



Kenya Commercial Bank Limited v Bogita (Employment and Labour Relations Appeal E286 of 2024) [2025] KEELRC 1729 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1729 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E286 OF 2024**

**JW KELI, J
JUNE 12, 2025**

**BETWEEN
KENYA COMMERCIAL BANK LIMITED APPELLANT
AND
DOUGLAS NYAMWAMU BOGITA RESPONDENT**

(Being an Appeal from the Judgment and Orders of the Honourable W. K. Micheni (CM) delivered at Nairobi on the 20th day of September, 2024 in MCELRC No. E899 of 2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable W. K. Micheni (CM) delivered at Nairobi on the 20th day of September, 2024 in MCELRC No. E899 of 2021 between the parties filed a memorandum of appeal dated 28th October 2024 seeking the following orders:-
 - a. The Appeal be allowed as a consequence whereof the Judgment and Decree of the Chief Magistrate’s Court at Nairobi, Milimani Law Courts (Hon. Wendy Micheni) in MC.ELRC No. E899 of 2021 dated 20th September 2024, be set aside and substituted with an order dismissing the suit, with costs.
 - b. The costs of the Appeal be awarded to the Appellant.

Grounds of the Appeal

2. That the Honourable Trial Magistrate erred in law and in fact by finding, without any legal basis, that the Respondent had a legitimate expectation of renewal of the fixed-term contract.



3. That the Honourable Trial Magistrate erred in law and in fact by finding that the Respondent's termination from employment was unjust and unlawful in spite of the fact that the Respondent's contract was terminated by effluxion of time.
4. That the Honourable Trial Magistrate erred in law and in fact in finding that the Respondent was entitled to the benefits under the Collective Bargaining Agreement(s) between the Kenya Bankers Association and the Banking and Finance Union Kenya(the "CBA").
5. That the Honourable Trial Magistrate erred in law and in fact in finding that the Appellant discriminated against the Respondent by failing to disclose that the Respondent was protected under the CBA.
6. As such, the Honourable Trial Magistrate erred in law and in awarding the Claimant:-
 - a. One month's pay in lieu of notice Kshs. 68,716/-
 Underpayment Kshs. 954,135/-
 House Allowance Kshs. 216,455/-
 Leave Allowance Kshs. 137,432/-
 Compensation for wrongful termination Kshs. 137,432/-
 Total Kshs.1,514,170/-
 - b. Interest on the total above at court rates from the date of judgment until payment in full.
 - c. Costs of the suit.
7. In the circumstances, the Honourable Trial Magistrate failed to do justice as regards the suit that was before her and accordingly erred in law by arriving at the decision that she did, and ultimately ended up in the unjust enrichment of the Respondent.

Background to the Appeal

8. The Respondent filed a claim against the Appellant vide a Statement of Claim dated the 24th of May 2021 seeking the following orders:-
 - a. Special damages of Kshs. 10,761,185/-
 - b. General damages.
 - c. Costs and interest of this suit.
9. The Respondent filed his verifying affidavit and list of witnesses dated 24th May 2021; as well as his undated witness statement and list of documents (pages 7-86of ROA). He later filed a Supplementary List of Documents dated 30th May 2022 (pages 118- 159 of ROA).
10. The claim was opposed by the Appellant who entered appearance and filed a memorandum of reply dated 15th July 2021 (pages 87-89 of ROA); list of witnesses dated 14th November 2022 (page 90 of ROA); witness statement of Robley Njoge dated 14th November 2022 (pages 91-94 of ROA), and produced the documents attached to their list and bundle of documents dated 14th November 2022 (pages 96-112 of ROA).



11. The Claimant's/Respondent's case was heard on the 4th of May 2023 where the Claimant testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the Appellant Mr. Rabuti (pages 351-357 of ROA).
12. The Appellant's case was heard on the 29th of November 2023. RW1, Robley Njoge, testified relying on his filed witness statement, and produced the Appellant's documents. He was cross-examined by counsel for the Claimant/Respondent Mr. Nyachoti (pages 358-362 of ROA)
13. The parties took directions on filing of written submissions after the hearing. The parties complied.
14. The Trial Magistrate Court delivered its judgment on the 20th of September 2024 partially allowing the Claimant's claim and awarding him the sum of Kshs. 1,514,170/- made up of one month's pay in lieu of notice, underpayment, house allowance, leave allowance, and compensation for wrongful termination (Judgment at pages 363-375 of ROA).

Determination

15. The appeal was canvassed by way of written submissions. Both parties filed.
16. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."
17. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
18. The court having considered the grounds of appeal and the submissions by the parties was of the considered opinion that the issues placed by the parties before the court for determination in the appeal were:-
 - a. Whether the Honourable Trial Magistrate erred in finding that the Respondent had a legitimate expectation that his contract of employment would be renewed.
 - b. Whether the Honourable Trial Magistrate erred in finding that the Respondent was entitled to the benefits under the Collective Bargaining Agreement between the Kenya Bankers Association and the Banking and Finance Union Kenya.
 - c. Whether the Respondent was entitled to the award of Kshs. 1,514,170/- and whether the same should be set aside.



Whether the Honourable Trial Magistrate erred in finding that the Respondent had a legitimate expectation that his contract of employment would be renewed.

19. The grounds of appeal under the issue were as follows:-

* That the Honourable Trial Magistrate erred in law and in fact by finding, without any legal basis, that the Respondent had a legitimate expectation of renewal of the fixed-term contract.

* That the Honourable Trial Magistrate erred in law and in fact by finding that the Respondent's termination from employment was unjust and unlawful in spite of the fact that the Respondent's contract was terminated by effluxion of time.

Appellant's submissions

20. The Appellant asserted that all the Respondent's contracts were for 1 year fixed consistent with its policy. That fixed term contracts carry no expectation of renewal. In *Transparency International - Kenya v Omondi* - "...there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed." (Civil Appeal 81 of 2018) [20231 KECA 174 (KLR) (17 February 2023) (Judgment). the Court of Appeal stated thus -"Indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed-term contract and its non-renewal cannot constitute unfair termination or dismissal. Having noted that the respondent was in employment under a fixed- term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was automatically not available to her." Similarly, the Court of Appeal Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boya Secondary School v Julius D M Bani [2017] eKLR stated that: "to require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination." In *Rajab Barasa & 4 Others v. Kenya Meat Commission* [2016] eKLR, it was held that fixed term contract will not be renewed automatically, even when there exists a clause allowing for such renewal. A similar holding obtained in *George Onyango v The Board of Directors of Numerical Machining Limited & Others* [2014] eKLR. The common thread in these decisions is that once a fixed term contract has expired, parties can only engage thereafter on a tabula rasa basis. The general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.

21. That during his cross-examination on 4th May 2023, the Respondent himself acknowledged that renewal of the contract was at the discretion of the Appellant and that the said renewal is not guaranteed (see page 356 of the Record of Appeal), thus it cannot be said that the Respondent had a legitimate expectation that his contract would be renewed. While the Learned Magistrate in the instant case agreed that there is jurisprudence to the effect that there can be no legitimate expectation of renewal of a fixed term contract (see page 365 of the Record of Appeal), she ultimately held that the Respondent, on the basis of the Appellant's actions, had a legitimate expectation that his fixed-term contract would be renewed. The Learned Magistrate's rationale was that the said jurisprudence is a general rule which is subject to exceptions like the practice by the employer, previous renewals, promise by the employer in the contract that the contract will be renewed upon fulfilment of certain conditions by the employee and the employee fulfils the conditions, and the conduct of the employer that leads the employee to expect a renewal. That the Learned Magistrate erred in making this finding, given that the decisions of the Court of Appeal on this matter (which decisions are binding upon lower Courts) maintain that there can be no legitimate expectation of renewal of a



fixed-term contract. It follows, therefore, that the Learned Magistrate also erred in failing to arrive at the conclusion that the Respondent's contract of employment was terminated by effluxion of time and that, in the circumstances, it could not be concluded that the said termination was unjust and unlawful. In inferring legitimate expectation, the Learned Magistrate essentially rewrote the Contract of Employment between the Appellant and the Respondent. It is a long-standing principle in law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. The Appellant relied on the pronouncement of the Court of Appeal National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR in where it was stated thus -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.” Similarly, in Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR the Court of Appeal held as follows - “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

Respondent's submissions

22. The parties on evidence agree that the Respondent was employed by the Appellant on a yearly fixed-term renewable contracts with effect from 2009 as a field attendant/driver at a constant monthly salary of Kshs. 23, 281/= to 2021. That the Appellant vide a letter dated 1st January 2021 opted not to renew the Respondent's yearly contracts. The Appellant's document KCB 1 at page 96-103 of the record of appeal are the fixed-term contracts. The fixed-term contract/Letter of employment clause provides for duration, clause 2 the staff human resource policy “in addition to the the terms general and condition set herein your employment will be governed by conditions of employment contained in the staff's human resource policy (the HR policies) (in so far as the same are not inconsistent with the existing labour laws in Kenya). Clause 7 on termination "your employment may be terminated by either party giving the other one-week written notice of termination. On commencement date and duration of employment it expressly provides" your employment is on a fixed-term contract basis and your continued employment during the fixed-term and renewal following the end of the contract will depend on the performance and the company's business requirements. The Bank Appellant's document KCB-2 at page 104 of the record of appeal is the KCB policy on recruitment of casual and temporary employees applicable to “where casual/temporary employees whose contract tenures do not exceed one year contracts exceed one year, the normal terms of service applicable respectively to management and non-management cadre's staff shall apply or as otherwise stipulated in the respective specific contracts of employment” In construing the terms of employment of the Respondent, under the express fixed-term contracts, the Respondent was hired periodically for a period not exceeding one year. It is clear from the fixed-term contract as read with the KCB Policy on recruitment of casual and temporary employees which form the contract that the Respondent having served for a period of over one year relying on the Appellant's exhibit 2, the Respondent was entitled to enjoy normal terms of service applicable to management and non-management cadres. These terms of service bound the Appellant based on the CBA produced as an exhibit in this case. The terms were properly expounded by the trial magistrate in making reference to the collective bargaining agreement (CBA) which protected the Respondent though not a member of the union. The Respondent is protected under section 5 of the *employment Act* 2007 from discrimination thus it was not open to the Appellant to give different terms of service for employed for the same cadre by differentiating between casual, contractual and permanent. The judgment appealed from is at page 362 of the record of appeal and on ground 1, 2 and 5 of the Memorandum of Appeal legitimate expectation of renewal of the fixed-term



contract we agree with the Appellant's submissions on a point of law that a fixed-term contract lapses within the time expressed in the contract and that there is no obligation on the part of the employer to issue a termination notice.

23. The respondent agreed that courts of law do not write contracts for the parties but construe the contracts as entered. The learned trial magistrate cannot be faulted in finding that the Appellant created a reasonable expectation of renewal of contract based on the following: - 1. Renewing the yearly fixed-term contract over 10 times which created a practice of renewal and thus expectation of renewal; 2. The Appellant's policy was to entitle a temporary employee retained for a period of over one year to the same terms enjoyed by the management and non-management cadre staff which in itself by conduct off the long period created an impression that the Respondent was to be treated as other staffs in respect to separation; 3. The Appellant recognized and congratulated the Respondent for dedication and handwork as per the email at page 157 of the record appeal. The has relied on Transparency International Kenya-vs- Teresa Carlo Omondi that fixed-contracts carry no expectation of renewal. For the purpose of contra-distinguishing the above case with the facts of the Respondent's case herein, Teresa Carlo Omondi was employed by TI Kenya as a Deputy Executive Respondent Director for a period of two years and further extensions of contract were subject to satisfactory performance and ongoing requirement of services by TI Kenya. That upon expiry of the two-year contract, TI Kenya refused to extend the contract and Teresa Carlo Omondi sued TI Kenya and was awarded among other remedies 3 months' salary in lieu of notice, two years' salary for non-renewal of contract and on appeal the judgment was set aside and the court of appeal held "Indeed the doctrine of legitimate expectation does not arise in the renewal of a fixed term contract and it is non-renewal cannot constitute unfair termination or dismissal having noted that the Respondent was in the employment under a fixed-term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the Respondent on basis of her assertion that her contract was fairly terminated was not available to her". At paragraph 29 in TI Kenya -vs- Teresa Carlo Omondi "it is old that, the parties are bound by the terms of contract they enter into. The exception to the general rule that fixed-term contracts end at their expiry date and that parties are bound by the contracts they enter into is found at the holding in TI Kenya -vs- Teresa Carlo Omondi at paragraph 30 (Page 9 Appellant's submissions). "Concomitantly, the scenario would have been different if there was an indication, by acts or omission from the appellant, to indicate renewal was forthcoming to wet the respondent's appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation". The respondent submitted that the facts in the case of TI Kenya -vs- Teresa Carlo Omondi are different from the case before the court. In the case before court both the fixed-term contract and the human resource policy provided for a contract of not more than one year. For a temporary employment over one year, the Respondent was entitled to normal terms of employment of the bank. The Appellant went against its own policy by extending one year contract over ten times. The Appellant was circumventing its own contractual terms by repeatedly renewing the expired contract ten times which went against a temporary employment because accumulative duration of over ten years cannot be termed temporary. The express assertion by the Appellant in the congratulatory message that the Respondent had exhibited handwork and dedication in the past ten years and continually impressed the Appellant created a reasonable expectation of renewal for a period of one year. The respondent urged this court to award the Respondent's salary of one year based on the salary enjoyed by other drivers/messengers as pleaded in the claim. Whereas there is no definition of reasonable expectation, in the High Court of Tanzania at Moshi Labour Relation Revision No. 11 of 2023 Tumaini Jacob Mathayo & 5 others-vs- Kili Security Co. Ltd Mwongela J. 19th March 2024 where the court referred to Medecins San Frontiers (MSF) Belgium -vs- Vengai Nhopi and 11 others Civil Appeal No. SC. 278/16 Supreme court of Zimbabwe approved the



assertion on reasonable expectation of renewal "the test for legitimate expectation is objective: would a reasonable person expect reengagement? This requires an assessment of all circumstances of the case. To be legitimate, the expectation must arise from impression created by the employer". In the same authority the judge referred to Tanzania Civil Appeal 53 of 2019 (TZCA 96 (7 March 2022) TANZLII where the Court of Appeal found that reasonable expectation was not defined in Tanzania law like in Kenya and drew inspiration from South Africa in *Dierks -vs- University of South Africa* (1999) 20ILT 1227 where the court set the criteria..... this includes an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business" In the case under reference, the judge considered circumstances of granting leave after the date of commencement, the number of previous renewals as treating the Applicant as somehow long-term employees and upholding reasonable expectation of renewal of fixed-term contracts and proceeded to grant the remedies. The learned trial magistrate as she then was correctly applied the circumstances surrounding the Respondent's employment and rightfully found that there was reasonable expectation of renewal of contract based in the practice of renewing a one-year contract more than ten times which formed a practice of renewal. It was therefore sound for the learned magistrate to find as she did in the judgment that there were circumstances to find reasonable expectation of renewal. There is no dispute that the fixed-term contracts were not to exceed a period of one year and that the short-term employees were meant for special projects. The Appellant's policy produced as an exhibit was categorical that temporary contracts of over one year entitled employee the same terms as of those on permanent terms. Having retained the Respondent on continuous and consistent renewal for over ten years and recognized the dedication and hard work of the Respondent there was a reasonable expectation of renewal for a period of one year and the non-renewal notice of less than two weeks was unreasonable.

Decision

24. The court on re-evaluation of the evidence before the trial court established that the respondent served on back to back fixed term contracts which on cross-examination the witness for appellant confirmed they were all for a period of not more than one 1 year and the appellant served for 11 years(2009 to 2021)(page 366 and page 360 of ROA).The appellant produced its policy on recruitment of casual and temporary employees which provided that it applied to temporary contracts whose tenures do not exceed one year. In the opinion of the court the tenure meant the period of the contract. The trial court relied on the decision of *Teresa Carlo Omondi v Transparency International Kenya* (2017)e KLR to hold that the claimant after the continuous renewals of the fixed term contracts, had legitimate expectation of renewal. The trial court further relied on a letter by the human resources office dated 1st February 2018 which congratulated the respondent for service of 9 years in concluding there was legitimate expectation of renewal. The decision relied on by the trial court had since been overturned by the Court of Appeal in *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [20231 KECA 174 (KLR) (17 February 2023) (Judgment). It was not good law. The Court of Appeal stated thus -"Indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed-term contract and its non-renewal cannot constitute unfair termination or dismissal. Having noted that the respondent was in employment under a fixed- term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was automatically not available to her." The Court of Appeal qualified its decision as follows:- "Concomitantly, the scenario would have been different if there was an indication, by acts or omission from the appellant, to indicate renewal was forthcoming to wet the respondent's appetite, that her contract would be renewed and hence rely on



the doctrine of legitimate expectation. In the instant case there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation". This court found no basis for the presumption of existence of legitimate expectation of renewal of contract as there cannot be any obligation of employer (save for terminal dues) to an employee beyond the appointed end date of a fixed term contract. The Appellant never gave any indication it will renew the last contract. The respondent was issued with these contracts and agreed to their terms. The court upholds the decision of the court of appeal in *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [20231 KECA 174 (KLR) (17 February 2023) (Judgment)]. The trial court in judgment dated 20th September 2024 relied on an overturned decision of the court thus arriving at the wrong conclusion. The court interferes with the decision of the trial court to hold that there was no case of unfair termination as the contract terminated by reason of effluxion of time. The award for unfair termination can thus not be stand and is set aside.

Whether the Honourable Trial Magistrate erred in finding that the Respondent was entitled to the benefits under the Collective Bargaining Agreement between the Kenya Bankers Association and the Banking and Finance Union Kenya.

Appellant's submissions

25. the Collective Bargaining Agreement (grounds 3, 4 and 5 of appeal). On the basis of the provisions of the Agreement, the Trial Court awarded the Respondent twenty-one months' salary for underpayment which totaled KES 954,135 and two months' salary for leave allowance which totaled KES 137,432 (see pages 372- 373 of the Record of Appeal). It is trite law that an employee will only draw benefit from a collective bargaining agreement where it is shown that he is entitled to those benefits. This entitlement is crystallized by registration with the union and the payment of the union dues. This was the decision of the Court of Appeal in *East African Portland Cement Limited v. Kenya Chemical & Allied Workers Union* [2017] eKLR wherein it observed thus:- "Payment of union dues is a condition for membership in a Union. As the CBA applies to members, it goes without saying that non-members of a Union cannot be beneficiaries of negotiations for wages and conditions of service negotiated for members of a Union. Section 48 of the *Labour Relations Act* deals with the issue of payment of union dues and membership in a trade union and it is implicit that terms negotiated by a Union on behalf its member's benefit all members on whose behalf the Union has negotiated. Can non-members on whose behalf the Unics may negotiate legitimately claim benefit from such terms?"
26. The Employment and Labour Relations Court had similar findings in ELRC Cause No. 2153 of 2017 - *Lynda Vihenda Chimwani v. Diamond Trust Bank Limited* where it was stated that -

“Membership to a union can be evidenced through various means, for instance, the register of Members, proof of deductions etc. In this case, no evidence of membership was availed before Court. Indeed, she did not produce a pay slip to indicate that she was remitting deductions to the union. Simply put, there is no proof of membership of the claimant to BIFU. The appellant relied on the decision in *East Africa Portland Cement Co. Ltd vs Kenya Chemical & Allied Workers Union* [2017] eKLR... “As such, the provisions of a CBA are only enforceable by and against members of the union that is a signatory to the said CBA. Therefore, it is only logical that the claimant could only benefit from the terms stipulated under the CBA subject to proof of her membership to the union. It will be very erroneous to infer that the claimant was an automatic member of the union on account of serving the respondent in the cadre of a clerical staff. Membership to a union is by choice and not by



force or implied. The fact that she was unionisable did not guarantee her automatic benefit to the terms of the CBA executed by the union on behalf of its members."

27. From the foregoing, the appellant submitted that the Learned Magistrate's finding that the Respondent was entitled to the benefits under the CBA is erroneous given that the Respondent did not tender any evidence of his registration with the CBA, neither did he tender any evidence of payment of the union dues by himself in that regard. The Respondent admitted as much during cross-examination (see page 354 of the Record of Appeal). It follows, then, that the Respondent could not be entitled to compensation for underpayment and leave allowance as computed by the Trial Court. Further, the allegations of discrimination on this basis as alleged by the Respondent ought to have been properly addressed by a Constitutional Court. As such, the Learned Magistrate erred in fact and in law in finding that the Appellant discriminated the Respondent by failing to disclose that the Respondent was protected under the CBA.

House Allowance (Grounds 5 and 6 of Appeal)

28. Where contract of employment provides for house allowance in the consolidated monthly salary, the Court cannot award house allowance separate from this amount. The Court of Appeal in *Grain Pro Konya Inc. Ltd v Andrew Waithaka Kiragu (Civil Appeal 228 of 2017) 12018) KELA S63 (KR) (Civ) (28 June 2019) (Judgment)* had the following to say in this regard:- "Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid "other benefits as required by law"... Counsel for the appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law" in the contract to award house allowance. We would have applied Section 31 (2) (a) of the *Employment Act* to exclude it." For context, Section 31(2)(a) of the *Employment Act*, CAP 226 of the Laws of Kenya provides that -"This section shall not apply to an employee whose contract of service-

- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
- (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)." The import of this provision is that an employer is not obligated to pay an employee house allowance over and above that which is provided for in the employee's consolidated monthly salary. Clause Respondent's Contract of Employment dated 19th January 2021 provided as follows (see page 98 of the Record of Appeal) -"You shall be paid a consolidated monthly salary of KES 23,281.00 which shall be deemed to accrue from day to day" It follows that the Respondent's house allowance was consolidated in his monthly salary, thus the Learned Magistrate erred in awarding him 21 months' house allowance at 15% of his salary (see page 372 of the Record of Appeal). The Court's computation was also based on the provisions of the CBA which, as earlier stated, do not apply to the Respondent. In so finding the Learned Magistrate, once again, essentially rewrote the Contract of Employment between the Appellant and the Respondent, a matter



that was not for the Court to do. See the precedent in National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (supra) and Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (supra).

Respondent's submission s

29. The learned magistrate erred in fact and in law in finding that the Respondent was entitled to t33he benefits under the CBA Agreement. The learned trial magistrate rightfully came to the conclusion that the Respondent under Section 5 (4) an employer shall pay his employees equal remuneration for work of equal value. It is not in dispute that the Respondent as a driver on contract was earning Kshs. 23,281/= while the other driver who were pensionable were earning Kshs. 68,716/= which was proved by the Respondent through production of the CBA as an exhibit and the salary of the driver was confirmed by the defence witness to be Kshs. 68,716/=. The learned trial court properly addressed itself on the law and caselaw which support the Respondent's case that he was being discriminated by being paid a different salary as a driver of Kshs. 23,281/=. The award for underpayment of Kshs.954,135/= was based on the law and the actual evidence before court.
30. The argument that the Respondent was not a unionizable employee and therefore not entitled to the negotiated terms cannot hold based on the Appellant's own authority No. 7 at page 69-75 of the Appellant's submissions Court of Appeal Civil Appeal No. 14 of 2016 East African Portland Cement Co. Ltd vs Kenya Chemical and Allied Workers Union at page 57 of the case "the record of appeal shows that the Appellant has employees who are on contract and employees who are not on contract who are referred to as casuals. The former are not part of management. Both categories do the same work". At page 67 of the authority (74) of the record of appeal "the appellant's argument that there were separate negotiations for non-management workers, some of whom were on contract and others not, does not hold sway and must fail we so find. The negotiated wages, terms and conditions of service applied to the contract staff as well as the casuals by dint of Section 59 (1) (b) of the *Labour Relations Act*.....in the impugned judgment, the learned judge held that it was discriminatory for the appellant to treat the contract staff and casuals differently in terms of wages as this abrogated the ILO Convention 100 which fortified by Article 27 of *the Constitution* of Kenya 2010 which the learned judge alluded to.
31. The Respondent was in agreement with the learned judge's finding and urged the court to dismiss ground 3 of the memorandum of appeal as the trial court applied the law, evidence and the judicial pronouncement by the higher courts. The learned trial magistrate in awarding the Respondent house allowance of Kshs. 216,455/= the court was guided by the principle of equal pay for equal work and there is no argument that the terms for the cadre of a driver were negotiated and agreed. It is a misapprehension of the law to argue that the Respondent having not been a member of the union cannot benefit from the negotiated terms. The respondent reiterated the above submission on discrimination. The Respondent was equally entitled to leave allowance like other drivers protected by the CBA. The only benefits the Respondent could not be entitled to are terminal dues on retirement but on the basis of equal work equal pay the Respondent was entitled to the same remuneration for the period worked. The honorable trial court having found that the Respondent had a legitimate expectation of renewal of contract gave compensation of Kshs.137,432/=. The respondent urged this court to consider the length of the period served of about 11 years and noting that the renewals were on a yearly contract it would have been reasonable to order compensation of 12 months instead of two months given that the Appellant went against its own policy of retaining the temporary employee for a period of over one year and in order to circumvent the contractual terms and the policy renewed the fixe-term contract for over ten times instead of granting the Respondent the fixed-term contract of 10 years. The KCB policy. on recruitment at page 105 of the record of appeal inter-alia state that where contracts exceed one year the normal terms of service applicable to management and non-



management cadres' staff shall apply respectively. It further provides that casual employment shall be for special projects and to satisfy pressing business needs..... From the evidence on record the appellant exploited the Respondent as a regular driver not assigned to any project and kept renewing the fixed-term contract for ten years. The respondent urged the court to dismiss the appeal, make an award for discrimination at the work place and enhance compensation for non-renewal or reasonable expectation of renewal to 12 months salary as was pleaded.

Decision

32. The court established that this issue(similar in facts on cadre of employees holding 1 years contracts) had already been determined by the court in *Omondi Justus Ranga'nga & 28 others v KCB Bank Kenya Ltd & BIFU* (Nairobi Cause No E618 OF 2021 delivered on the 30th November 2022)by Justice M. Mbaru . In its judgement, the trial court held that rights of employment are protected, and that the applicant was bound under section 26 of the *Employment Act*, to apply the terms and conditions under the Collective Bargaining Agreement (CBA then in force), or such other terms as were favourable to the respondents. According to the trial court, the basic minimum conditions of employment ought and should have been those under the CBA or such other favourable terms and conditions, and to go below this level was unlawful; and that the redress where an employer engages in unfair labour practices is payment for damages. Accordingly, the court (Lady Justice Mbaru) made a declaration that the respondent applied unfair labour practices against the respondents; and that the respondents were discriminated against. The court also directed that each respondent be paid: general damages of Kshs 2 million; pension at Kshs 241,657.20; underpayment at Kshs 1,247,256; untaken leave days at Kshs 30,995; leave allowance at Kshs 31,500; house allowance at Kshs 424,800; meal allowance at Kshs 7,200; and that the applicant do issue the respondents with certificates of service, and bear the costs of the claim. The decision has not be overturned by the higher court. I find no reason to take a different position. The finding that the Respondent was entitled to the benefits under the Collective Bargaining Agreement between the Kenya Bankers Association and the Banking and Finance Union Kenya by the lower court is upheld. Ideally, the claimant ought to have sought damages for discrimination but this being not an issue canvassed at trial court it is not open to this court to delve into at appeal stage.

Whether the Respondent was entitled to the award of Kshs. 1,514,170/-

33. In the said upheld decision (*Ranga'nga v KCB &BIFU*), on reliefs the court held that the same was limited to three years post termination as the employee ought to have asserted his rights within three years of the contracts. Having upheld the decision I so find. The notice pay and compensation is set aside as the court on appeal has held there was no case of unfair termination or legitimate expectation of renewal of contract. The court noted that the underpayment was restricted to the CBA period of 21 months and I find no reason to interfere with the lower court decision on the item.
34. On House allowance the appellant submitted where contract of employment provides for house allowance in the consolidated monthly salary, the Court cannot award house allowance separate from this amount. The Court of Appeal in *Grain Pro Konya Inc. itd v Andrew Waithaka Kiragu* (Civil Appeal 228 of 2017) 12018) KELA S63 (KR) (Civ) (28 June 2019) (Judgment) had the following to say in this regard:-"Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid "other benefits as required by law" ... Counsel for the appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the



employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law" in the contract to award house allowance. We would have applied Section 31 (2) (a) of the *Employment Act* to exclude it. For context, Section 31(2)(a) of the *Employment Act*, CAP 226 of the Laws of Kenya provides that -

“ This section shall not apply to an employee whose contract of service-

- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
- (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).” The import of this provision is that an employer is not obligated to pay an employee house allowance over and above that which is provided for in the employee’s consolidated monthly salary under contract. Clause Respondent’s Contract of Employment dated 19th January 2021 provided as follows (see page 98 of the Record of Appeal) -

“ You shall be paid a consolidated monthly salary of KES 23,281.00 which shall be deemed to accrue from day to day” It follows that the Respondent’s house allowance was consolidated in his monthly salary, thus the Learned Magistrate erred in awarding him 21 months’ house allowance at 15% of his salary (see page 372 of the Record of Appeal). The Court’s computation was also based on the provisions of the CBA which, as earlier stated, do not apply to the Respondent.

- 35. The court finds that the contracts held by the respondent indicated the salary was consolidated. That meant it was all inclusive. The lower court erred in taking a different position. The award is set aside. From the foregoing the award of leave is set aside and replaced as follows:- Kshs. 68716-23281 x 2 months thus Kshs. 90870.
- 36. In conclusion the appeal is partially allowed. The Judgment and Orders of the Honourable W. K. Micheni (CM) delivered at Nairobi on the 20th day of September, 2024 in MCELRC No. E899 of 2021 is set aside and substituted as follows:-
 - a. Underpayment of salaries Kshs. 954,135/-
 - b. Leave allowance Kshs. 90870.
 - c. Interest for the total sum of Kshs. 1,045,005/ (a and b) at court rates from date of judgment
 - d. Costs of the suit.
- 37. Each party to bear own costs in the appeal.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE 2025.

J.W. KELI,



JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant – Stacy Manani/ Chacha Odera

Respondent: -absent

Court Order

Stay order of 30 days granted.

J.W KELI

JUDGE

