



**Parteyie v East African Portland Cement PLC (Cause 574 of 2019)  
[2022] KEELRC 4056 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4056 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 574 OF 2019**

**M MBARÚ, J**

**JUNE 6, 2022**

**BETWEEN**

**EMMANUEL OSHUMU PARTEYIE ..... CLAIMANT**

**AND**

**EAST AFRICAN PORTLAND CEMENT PLC ..... RESPONDENT**

**JUDGMENT**

1. On October 12, 2005 the respondent employed the claimant in the position of Energy Electrician and which employment was also subject to the existing CBA.
2. On June 30, 2019 the claimant was served with a Notice indicating that his contract would not be renewed. The CBA did not have provision for fixed term contract or termination of employment upon the lapse of the contract term.
3. Employment terminated unfairly, the claimant had no show cause notice, a hearing or the provisions of Section 41 of the *Employment Act* followed.
4. At the time employment terminated the claimant as earning ksh.98,480 contrary to what was due under the CBA at ksh.131,307.
5. In a judgement delivered by the court on July 6, 2015 in Kenya Chemical and Allied Workers Union v East African Portland Cement Company Limited Cause No.2119 of 2014 the court held that all contract employees of the respondent including the claimant were beneficiaries of the CBA. The Court of Appeal in Civil Appeal No.14 of 2016 further held that the respondent ought to pay all the contract employees in accordance with the CBA.
6. The respondent should have dealt with the claimant's employment in terms of the CBA and not the letter and term contract which was superseded by the CBA.



7. During employment, the claimant was not accommodated or paid a house allowance and claim the following;
  - a. 2 months' notice pay Ksh.315,136;
  - b. House allowance Ksh.787,830;
  - c. Gratuity for 14 years Ksh.6,108,790;
  - d. Underpayments Ksh.984,810;
  - e. Compensation for unfair termination of employment;
  - f. Shift allowances and overtime pay Ksh.362,243; and
  - g. Costs.
8. The claimant testified that he worked for the respondent from November 1, 2005 until June 30, 2019 when he was served with letter of non-renewal of his contract which was without notice, hearing or any reasons to justify termination of employment. his terminal dues for 14 years were not paid. in the year 2014 the claimant had taken a loan with the bank and the respondent was the guarantor for 6 years ending March, 2021 but was dismissed from his employment midway and has been unable to repay the loan which has accumulated in interests. The respondent had confirmed his employment as permanent and pensionable and was hence able to secure the loan facility.
9. The claimant testified that he was employed at job grade 'H' but his salary was ksh.98,408 lower than due for the same grade under the CBA at ksh.131,307. The underpayment is due.

## Response

10. In reply, the respondent has made mere denials and that the claimant joined the respondent as a casual employee on November 1, 2005 to January 31, 2006 and thereafter employed in the same position on contractual basis from time to time. the CBA was not applicable to the claimant as the time of his retirement from the respondent.
18. There was Civil Appeal No.14 of 2016 – East African Portland Cement Company Limited v Kenya Chemical and Allied Workers Union whose judgement is subject for an order of stay.  
No evidence was called by the respondent.  
At the hearing, the respondent remained absent.  
The respondent filed work records.
19. The claimant filed written submissions that the effect of Section 59 of the *Labour Relations Act* (LRA) is that a CBA binds the parties for the period of the agreement and in the case of *Musa Mohamed Kaleve & 2 others v East African Portland Cement Limited* [2020] eKLR the court held that the terms of a CBA are not only binding on the individual employees but as a matter of law are incorporated into the employees' contract of employment.
20. The respondent's case that the CBA between it and the union as not binding on the claimant has no basis in law. the terms under the CBA applied to the claimant's employment as held in Cause No.2119 of 2014 – Kenya Chemical and Allied Workers Union v East African Portland Cement and which matter on appeal, the Court of Appeal held that the respondent ought to pay all contract employees in accordance with the CBA as held in the case of Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers Union v North Coast Beach Hotel Cause No.109 of 2014 that the



terms and conditions of employment contained in the CBA supersede all other terms and conditions of employment applicable to the employees.

21. The respondent issued the claimant with letter of non-renewal of contract without notice or a hearing which was unlawful n he is entitled to two months' notice pay, house allowance for the period of employment, underpayments, gratuity and retirement benefits under the CBA.

### **Determination**

22. Part of the records the respondent filed are employment contracts with regard to the claimant.
23. Contract dated July 22, 2011for the period of July 1, 2011to June 30, 2012;
24. By letter dated June 4, 2012the respondent informed the claimant that his employment contract had been renewed for a further period of 3 years from July 1, 2012to June 30, 2015;
25. On June 19, 2015the respondent renewed the contract of employment for 33 years from July 1, 2015to June 30, 2018;
26. By letter dated December 7, 2016the respondent upgraded the claimant from Grade F to H with effect from December 1, 2016at a salary of ksh.98,480 per month;
27. By letter dated February 16, 2018there was a role change from power electrician to Energy Technician – Kibini;
28. By letter dated February 21, 2018the claimant requested for renewal of his employment contract and h=in reply through letter dated May 24, 2018 the respondent renewed the contract for one years with effect from July 1, 2018to June 30, 2019; and
29. By letter dated June 24, 2019 the respondent issued notice to the claimant that his contract of employment would not be renewed.
30. Whereas every employee has a right to fair labour practices pursuant to Article 441 of *the Constitution*, 2010 and is entitled to employment terms and conditions that are favourable and not below the applicable terms and conditions applied to unionisable employees, employment on a fixed contract terms is lawful and legitimate pursuant to the provisions of Section 10(3) of the *Employment Act*, 2007 (the Act). an employer who issues an employee with a fixed term contract even where there is a CBA governing terms and conditions of employment commits no wrong save, the terms and conditions thereof cannot be applied to the disadvantage of the subject employee.
31. In this regard, the Court of Appeal in the case of East African Portland Cement v Kenya Chemical and Allied Workers Union, referenced above, held that the respondent ought to pay all contract employees in accordance with the CBA.
32. The Court of Appeal matter emanated from this occur judgement in Cause No.2119 of 2014 – Kenya Chemical and Allied Workers Union v East African Portland Cement and where the court held that the payment of different wages for workers performing similar work is discriminatory and that the respondent was in breach of the CBA by applying different wage payments and should implement the CBA as negotiated.
33. The claimant was unionised under Kenya Chemical and Allied Workers Union and the wage disparities thus addressed, from such suit, his underpayments of salary, house allowances and shift allowances and overtime ought to have been addressed.



34. The rationale is that under the fixed term contracts, the claimant is bound under Section 90 of the Employment Act, 2007 and cannot go back on his claims 3 years after the last contract served. Each term contract renewed the employment relationship. The last covered the period ending 30<sup>th</sup> June, 2019 and 3 years backwards is June 30, 2016. All other claims before such date is time barred by operation of the law. upon the lapse of each contract, the claimant applied for renewal and a new contract terms issued. The claimant was aware at all material times that his employment had a time period.
35. Upon the lapse of the last term contract of one (1) years ending on June 30, 2019no notice was due as the contract lapsed on its terms.
36. Under the renewed contract, the respondent carried the phrase that other terms of employment remain unaltered.
37. Under the initial contract dated July 22, 2011the claimant was entitled to payment of gratuity at 15 days for each completed year of service. under the term contract, such pay is due for 3 years all at 15 days x gross wage at 89,480 all Ksh.147,720.
38. On the contract, either party was at liberty to terminate upon one month notice or payment in lieu thereof. But such applied where the end date of the contract was not applicable as such is the purpose of a term contract. It has a start and end date.
39. On the claim for a house allowance, the claimant's pay was addressed under his term contract. His was not a minimum wage and clause (2) was to the effect the your consolidated salary i.e. inclusive of house allowance will be ...
40. The benefits then secured under the claim filed by the trade union for and for the benefit of the claimant ought to be extracted and the decree thereof executed. Another suit where the claimant had a benefit cannot be enforced through the instant claim. Claims for house allowances, shift and overtime pay, if at all due, such do not accrue in this case. Such would result in duplication of remedies.
41. The contract lapsed on its terms and notice of nonrenewal issued. A case of unfair termination of employment does not arise.
42. Accordingly, save for gratuity payments of Ksh.147, 720 if not already paid, other claims fail. Each party shall bear own costs.

**DELIVERED IN COURT AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE, 2022.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....

