



**Maina v Bajrang Construction Limited (Cause 826 of 2016)  
[2024] KEELRC 2670 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2670 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 826 OF 2016  
J RIKA, J  
OCTOBER 31, 2024**

**BETWEEN**

**GODFREY NDEGWA MAINA ..... CLAIMANT**

**AND**

**BAJRANG CONSTRUCTION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim, dated 10<sup>th</sup> May 2016.
2. He avers that he was employed by the Respondent as a Mason, between March 2014 and November 2015.
3. He avers that he was unfairly and unlawfully dismissed by the Respondent in November 2015.
4. As of the date of dismissal, he was earning a monthly salary of Kshs. 12,750.
5. He was not issued a written contract.
6. He was working on a lower floor at the Respondent's construction site, on 3<sup>rd</sup> March 2015, when a block fell from the upper floor, injuring him, on the right shoulder.
7. He avers that the Respondent failed to put in place, proper safety measures, which resulted in the Claimant sustaining a broken clavicle.
8. He was admitted at Nairobi Hospital in Thika Town, for 7 days. His condition worsened and he was taken to other hospitals. He has become disabled, as a result of the injury.
9. He returned to work, but the Respondent terminated his contract, due to his disability, and refused to pay his outstanding salary and benefits.



10. He was not given a hearing under section 41 of the *Employment Act*. He was not availed his Certificate of Service. He was denied his annual leave entitlement.
11. His prayers are: -
- a. Declaration that termination was unfair and unlawful.
  - b. Certificate of Service to issue.
  - c. Compensation for violation of his constitutional rights.
  - d. A fine of Kshs. 100,000 against the Respondent for failing to comply with Section 51 [3] of the *Employment Act*.
  - e. Payment of –
    - I. 1-month salary in lieu of notice at Kshs. 12,750.
    - II. Notice payments at Kshs. 12,750.
    - III. Annual leave allowance at Kshs. 25,500.
    - IV. Damages equivalent of 12 months' salary at Kshs. 153,000.
    - V. Service pay at Kshs. 12,750.
    - VI. Unpaid leave at Kshs. 12,750.
    - VII. Public holidays at Kshs. 4,250.
    - VIII. 52 rest days at Kshs. 22,100.
    - IX. Underpayment of salary at Kshs. 108,733.  
Total ... Kshs. 364,583.
    - X. N.S.S.F contributions from 2014.
    - XI. N.H.I.F contributions from 2014.
  - f. Costs.
  - g. Interest.
  - h. Any other suitable relief.
12. The Respondent filed its Statement of Response on 28<sup>th</sup> September 2016. It is denied that the Claimant was employed by the Respondent. He was employed by another company, B.K. Construction Limited, which had been independently subcontracted to carry out some construction works. The Respondent is not aware about the Claimant's injury, treatment, and termination of contract. It never employed the Claimant. The Respondent denies that it is in any way liable to the Claimant. The Respondent urges the Court to dismiss the Claim with costs.
13. The Claimant and his witness Peter Muhia, gave evidence and rested his case, on 29<sup>th</sup> September 2023. The Respondent's witness, Human Resource Officer Hellen Mutindi, gave evidence on 30<sup>th</sup> July 2024, closing the hearing.



14. The Claimant restated the contents of his Statement of Claim, in his evidence-in-chief. He adopted his witness statement and documents [1-7]. The Respondent was his Employer, and paid the full cost of his medical treatment.
15. Cross-examined, the Claimant told the Court that he did not have any document, to establish that he earned a monthly salary of Kshs. 12,750. Peter Muhia was the foreman, and his supervisor. The Claimant did not know that the Respondent subcontracted B.K. Construction Limited. He was not supplied safety equipment. Construction was taking place at Thika, Garissa Road.
16. Peter Muhia told the Court that he worked with the Claimant, at the Respondent's construction site. Muhia was the foreman. The Claimant was under him. The Claimant was injured while at work. Muhia took him to hospital, upon the instructions of the Respondent's Site Manager. The Claimant was paid a monthly salary of Kshs. 12,750. He was not paid terminal benefits. Cross-examined, Muhia told the Court that the Claimant was not supplied any document, on payment of salary.
17. Hellen Mutindi relied on her witness statement and documents filed by the Respondent, in her evidence-in-chief. Cross-examined, she told the Court that the Claimant was never employed by the Respondent. He claimed he was employed by the Respondent in March 2014. The subcontract is dated 1<sup>st</sup> July 2014. Hellen did not agree that the Claimant was already in employment, when the subcontract was executed. The subcontractor was to do all work, from the 1<sup>st</sup> to the 7<sup>th</sup> floor. Hellen did not know if the Claimant was injured at work. Redirected, she told the Court that the Claimant did not exhibit any employment contract, executed with the Respondent. The subcontractor recruited its own workers.
18. The issues are whether the Claimant was employed by the Respondent; whether the Respondent terminated his contract unfairly and unlawfully; and whether he merits the remedies sought.

**The Court Finds:**

19. The Court is persuaded through the evidence of the Claimant, and that of Peter Muhia, that the Claimant was employed by the Respondent as a Mason. The evidence of Peter Muhia in particular was helpful. He was the Claimant's supervisor, a foreman, and filled the evidential gap, created by lack of an employment letter, or other document, issued by the Respondent to the Claimant, establishing employer-employee relationship. Without Muhia, the Claimant would have been hard-pressed to convince the Court, that he worked for the Respondent. Construction industry [mjengo] workers, are not always beneficiaries of written contracts, and when their foremen present evidence of their employment, the Court ought to be receptive.
20. The Claimant was injured at work, and the Respondent took the responsibility for his medical treatment. The Respondent's Site Manager, instructed Muhia to take the Claimant to Thika Hospital. The Respondent catered for the hospital bill. There is nothing to show that the Claimant was employed by the subcontractor.
21. The medical report prepared by Dr. Karanja confirms that the Claimant sustained injury, causing him pain and inability to perform his masonry duties.
22. The Respondent could not retain the Claimant, because of his inability to perform his masonry work. Rather than release him on medical ground, the Respondent opted to terminate his employment without notice.
23. To this extent, the Court would agree that termination was unfair. The Respondent ought to have communicated to the Claimant that he was being released, on account of his inability to discharge



his masonry duties, instead of sending him away abruptly, and seeking to evade liability under the subcontract. In effect, the Respondent overlooked the option of letting the Claimant leave through retirement on medical ground, and instead, subjected him to termination at will. Our employment law does not countenance termination at will, even in instances where the Employee is injured and unable to discharge his role. There must be a fair and lawful termination.

24. The prayer for notice of 1 month is allowed at Kshs. 12,750.
  25. Prayer [ii], pleaded as ‘notice payments,’ has no foundation and is declined.
  26. There was no evidence placed before the Court to establish the prayers for annual leave, leave allowance, public holidays, service, underpayment, rest days, and statutory deduction refunds. These prayers are declined.
  27. The Respondent has not been tried for an employment offence of a criminal nature, for the Court to impose a sentence of a fine of Kshs. 100,000.
  28. The Claimant worked for 1 year. His contract was terminated by the Respondent, after he was injured at work. He did not cause or contribute to the circumstances leading to termination of his contract. He sustained permanent disability assessed by his Doctor at 10%. It was open to him to pursue compensation for work injury. This Court is confined to compensating the Claimant for unfair termination. He could not continue working as a mason. He is granted equivalent of 4 months’ salary in compensation for unfair termination, at Kshs. 51,000.
  29. There is no evidence to suggest that the dispute was in any way a constitutional dispute, warranting the prayer for compensation for constitutional violations. The alleged violations in any event, were not specified. This prayer [c], is declined.
  30. Costs to the Claimant.
  31. Interest allowed at the rate of 14% per annum, from the date of Judgment, till payment is made in full.
- It Is Ordered: -
- a. It is declared that termination was unfair.
  - b. The Respondent shall pay to the Claimant notice at Kshs. 12,750 and equivalent of 4 months’ salary in compensation for unfair termination at Kshs. 51,000- total Kshs. 63,750.
  - c. Costs to the Claimant.
  - d. Interest allowed at the rate of 14% from the date of Judgment till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**JAMES RIKA**

**JUDGE**

