



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 15 OF 2006

TUSKER SAFARIS TOURS AND TRAVEL LTD APPELLANT

VERSUS

MAURA BERTIMO RESPONDENT

JUDGEMENT

This is an appeal from the judgment of J. Kiarie, PM delivered on 3rd May, 2006 in Mombasa CMCC No. 275 of 2002. The grounds of appeal as per the memorandum of appeal dated 29th May, 2006 are that: -

- i. The trial court erred in law and fact by holding that the respondent was employed by the appellant despite the absence of any employment contract.
- ii. The trial court erred by failing to find that the respondent failed to prove that she was employed by the appellant for the period January 1997 to 24th May, 1999.
- iii. The trial court erred when it failed to hold that the respondent failed to prove termination of her alleged employment by the appellant.
- iv. The trial court erred in law and fact when it did not hold that the respondent failed to prove that her salary was Kshs.240,000/= per year.
- v. The trial court erred in law by finding that the appellant's defence was untenable.

The respondent was served with the hearing notice but did not attend during the hearing of the appeal. Miss Atieno, counsel for the appellant relied on the record of appeal and urged the court to allow the appeal

This is a first appeal and the court is required to evaluate the record of the trial court and make its own decision. The dispute has been in court for 14 years. Initially the case was filed before the High Court in Mombasa. It was later referred to the Chief Magistrate's Court on 29th September, 2002 when the matter was listed before Justice D. Onyancha. The respondent was the plaintiff before the trial court. The totality of her evidence is that in January, 1997 she was employed by the appellant as a tour leader. She earned a salary of Kshs.20,000/= per month plus bonuses and commissions. The appellant applied for work permit for her. She was not employed on commission basis. She worked for three years and left in May 1999. During the 3rd year the salary was Kshs.40,000/= per month plus bonuses. She was not paid for the 3rd year and that was her claim before the court. She worked from morning to evening. She was

not a commission agent but a salaried employee. She did not even go on leave during the low seasons.

DW1 LILIAN LEONARD NGUMBAO was a manager employed by the appellant. By 2002 she had worked for thirteen years for the appellant. It was her evidence that the respondent was employed as a tour leader and was to be paid at 5% commission on the tours and safaris she would have sold. The payments were made either weekly or monthly or when there was cash. When the respondent sold safaris in cash she would go to the office and get cash payment. If the tourists paid by credit card or travelers cheques the respondent would be paid either by cheque or cash. The witness produced payment slips for Kshs.88,620, 115,000/=, 100,000/=, 30,000/= and 20,000/= that was paid as commission to the respondent. The company wrote to the Immigration office indicating that the respondent was the employee earning a salary of Kshs.240,000/= per year. It is her evidence that that was not the respondent's salary. During low season the respondent would go back to her home.

DW2 EDMOND BUFFA was a tour operator and the managing director of the appellant. He testified that the respondent was introduced to the company by a friend in Watamu. She used to sell safaris and was Italian who could easily communicate with the tourists. The company engaged her as a tour leader on a 5% commission basis. She did that for the period 1997 to 1999. The policy was to pay the tour leader on commission. In order to enable her obtain a work permit the company wrote to the Immigration Department indicating that the respondent was their employee. They were advised that they could not indicate that the respondent was being paid on commission. The minimum salary that was to be indicated in the letter was Kshs.240,000/=. That amount was not the respondent's salary but was meant to facilitate the processing of the work permit for the respondent. The company paid the respondent all her dues. She was not a salaried employee.

DW3 ABDUL OMAR HAJI was employed by the appellant as a tour leader in 1999. He was paid 5% commission by the appellant. Tour leaders preferred to be paid commission as opposed to a monthly salary. By the time he was employed the respondent had already left. DW4 FRANKLINE KOMBE YERI also worked for the appellant from September 1995 to 2000 as a tour guide. He later became a tour leader. It is his evidence that the appellant used to pay him 5% commission on all the safaris and excursions they procured. The respondent joined the company when he was working. She used to sell safaris. She later left.

This appeal raises two main issues namely whether the respondent was employed by the appellant and whether the respondent proved her case on a balance of probabilities before the trial court. From the evidence of the respondent, it is established that she was engaged by the appellant as a tour leader. There is no letter of appointment of employment. The respondent relied on the letter dated 3rd June, 1997 to the Principal Immigration Officer requesting for a visa for her. The evidence on record proves that the letter was written mainly to facilitate the issuance of a work permit to the respondent. That was mainly to enable the respondent have a valid document which enables her to work in Kenya. An employment letter could have been the most ideal document to prove permanent employment. The evidence of DW2 was that the request for a work permit could not have stated that the respondent was a commission agent. That reason is understandable. I do find that there was no permanent employment between the appellant and the respondent.

The appellant produced his bank statement which showed how the commissions to the respondent were being paid. The payment is not fixed and it seems it varied depending on the value of the safaris. The appellant produced some payment slips which tally with the bank statement. I do find that the arrangements between the appellant and the respondent was based on commission as opposed to a monthly salary. There is no consistent payment of the sum of Kshs.20,000/= as a monthly salary flowing each month. The respondent alledged that the salary was increased to Kshs.40,000/= per month but there is nothing to prove that. Everything seemed to have been done orally but the mode of payment can be discerned from the bank statements. I am satisfied that the trial court erred in law and fact by converting the arrangements between the parties to one of permanent employment. It is not clear why a permanent employee would wait for one year and thereafter claim her full year salary. The respondent was not a salaried employee and did not prove her case before the trial court on a balance of probabilities.

In the end, I do find that the appeal is merited and is hereby allowed. The judgement of the trial court is set aside and replaced with an order dismissing the respondent's suit. Each party shall bear their own costs both for the lower court suit and for this appeal.

Dated and delivered in Malindi this 22nd day of November, 2016.

S.J. CHITEMBWE

JUDGE