



**Njanjo v Jomat Construction Limited (Cause 1514 of 2018)
[2024] KEELRC 2171 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1514 OF 2018
J RIKA, J
AUGUST 30, 2024**

BETWEEN

STEPHEN KIAMA NJANJO CLAIMANT

AND

JOMAT CONSTRUCTION LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on 14th October 2016.
2. He states that he was employed by the Respondent on 12th November 2012, as a Manager, Operations.
3. He last earned a monthly salary of Kshs 60,000.
4. The Respondent terminated his contract on 8th July 2016. There was no notice. His salary was not paid for 19 months, amounting to Kshs 1,140,000. He was evicted from his rental residence in Nairobi, and his Children sent away from school on account of unpaid fees.
5. He prays for: -
 - a. Reinstatement; or
 - b. Gratuity;
 - c. 1-month salary in lieu of notice;
 - d. Annual leave traveling allowance;
 - e. Salary for days worked;
 - f. Withheld salaries over a period of 19 months;
 - g. 12 months' salary in compensation for unfair and unlawful termination; and,



- h. Costs.
6. The Respondent filed its Statement of Response and Counterclaim, dated 29th November 2016. It is denied that the Claimant was unfairly and unlawfully dismissed by the Respondent. He deserted on 8th October 2015. The Respondent wrote to him on 22nd January 2016, informing him that the Respondent considered him to be a deserter, and his contract terminated.
 7. He owed the Respondent a sum of Kshs 215,000 by the time of his desertion.
 8. He carted away and converted to his own use, the Respondent's construction tools and material including: bitumen sprayer; road measuring wheel; desktop computer with printer; 4 space workstations; 2 executive chairs; dumper logbook registration KBA 513 N; 5 assorted files; 1 old green survey machine; propeller; drive shaft; and an old clutch plate.
 9. The Respondent counterclaims return of the above items. There is no prayer counterclaiming the sum of Kshs 215,000, and it is not made clear in the Respondent's Pleadings, if the sum of Kshs 215,000 is the value of the items listed above.
 10. The Respondent prays for dismissal of the Claim, and grant of the Counterclaim with costs.
 11. The Claimant filed Reply to the Statement of Response and Counterclaim, on 14th December 2016. He denies that he owes the Respondent any amount of money. He explains that some of the items counterclaimed by the Respondent, were stored at the yard of Dogra Enterprises, after the Respondent was evicted from the premises it was occupying. The items are lying at the yard, uncollected. Others are held by the Claimant's former landlord as lien, for unpaid house rent. The Claimant indicated that he would apply for preliminary dismissal of the Counterclaim. There is no record of such a Preliminary Application.
 12. The Claimant gave evidence on 13th December 2022 and 27th July 2023, when he rested his case. The Respondent did not give evidence, and closed its case on 26th January 2024. The Court was informed by the Counsel for the Respondent that the Respondent's only witness passed away. The Claim was last mentioned on 12th July 2024, when the Claimant confirmed filing and service of his Closing Submissions.
 13. The Claimant relied on his Witness Statement, Documents and Supplementary Documents [1-11]. He restated his employment history and details of his contract with the Respondent, as summarized above, in his Statement of Claim. He was advised that work had diminished, and would be paid his dues later through M-pesa. He was not paid. He was not aware of any money owed by him to the Respondent. He returned all the tools of trade to the Respondent.
 14. Cross-examined, he told the Court that he worked from Kasarani in Nairobi. His supervisor Joshua Ndirangu was at the Head Office, in Karen Nairobi. The Claimant communicated with Ndirangu, through the phone. All staff at Kasarani left for Nanyuki. The Claimant was left with a staff of 2. He was in charge. He was a Mechanic, not a Manager Operations. He did not leave work voluntarily. He did not retain the Respondent's car. He did not give away the Respondent's properties to another company called Dogra. The items were stored at Dogra for security. The Respondent had been ejected from its leased premises by Zakhem Limited.
 15. He did not receive any letter requiring him to hand over the items claimed by the Respondent. He was not paid salary for 19 months. He survived over the period on family support. He did not desert, to work in greener pastures. He represented the Respondent for tender opening in Nyandarua County.



Anyone, even a driver could represent the Respondent at tender opening. He reported the presence of some of the Respondent's items in his house, to Kasarani Police.

16. Redirected, he told the Court that his position was Manager, Operations. He was not told by the Respondent about retained items. The Respondent did not report him to the Police. Dogra kept the items. Tender documents were opened at Nyandarua on 2nd March 2016. The Respondent alleges he deserted on 8th October 2015. He signed the tender documents. He did not forge the exhibited documents. He had 3 different signatures.
17. The issues are whether, the Claimant's contract was terminated lawfully and fairly, or at all, by the Respondent; whether he merits the prayers sought; and whether the Respondent has established its Counterclaim.

The Court Finds: -

18. The Claimant was employed by the Respondent with effect from 1st December 2012, through a Notification of Appointment, dated 12th November 2012.
19. His designation was not specifically given. The Notification states that, "your duties will be in operations and any other relevant assignment..."
20. In his evidence on 13th December 2022, the Claimant told the Court that, "I was a Mechanic. I was not an Operations Manager..." Elsewhere, he pleads and told the Court that he oversaw operations at the Respondent's construction site.
21. He appears to have been a foreman, who oversaw construction works for the Respondent.
22. Counterclaim: The Respondent is a limited liability company, and the Court did not quite understand why the death of one witness, would result in the Respondent being totally unable to give evidence.
23. The Claimant closed his case on 27th July 2023. The Respondent's case was scheduled for hearing on 14th December 2023.
24. The Respondent did not turn up in Court and the Claimant's Advocate, informed the Court, that he was told by his colleague that the Respondent's Director had passed away. The Court adjourned hearing to 26th January 2024, when the Respondent's Advocate attended Court, and asked the Court to close the proceedings, on the ground that the Respondent's witness had passed away.
25. There is therefore no evidence to challenge that of the Claimant, or to support the Counterclaim, given by the Respondent.
26. The Counterclaim is declined.
27. Termination: There is no evidence by the Respondent to show that the Claimant deserted on 8th October 2015 or any date thereafter. The Claimant is shown to have represented the Respondent at the opening of a tender in Nyandarua County, in early 2016.
28. He was a foreman and granted wide latitude, in overseeing the Respondent's construction sites and transactions. He had flexibility in his attendance of duty. He does not seem to have been closely supervised. He was entrusted considerable amounts of construction equipment and material. He determined where to utilize these, and decided where to have them stored. He was given a vehicle, and was not confined to a physical office, where he signed an attendance register each morning. When others were moved from Nairobi to Nanyuki, he was left with a skeleton workforce in Nairobi.



29. Having been granted a wide discretion, in roaming about the Respondent's construction sites, and having been the custodian of the Respondent's construction equipment, it is not convincing that he woke up one morning, and abandoned work, leaving everything behind. He drove out in the construction sites, using a vehicle the Respondent had provided him. He was not confined to an office at Ruaraka. He was in Nyandarua to witness opening of a tender the Respondent was involved in, in early 2016. He is not likely to have deserted, at the end of the year 2015.
30. There is therefore, no evidence that the Claimant deserted. Termination was instigated by the Respondent. It was not based on valid reasons, under Sections 43 and 45 of the *Employment Act*.
31. The Respondent pleads at paragraph 4 of its Response, that it issued a letter to the Claimant, dated 22nd January 2016, indicating that the Claimant had deserted, and his contract terminated with effect from 8th October 2015.
32. The Respondent wrote various Internal Memos to the Claimant in quick succession, from 14th October 2015, warning him about absenteeism. The Memos were internal, which suggests, that they were personally delivered to the Claimant. The one dated 23rd October 2015, warned that absenteeism amounted to gross misconduct, and disciplinary action would be taken against the Claimant, in the absence of a written response, within 7 days.
33. The letter terminating the Claimant's contract, unlike the Internal Memos, was addressed to the Claimant, through a postal address at a place called Kiptangwanyi. The Respondent does not explain why there was variance on the mode of communication of the warnings and the letter of termination, but it is clear from these communications that the Claimant was within the reach of the Respondent, and a disciplinary hearing ought to have been convened, before the decision to terminate his contract, was made.
34. Procedure was not in conformity with Sections 41 and 45 of the *Employment Act*.
35. Remedies: The Counterclaim is declined.
36. It is declared that termination of the Claimant's contract was initiated by the Respondent, and was not founded on valid reason, or executed fairly.
37. The remedy of reinstatement is not legally permissible, termination having taken place in 2016. It is neither reasonable, nor practicable.
38. There is no support in evidence for the prayers on gratuity, annual leave traveling allowance, and pay for days worked. The Claimant did not draw the attention of the Court to any contractual clause or legal provision, granting him gratuity and leave traveling allowance. He did not specify how many days he worked without being paid, to warrant the prayer for "pay for days worked."
39. His salary was Kshs 60,000. He is allowed the prayer for notice, at Kshs 60,000.
40. He did not specify in his evidence during which month, of which year, his salary was not paid, resulting in arrears of 19 months' salary. He appears to have been entrusted the Respondent's equipment, including a vehicle, which he used beyond his call of duty. He even entered into some form of agreement which is exhibited, where he allowed his landlord to retain as security, until all his rent arrears were paid. It is not likely that such an Employee would be owed salary for 19 months, and not have equally creative means of self-help, in recovering his arrears of salary from his Employer. His prayer for salary of 19 months is declined.



41. The Court is satisfied that termination was unfair, and allows the prayer for compensation, equivalent of 12 months' salary, at Kshs 720,000. Maximum compensation because, the Claimant did not cause or contribute to the circumstances leading to termination; there is no evidence at all from the Respondent to challenge this assessment; he prayed for reinstatement which is unavailable due to a provision of the law; and he worked for the Respondent for over 10 years.

42. Costs to the Claimant.

In sum, it is ordered: -

- a. The Counterclaim is declined.
- b. It is declared that termination of the Claimant's contract was initiated by the Respondent and was unfair and unlawful.
- c. The Respondent shall pay to the Claimant: notice at Kshs 60,000; and equivalent of 12 months' salary in compensation for unfair termination at Kshs 720,000 – total Kshs 780,000.
- d. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF AUGUST 2024.

JAMES RIKA

JUDGE

