



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 129 OF 2019**

**JEFF KARINGO NJAGI a.k.a JAPHTHAH KARINGO NJAGI.....CLAIMANT**

**VERSUS**

**ENERGY4 IMPACT.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 28.02.2019 through Mumia & Njiru Advocates. The claimant alleged refusal to confirm him past confirmation date, unfair and unlawful termination, discrimination, unfair labour practices by the respondent leading to premature loss of career by the claimant, and refusal to pay the claimant's terminal dues and accrued salary. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant was discriminated against by the respondent.
- b) A finding that the claimant was deemed confirmed after the lapse of his probationary period.
- c) A finding that the respondent's conduct and handling of the claimant and subsequent separation amounted to unfair labour practice and thus unfair and unlawful termination.
- d) A declaration that the claimant's constitutional rights were violated by the respondent.
- e) An award of Kshs.15,666,666.66 made up as follows:
  - i. 20 accrued leave days Kshs.666, 666.66.
  - ii. 3 months' notice Kshs.3, 000, 000.00.
  - iii. 12 months' compensation Kshs.12, 000, 000.00.
  - iv. Aggravated damages for discrimination to be assessed by the Court.
  - v. Accrued salary up to the time of determination of the suit.
  - vi. Pension contribution from August 2018 to the date of determination of this suit or as the Court may award.
  - vii. Costs of the suit.

viii. Any other relief that the Court may deem fit to grant.

f) Costs of the suit.

g) Any other relief that the Court may deem fit to grant.

The respondent filed the memorandum of response on 28.03.2019 through Messrs. Kilukumi & Company Advocates. The respondent prayed that the memorandum of claim be dismissed with costs. The claimant filed the reply to the response on 09.04.2019.

To answer the **1st issue** for determination, there is no dispute between the parties that they were in a contract of service. The respondent employed the claimant by the employment contract dated 23.01.2018 to the position of Africa – Regional Director and reporting to the respondent’s Chief Executive Officer at Kshs.1,000,000.00 per month. The claimant signed the contract on 24.01.2018 and it commenced on 12.02.2018. The contract provided thus, **“1.2. This contract will terminate on the initial Termination Date, which shall be 182 days after the Commencement Date, unless agreed otherwise between the parties, in accordance with clause 6 of this agreement.”** Clause 6 on contract extension and probation period provided as follows:

**“6.1. Notwithstanding clause 1.2, this contract may be extended beyond the initial termination date, by joint agreement of the parties, on the same terms, subject to clause 5.7.**

**6.2. No later than 90 days after the commencement date, the CEO and the employee will discuss informally the prospects for a potential extension of this contract.**

**6.3. No later than 150 days after the commencement date, the CEO and the employee will formally agree either not to extend this contract, or the period of the extension and the arrangements for subsequently agreeing a potential second extension of this contract.**

**6.4. The period up to the initial termination date shall be a probation period. Notice required during this (probation) period is one month from either party. During or at the end of the probation period, if performance is unsatisfactory and the contract is terminated, normal disciplinary rules will not apply and the employer reserves the right to extend this period as appropriate.”**

Clause 5.7 provided that in the event of an extension of the contract in accordance with clause 6 of the contract, the employer operated a voluntary staff benefit scheme which the employee will be eligible to join should the employee wish and contributions are matched up to 6% of salary. Clause 10 on retirement stated that the contractual or normal age of retirement will be 65 years for all employees. Further it stated that early retirement could be taken with the consent of the employer.

The claimant’s place of work was the respondent’s Africa Regional Office in Nairobi, Kenya. There was no dispute between the parties that the Kenyan employment law applied.

The **2nd issue** for determination is whether the termination of the employment relationship was unfair. The Court has considered the parties’ respective cases about the claimant’s service. The evidence is that the claimant served and the initial six months lapsed on or about 12.08.2019. Thereafter, the claimant continued to serve the respondent. The claimant’s case is as follows:

a) He discussed the issue of the probationary service with the respondent’s CEO one Ben Good and who confirmed that the claimant’s service during probation had been exemplary and he promised to confirm the claimant in permanent employment. The CEO was based in London.

b) In May 2018 he discussed the issue of confirmation with the respondent’s Human Resource Manager based in Nairobi office who instead of processing the confirmation letter advised the claimant to hold further discussions with the CEO.

c) In June 2018 the claimant travelled to London and held a meeting with the CEO who promised he would communicate with the Human Resource Manager in Nairobi to issue the confirmation letter. There after the claimant and the Human Resource Officer based in Nairobi wrote emails to the CEO about the confirmation the last one being on 03.11.2018. The claimant stated in that email that it was the last time he was asking the CEO about the confirmation. The claimant was concerned that he had started missing on the contributory pension thus being discriminated as per section 5 of the Employment Act, 2007. The CEO replied the email of 03.11.2018 by his email of 05.11.2018 apologising and indicating that that the issue would be resolved that week and the accrued pension honoured in retrospect.

d) The promise was not honoured and instead the CEO called the claimant on the cell phone on Saturday 11.11.2018 and informed the claimant that the respondent had decided not to confirm the employment. The claimant's case is that though he was not appraised on time, he considered himself confirmed in appointment by operation of the law. In particular over 3 months earlier the CEO had indicated he would be confirmed; he had a clean record and 3 months had lapsed since ending of 6 months of probationary service, on 05.11.2018 the CEO had promised to confirm the claimant, pension would apply only to confirmed employees, and section 42 of the Employment Act 2007 barred extension of the probation beyond six months unless the employee had agreed in writing. The claimant's further case is that he raised the issues with the CEO during the cell phone call on 05.11.2018.

e) On 13.11.2018 the CEO Ben Good wrote an email stating that he wanted an amicable exit for the claimant. The claimant replied stating he wished to receive official letter indicating the terms of exit, the effective date and, reasons per section 43 (1) of the Employment Act, 2007. In the meantime and prior to the reply, the CEO's Administrative Assistant in London send an email to all staff promulgating a new organogram that did not feature the claimant's role of Africa Regional Director and the email stated that the claimant's last day at work would be 30.11.2018. At that time the amicable exit had not been negotiated at all. The respondent's roles were to be distributed to other offices.

f) On 26.11.2018 the claimant received the CEO's email offering two options. Option A was to pay contractual one month pay in lieu of notice, retrospective pension obligation and a few weeks of work until transition was completed. In alternative option B being 3 months' salary from the date of notification on 13.11.2018, the last day in office to be 30.11.2018 and pension contribution from 13.08.2018 to end of the 3 months' notice. Option A was said to be included as the interpretation of the contract and the financial pressure on the respondent while B was the generous offer and if A was sufficient for the claimant's needs given his financial position and employment prospects then he would opt for A.

g) On 29.11.2018 the claimant replied the email of 26.11.2018 agreeing to separate by agreement but upon demanding 3 months' salary in lieu of notice from 01.12.2018, net of tax payment of pension contribution from 12.08.2018 to 30.11.2018; payment of unutilised leave days, and net payment of special damages for all breaches to the law and constitutional rights.

h) The claimant was given a certificate of service dated 30.11.2018, and his leave days computed at 19.12.

i) On 03.12.2018 the claimant wrote to the respondent's CEO about the claimant's letter dated 29.11.2018 requesting payment of all unsettled amount to avoid interest effective 01.12.2019. He gave notice to institute legal proceedings if not paid by 11.12.2018.

j) The CEO replied by the without prejudice SMS dated 07.12.2018 that his offer would remain open until 10.12.2018 at noon. The CEO further issued the letter of 10.12.2018 proposing to pay one month salary in lieu of notice; 18 days paid leave and ex-gratia payment of pension for 3 months. The letter was forwarded by email at 8.55. The claimant replied by his email of 10.12.2018 at 9.22 indicating he accepted the offer of Friday 07.12.2018 on without prejudice

basis. The CEO replied by the email of 10.12.2018 stating that he accepted in good faith that the claimant had accepted the offer of 07.12.2018 by the deadline of noon and the letter forwarded at 8.55 on 10.12.2018 would be disregarded. The payment would be effected subject to signing an agreement specifying the sums to be paid. On 18.12.2018 the claimant wrote reminding the CEO to pay and providing his bank details.

The respondent's case is as follows:

- a) The claimant was employed under a fixed term contract of six months lapsing after the 6 months of probation. The contract was subject to renewal or extension by express agreement of parties. The 3 months the claimant worked after lapsing of the 6 months was therefore a month to month contract.
- b) The respondent admits parties explored the amicable settlement of the separation. Further the offer of 26.11.2018 was not accepted on time and it lapsed.
- c) The threats and blackmail by the claimant derailed the amicable settlement by negotiation.
- d) The claimant is entitled to only one month pay in lieu of notice and 18 days' leave which the respondent is willing to deposit in Court.

The Court has carefully considered the parties' pleadings and the evidence. It is clear that the respondent opted to re-organise with the consequence that the claimant's role as Africa – Regional Director was distributed to other offices in the respondent's establishment. Thereafter the respondent decided to terminate the claimant's contract of service. The Court finds that the claimant accepted to separate but the terms of the separation had to be agreed upon. The final of the offer on such separation terms by the respondent was by CEO's SMS dated 07.12.2018 sustaining the offer of 26.11.2018 being option B the claimant had opted for being 3 months' salary from the date of notification on 13.11.2018; the last day in office to be 30.11.2018 and pension contribution from 13.08.2018 to end of the 3 months' notice. By the email of 10.12.2018 at 10.03pm, the negotiations ended when the CEO confirmed that the payment would be effected and the Court observes that the email was not on without prejudice basis. The Court finds that parties agreed to terminate the employment by agreement. In the letter dated 03.12.2018 the claimant confirmed he had been given a warm send off and he had received the certificate of service. The Court returns that the parties must be bound by that agreement.

Thus the claimant testified, **“I pray for the 3 things we agreed. I have been treated unfairly. When suit was pending my CEO suggested to pay on the three headings as agreed. That was on 01.02.2019.”**

The respondent's witness (RW) was the CEO Ben Good. He confirmed the SMS messages filed were exchanged between the parties. By that evidence it is clear that his email of 10.12.2018 at 10.03pm was binding because it confirmed the agreed package of the separation.

Accordingly, the Court returns that the claimant served for slightly over 9 months up to 30.11.2018, the parties separated by agreement, and they are bound accordingly. The claimant's alleged unfair termination will therefore fail and the claimant is awarded in terms of the separation agreement being 3 months' salary from the date of notification on 13.11.2018; the last day in office to be 30.11.2018 and pension contribution from 13.08.2018 to end of the 3 months' notice.

While making that finding the Court returns that the claimant is not entitled to a declaration that the termination was unfair and compensation for alleged unfair termination under section 49 of the Act. Further, by reason of the separation agreement, it is clear that the parties were not bothered with the effect of the initial 6 months service and thereafter slightly over 3 months' service because they took into account all that relationship and settled on the terms of the separation. The Court returns that whether the subsequent three months' service was on month to month basis or an extension or renewal of the contract or constructive confirmation in permanent and pensionable terms, the separation agreement became an

overriding and final agreement in that regard. For avoidance of doubt, the amount is less tax in accordance with the applicable tax law and the contract of service on the payments.

To answer the **3rd issue** for determination, the Court finds as follows with respect to the other remedies prayed for by the claimant:

a) Since the respondent agreed to pay the accrued pension, the claimant is deemed to have been confirmed in permanent and pensionable service after the lapsing of the 6 months probationary service. The Court follows Ascrat Gilamichael Woldegabriel –Versus- Five Forty Aviation Limited [2015]eKLR where Nduma J held that it is trite law that once a specified probationary period has expired and the same is not immediately extended in writing, the employment of the affected employee is deemed to have become one on permanent terms.

b) Since parties agreed to separate and upon the agreed terms of the separation, it was not unfair termination and the alleged discrimination and unfair labour practices have not been established. The Court returns that salary up to the date of determination of the suit has not been established and justified at all. Further the claimant has not established the constitutional rights that were violated. The claimant had urged discrimination on account of unpaid pension but which the Court has found was part of the separation agreement. Further the respondent may have employed other staff but it is clear to the Court that parties voluntarily agreed to separate and employment of such other staff had no impact on the separation agreement.

c) The Court has considers the parties' margins of success and that the respondent failed to pay after the email by the CEO dated 10.12.2018 at 10.03pm. But again it is clear that the claimant rushed to file suit derailing the amicable settlement as agreed and as submitted and demonstrated by the short messages exchanged slightly before filing the suit. To balance justice for the parties, the respondent will pay 25% of the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) A declaration that the claimant is deemed to have been confirmed in permanent and pensionable service after the lapsing of the 6 months probationary service.

b) The respondent to pay the claimant in terms of the separation agreement 3 months' salary from the date of notification on 13.11.2018; the last day in office to be 30.11.2018 and pension contribution from 13.08.2018 to end of the 3 months' notice.

c) The amount in (b) to be agreed upon by the parties failing the claimant to file and serve the computed amount in 7 days for recording in Court on a convenient mention date and the amount to be part of the decree herein.

d) The respondent to pay the awarded amount by 31.12.2019 failing interest to be payable thereon from the date of filing the suit till full payment.

e) The respondent to pay 25% costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 29th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**