



Okumo & 7 others v East African Portland Cement Company Limited (Cause E439 of 2022) [2025] KEELRC 745 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 745 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E439 OF 2022
DKN MARETE, J
FEBRUARY 26, 2025**

BETWEEN

**PETRONILAH MAKOKHA OKUMO 1ST CLAIMANT
MATAYO MUKOTO 2ND CLAIMANT
BONIFACE KIMEU MUTUKU 3RD CLAIMANT
WILLIS ODHIAMBO 4TH CLAIMANT
SENIORINA SAMPULI WANJE 5TH CLAIMANT
JACINTA TAKA CHAMI 6TH CLAIMANT
KIVUVA MUTULU 7TH CLAIMANT
SAIDI SULEIMAN MASHA 8TH CLAIMANT**

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED. RESPONDENT

JUDGMENT

1. This matter was originated by way of a Statement of Claim dated 20th June 2022. The issue in dispute is herein cited as;

Refusal by the respondent to pay the claimants gratuity owed to them.

2. The Respondent in a statement of Response dated 11th November 2022 denies the claim and prays that the same be dismissed with costs.
3. The Claimant's case is that on or about 2004, 2004, 2005, 2005, 2003, 2011, 2008 and 2005 the Respondent offered the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Claimant's employment respectively under job groups A, E, D, C, C, A, C and A respectively until termination in 2019.



4. The Claimant's further case is that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th claimants were earning a monthly salary of Kshs.46,369/=, Kshs.84,838.12/=, Kshs.62,280.76/=, Kshs.66,541.38, Kshs.56,391, Kshs.46,369/=, Kshs.73,490.40 and Kshs.62,280.00/= respectively instead of Kshs.51,903/=, Kshs.89,508/= Kshs.83,041/=, Kshs.75,188/=, Kshs.75,188/=, Kshs.51,903/= 83,041/= and Kshs.83,041/= respectively as per the collective bargaining Agreement then in force between the Claimants' union the Kenya Chemical and Allied Workers union and the East African Portland Cement Company Limited.
5. The claimant's other case is on exit, the Respondent employer paid them a gratuity of fifteen(15) days of every year of service contrary to the CBA with their union stipulating seventy-two (72) days. This was clause 21 of the said CBA.
6. The claimants aver that they are severally sought settlement of the balances of gratuity by the Respondent but this has fallen on deaf ears.

They claim as follows;

- a. Petronilah Makokha Okumu – Job Group A
Kshs.51,903 x 57/26 x 15 years.....Kshs.1,706,810.19
 - b. Matayo Mukoto – Job Group E
Kshs. 89,508 x 57/26 x 15 yearsKshs.2,943,436.15
 - c. Boniface Mutuku Kimeu – Job Group D
Kshs.83,041 x 57/26 x 14 yearsKshs.2,548,719.92
 - d. Willis Odhiambo – Job Group C
Kshs.66,541.38 x 57/26 x 15 yearsKshs.2,472,528.45
 - e. Seniorina Sampuli Wanje – Job Group C
Kshs.75,188 x 57/26 x 16 yearsKshs.2,637,363.69
 - f. Jacinta Taka Chami – Job Group A
Kshs.51,903 x 57/26 x 9 years.....Kshs.1,024,086.11
 - g. Kivuva Mutulu – Job Group C
Kshs.83,041 x 57/26 x 11 years.....2,002,565.65
 - h. Saidi Suleiman Masha – Job Group D
Kshs.83,041 x 57/26 x 15 years.....Kshs.2,730,771.34
- Total amount due and payableKshs18,066,281.50

They pray as follows;

- i. A declaration that the Respondent's action of declining and/or neglecting to pay the Claimants their rightful and lawful gratuity pay was unfair and unlawful.

The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th claimants be paid their full gratuity pay as set out in paragraph 12 hereinabove amounting to Kshs.1,706,810.19, Kshs.2,943,436.15, Kshs.2,548,719.92, Kshs.2,472,528.45, Kshs.2,637,363.69, Kshs.1,024,086.11, Kshs 2,002,565.65 and Kshs.2,548,719.92 respectively.



- ii. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of Justice.
 - iii. The Respondent to pay the costs of this claim.
 - iv. Interest on the above at court rates.
7. The Respondent denies the claim. It is her case that the salary paid to the claimants was in accordance to the contractual terms entered into between themselves and the Respondent vide their respective contracts of employment.
8. It is the Respondent's further case that the 1st , 2nd , 3rd , 4th , 7th and 8th claimants were paid a gratuity of 15 days for every year of service upon lapse of their contracts of service whereas the 5th and 6th claimants were paid at 25% of their basic salary for every year worked. This was paid as from the year 2011 pursuant to their contracts of serve.
9. The Respondent avers that the CBA was applicable to employees proceeding to retirement after attaining the mandatory age of retirement upon doing 60 years on or on medical grounds.

The Respondent's other case comes out 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 to 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.
- The issues for determination therefore are;
1. Whether the fixed term contracts were independent of each other and subjected to limitation from the date of their expiry.
 2. Whether the Claimant are entitled to the relief sought.
10. The 1st issue for determination is whether the fixed term contracts were independent of each other and subjected to limitation from the date of their expiry. The claimants in their written submission dated 10th June, 2024 posit that the claim was filed on 23rd June, 2022. Time in the circumstances started upon receipt of the gratuity now complained off.
 11. Again, all the Claimant's contracts were terminated in 2019 as follows: the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th claimants last day of employment was 30/6/2019, 31/10/209, 30/11/2019, 30/11/2019, 30/9/2019, 30/10/2019, 30/11/2019 and 30/6/2019 respectively. They later received their gratuity on diverse dates, the earliest being the 1st and 8th paid in July 2019.
 12. The claimants further submit that they were members and paying union dues and therefore members of the trade union covered by the CBA whether employed on contract or personal basis. Be that as it may, even if the time was to start running from the Claimants' last day of employment/termination, this claim would still not be time barred since no claimant was terminated before 30th June, 2019.

The Respondent submits thus;

The 1st Claimant was first engaged on a short-term temporary basis in the year 2004. The 2nd Claimant was first employed on a temporary basis in the year 2004. He was thereafter



offered a one-year contract on 20th June 2007. The 3rd and 4th Claimants were employed on one-year fixed contracts of service in the year 2005. The 5th Claimant was offered a temporary appointment in the year 2003. The 6th Claimant was first employed on a one-year contract in the 2011. The 7th Claimant was first employed on a one-year contract in the year 2008. The 8th Claimant was offered a temporary appointment for a period of six months in the year 2005.

13. We submit that the following were the last contracts served by the Claimant prior to their termination;

1st claimant – 1st April 2016 to 30th June 2019.

2nd claimant – 1st November 2016 – 30th November 2019

3rd claimant – 1st December 2016 – 30th November 2019.

4th claimant – 1st December 2016 – 30th November 2019

5th claimant – 1st April 2019 – 30th September 2019.

6th claimant – 7th October 2019 – 31st January 2020

7th claimant – 1st December 2016 – 30th November 2019

8th claimant – 1st April 2019 to 30th June 2019

14. Whereas it is agreed that the claimants were paid their gratuity at the rate of 15 days for every year served, the 5th and 6th were paid at 25% of their basic salary for every year served in accordance with clause 11.6.12 of the subsisting Human Resource Policy.

15. The last contract period for the claimants was in the year 2019 and 3 years backward is the year 2016. All other claims before 2019 are time barred in accordance with the law. This is as follows;

This claim being on unpaid gratuity, the cause of action arises when each gratuity was paid. The last contract period for the Claimants was in the year 2019 and 3 years backward is the 2016. All other claims before 2016 are time barred by operation of the law.

16. The Respondent further submits that the Collective Bargaining Agreement did not convert the terms of the union employees under fixed term contracts to permanent employees and therefore their terms of employment were maintained as fixed term contracts. Therefore, gratuity payable under the Collective Bargaining Agreement was for employees retiring due to age or on medical grounds.

The Respondent in the penultimate submits thus;

29. ...we submit that a Collective Bargaining Agreement applies progressively and not retrogressively. The Claimants seek to rely on the CBA that came into force in 2014 and apply it to contracts that had been performed by the parties and had expired. The fact that contracts had been performed, dues paid and contracts extinguished has been admitted by the Claimants in their witness statements.

30. ...we further submit that a Collective Bargaining Agreement applies to the existing terms of engagement between the employer and employee. Therefore, any contract having been performed and any dues paid therein, the same is extinguished. A Collective Bargaining Agreement entered into in the future cannot apply to an expired contract.

31. ...we wish to rely in Section 59 of the *Labour Relations Act* which provides that the effective date of a CBA is the date agreed between the parties and is enforceable upon registration.



The Collective Bargaining Agreement (2012-2015) cannot be enforced in contracts that were performed prior to its effective dated.

34. ... we wish to submit that prior to 2011, the Claimants contracts did not provide for payment of gratuity and therefore the same was not payable. Any claim for unpaid gratuity that is not anchored on a contract of employment is therefore baseless and not payable. We ask this Court to take note of the various contracts of employment produced by the Claimant and the terms therein to confirm this position.
17. In conclusion, the Respondent submits that the 5th and 6th Claimants is are not subject to calculations for gratuity under the Collective Bargaining Agreement but under their contract and clause 11.6.12 of the Human Resource Policy. In any event, these were management staff. I therefor enter a finding that the fixed term contracts were independent of each other and lapsed on payment of the respective gratuities in this respect. The Claims prior to 2016 being pegged on these fixed term contract therefore become statute barred pursuant to section 90 of the *Employment Act*, 2007.
18. The Claimant's cases remain not proven on the above premises. This is because they cannot rely on the CBA and apply it retrogressively on contracts that has lapsed and dues paid and settled. Again, any claim for unpaid gratuity prior to 2016 are statute barred and therefore lapsed. The positions of 5th and 6th Claimant who were in managerial position were also concluded by payment on the gratuities in accordance with their terms on Human Resource Policy Manual. This answers the 1st issue for determination.
19. On finding of no case for the Claimants, they become disentitled to the relief sought.
20. I am therefore inclined to dismiss the claim with orders that each party their costs of the same.

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF FEBRUARY 2025.

D. K. Njagi Marete

JUDGE

Appearances:

1. Miss Maina holding brief for Chebiego instructed by Chebiego & Associates Advocates for the Claimant.
2. Mr. Nkatha instructed by Mwaniki Gachoka & Co. Advocates for the Respondent

