



**Mugenge v Seyani Brothers Limited (Cause 1175 of 2017)
[2024] KEELRC 1436 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1436 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1175 OF 2017**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

NICLAS MUGENGE CLAIMANT

AND

SEYANI BROTHERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a mason, between January 2013 to 19th November 2016.
2. Through his Statement of Claim filed on 23rd June 2017, he avers that his contract was terminated by the Respondent, unfairly and unlawfully.
3. He prays for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 1-month salary in lieu of notice at Kshs. 21,600.
 - c. Annual leave over the entire period of service at Kshs. 12,600.
 - d. Off days at Kshs. 207,360.
 - e. Gratuity at Kshs. 32,400.
 - f. 12 months' salary in compensation for unfair termination at Kshs. 259,200.
Total ... Kshs. 578,520.
 - g. Costs.
 - h. Interest.



4. The Respondent filed a Statement of Response dated 9th October 2017. Its position is that the Claimant was employed by the Respondent as a Mason, in February 2016, not 2013. He was assigned to the Respondent's village market project. In 2013, village market project had not started. He was paid a daily rate of Kshs. 725. He worked for the Respondent for 9 months. His contract was not terminated by the Respondent as alleged. The project where he worked, came to an end. He was informed that the project was at end, in good time. None of his prayers is merited. The Respondent prays the Court to dismiss the Claim with costs.
5. The Claimant gave evidence and rested his case, on 22nd November 2022. The Respondent tendered evidence through a storekeeper, on 11th February 2024, closing the hearing. The Claim was last mentioned on 4th April 2024 when the Parties confirmed the filing and exchange of their closing submissions.
6. The Claimant adopted his witness statement in his evidence –in – chief. He corrected his period of employment to June 2014 to 19th November 2016. He stated that he was called to office by a clerk, Simon Kyalo, and told there was no more work. He visited the workplace after a few weeks and found another Employee had taken up his position. He worked overtime without compensation. The Respondent did not pay N.S.S.F contributions.
7. On cross-examination, the Claimant told the Court that he was a Casual Employee. He did not have employment records stretching back to 2014. Kyalo told him there was no more work. Kyalo did not allow the Claimant access to the Managing Director. Redirected, he told the Court that he was not issued a letter of employment.
8. Kyalo adopted his two witness statements on record, in his evidence. He exhibited 4 documents filed by the Respondent. He confirmed that the Claimant was employed as a Mason. Kyalo knew him from 2015. The Claimant's contract lapsed on 17th October 2016 after the project ended. The Claimant was paid Kshs. 8,700 as terminal dues.
9. On cross-examination, Kyalo told the Court that he was employed in 1997. The Respondent undertook construction works at many sites. Kyalo had worked at village market, bomas galleria and tatu city. Kyalo registered workers assigned to different sites. He did not have the register of workers showing when the Claimant joined. The Claimant last worked on 19th November 2016. He was paid Kshs. 8,700 for days worked. Project commenced in 2014. The certificate of completion was not availed to the Court. There were other Masons. They all ceased working when the project ended.
10. The issues are whether the Claimant's contract was terminated fairly and lawfully; and whether he merits the remedies sought.

The Court Finds: -

11. The Claimant worked as a Mason, in a construction project the Respondent was undertaking, at village market, Nairobi.
12. The Respondent executed the agreement for commencement of the project, on 13th March 2014.
13. The Claimant was engaged subsequently. He stated he was engaged in January 2013, way before the commencement of the project. He corrected this to June 2014 in his evidence, which is closer to the commencement of the project. The Respondent states that he was engaged in February 2016, and worked for about 9 months.



14. There is no document exhibited by either Party, to conclusively show, when the Claimant was engaged. The Court would hold that he Claimant worked for the Respondent for some months or years, between the commencement of the project in March 2014, until he left in November 2016.
15. The nature of his engagement was not regular employment. The first thing he said on cross-examination was that, "I was casual..." He was a mason, engaged for a specific project at village market. Once masonry work was finished, there would be no logical reason, to continue engaging the Claimant. There was no work beyond the close of the project. There was no suggestion that the Claimant's contract was terminated for any other reason, other than the closure of the construction works.
16. The Parties were at liberty to discontinue their relationship, without incurring legal liabilities such as those the Claimant seeks to enforce against the Respondent. He conceded he was in casual employment. He could carry out masonry work elsewhere, while he worked for the Respondent, without any adverse legal consequences. He could take days off, and even cease reporting to work, without legal consequences. He told the Court he was in casual employment. He could come in and go out at will. This liberty probably is the reason why the Claimant cannot plead with certainty, when he first worked for the Respondent. It could have been any given day, during the life of the project. Mutuality of obligations rose and set with each new sun.
17. Overall, his continued engagement with the Respondent was tied down to the life of the project. Once he and the other Masons were advised that the project was winding down, they were free to move on to the next mjengo site. This the reality of the building and construction industry. It was not possible for the Respondent to continue employing the Claimant, unless a new project was within sight, and the Parties agreed to move on to the new site together.

It Is Ordered:

- a. The Claim is declined
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

Judge

