desperate employee. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such.

The 2nd issued is whether the Respondent paid the Claimant his full-service gratuity as per clause 21 of the CBA inter partes. The Claimant's case and submission is that he was not paid his service

gratuity in accordance with the CBA between the Respondent and the Claimant's union. Section 21 pf the CBA provides thus;

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.*
e) *…*

The Claimant on this seeks to rely on authorities of **Paul Bily Nyagilo vs East African Portland** and **Cement Limited [2018] KEELRC 1812 (KLR)** and **Musa Mohamed Kaleve & 2 others v East African Portland** and **Cement Limited [2020] KEELRC 1606 (KLR)** where the court upheld the position of clause 21 as the guide in a computation of gratuity in the circumstances of the Respondent employees. I agree with the Claimant. This is a clear-cut case where his last salary of Kshs.99,648.00 became applicable in computing his service gratuity as follows;

d) *Service Gratuity. (99,648/26x72 days x 21 years)*

……5,794,914/=

Less amount paid of ……2,922,742/=

AMOUNT DUE……2,872,172/=

The 3rd issue for determination whether the Claimant is entitled to the relief sought. He is. Having worn on a case of unlawful termination of employment, he becomes entitled to the relief sought.

The award of twelve months salary as compensation takes into consideration the nature and circumstances of the Claimant's termination of employment. Like is observed earlier in this judgment of court, this was cruel and crude to say the least. It is not in good taste that a prudent employer would treat their invalid staff in this manner.

I am therefore inclined to allow the claim and orders relief as follows;

(i) A declaration be and is hereby issued that the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.

(ii) A declaration be and is hereby issued that the refusal by the Respondent to pay the claimant full-service gratuity was wrongful, unfair and unlawful.

(iii) One (1) months salary in lieu of notice ……..…..Kshs.99,648.00

(iv) Leave pay 20/30x99,648.00……..…...Kshs.66,432.00

(v) Twelve (12) months compensation for unlawful termination of embayment.....Kshs.99,648 x 12months……..….Kshs.1,195,776.00

(vi) Balance of unpaid service gratuity ……...Kshs2,872,172.00

Total of claim/award…….Kshs.4,234,028.00

(vii) Interest at court rates from the date of filing this suit till payment in full.

(viii) The costs of this cause shall be borne by the Respondent

Delivered, dated and signed this 28th day of January 2026.

D. K. Njagi Marete
JUDGE

Appearances:

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

2. Miss Nkatha instructed by Mwaniki Gachoka & Company Advocates for the Respondent