



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 704 of 2009

Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate Court Case*

EMPLOYMENT CONTRACT

- 2.1 *Employer/appellant/original defendant*
Employee/respondent/original plaintiff
- 2.2 *Employee employed between 1992 - 2002*
- 2.3 *Employer received funds from directors to deal*
with disaster in country between 1997 – 1999
namely:
El Nino floods – 1997
Bomb blast Nairobi – 1998
Famine Turkana & West Pokot District
1999 – 2000 – Phase 1 & 2
- 2.4 *Employee called up to do extra work to deal*
with emergencies.
- 2.5 *Employee designated director CO DS*
Christian Outreach and Development Services.
- 2.6 *Employee ceased employment contract in 2002.*
- 2.7 *Benefits of employment paid. Employee signed*

- discharge document payment final and no further claim.*
- 2.8 *Five years later, employee sues for payments under contract with donors being the ACT Program.*
- 2.9 *ACT: action by churches together founded 1995 Geneva.*
- 2.10 *Employer joined ACT in 1998 and was given donor money*
- 2.11 *Money included termination for its staff.*
- 2.12 *Two staff paid including their normal salary.*
- 2.13 *Employee not paid under the ACT Program despite provision available.*
- 2.14 *Defence – through the Human Resources & Administration Director – employee signed document stating final benefit declaration. No further claim from employer.*
- 2.15 *Employee stopped from claiming ACT moneys.*
- 2.16 *The suit filed outside limitation of action Act.*
- 2.17 *Employee stated entitled to benefits.*
- 2.18 *Judgment by Hon. Magistrate held employee entitled to benefits.*
- 2.10 *Employer/respondent files appeal on 18th Dec. 2009*
Dated 16th Dec. 2009. Admission 20th September 2011
Section 79B (Ang'awa J)
Directions:
Order 42 r 13 Civil Procedure Rules 11th November 2011
(Angawa JO.
Hearing 16th July 2012.

3. *Appeal*

Hon. Magistrate erred in law and fact:

- 3.1 *...in finding that plaintiff had proved his claim on a balance of probabilities.*
- 3.2 *...in failing to appreciate the proper effect and principal of evidence and in arriving at a decision which is not supported ... by evidence ... thereby arriving at wrong decision.*
- 3.3 *... in finding that the Final benefits Declaration Form was not in respect of all dues owed by defendant to plaintiff thereby arrived at the wrong decision.*
- 3.4 *... misdirected himself when she held directive of estoppel not applicable.*
- 3.5 *... in finding that work done under the ACT project was extra work rather than that it was within the respondent's scope of his his terms of employment and within the capacity of his job title.*
- 3.6 *... in finding that the issue of limitation of the time could not be determined because it was not*

pleaded.

4. *Submission by appellant:*

- 4.1 *Respondent/original plaintiff/employee relied on a document ACT being a donor document between employer and the donors.*
- 4.2 *No privity of contract.*
- 4.3 *Payments under ACT made to two other staff but not to employee. If so done irrelevant.*
- 4.4 *Issue entitlement to normal salary claim or should clear under ACT be paid.*
- 4.5 *Estoppel – employee too late to claim ACT funds due to declaration forms signed.*
- 4.6 *Appeal be allowed with costs.*

5. *Submissions by respondent:*

- 5.1 *Nothing to stop employee from doing normal work and extra work.*
- 5.2 *Payments would normally be paid for extra work.*
- 5.3 *Act document excluded employee of employer in payment.*
- 5.4 *Audit report reflects misappropriation of moneys.*
- 5.5 *The payment due to employee used for day to day matters.*
- 5.6 *Declaration signed of no further claim referred to terminal benefit of employment of contract with employer not extra work for ACT donor funded project.*
- 5.7 *Nothing stops employer to make claims.*

6. *Held:*

- 6.1 *Decision of trial magistrate upheld.*
- 6.2 *Employee entitled to benefits.*

7. *Case Law:*

8. *Advocates :*

i) *V.M. Mulwa instructed by M/s Kairu & McCourt & Co Advocates for the appellant/ original defendant*

ii) *J.M. Njenga instructed by M/s J.M. Njenga & Co Advocates for the respondents/original plaintiff*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 704 OF 2009

THE REGISTERED TRUSTEES OF THE NATIONAL COUNCIL
OF CHURCHES OF KENYA (NCCK)..... APPELLANT/ORIGINAL DEFENDAN

VERSUS

(Being an appeal from the judgment and decree delivered by Hon. E.N. Maina – Senior Principal Magistrate on 19th November 2009 in Civil Case 443 of 2007 at Milimani Commercial Courts)

J U D G M E N T

I. INTRODUCTION

1. The relationship between the parties is that of employer/employee.

1.1 The Registered Trustees of the National Council of Churches of Kenya (NCCCK)

Appellant/original defendant (herein referred to as the employer.)

M/s Kairu & McCourt Advocates.

1.2 Ephraim A. Kiragu

Respondent/original defendant (herein referred to as the
employee)

Represented by M/s J.M. Njenga & Co Advocates.

2. The facts of this case have been well elaborated in the Hon. Trial Magistrate’s judgment. For ease of reference, the employee was employed between 1992 to 2002 by the employer.

3. The employer then received funds from donors to deal with disaster that arose in the country between 1997 to 1999. In brief the disasters being:

3.1 El Nino Floods

Tana River 1997

3.2 Bomb blast Nairobi 1998

3.3 Famine in Turkana & West Pokot Districts. 1999-2000 Phase 1 & 2

4. An organization was formed in Garissa in the year 1995 called ACT :- Action by Churches Together. The employer joined this organization in the year 1998. Funds were allocation to the employer as they would normally deal with relief and development programs.

5. The employee was called up to deal with extra work that arose from these emergencies. He was designated Director of Christian Outreach Development Services - CODS.

6. The employee was engaged in the ACT funded programs until 2002 when he ceased employment with his employer.

7. He was paid his benefits in full and duly signed a discharge document stating that the payment made were final. That there was no further claim by the employee to his employer.

8. Five years later, the employee filed suit against the employer claiming that the payment to be made to him under the ACT programs had not been paid.

9. That when he joined the ACT programs in 1998, that program provided that he and other employees called to work for the program were provided with remuneration over and above their normal salary.

10. Whereas two staff, an accountant and a secretary working with the employer were paid, the employee was never paid.

11. The defence through its Human Resources and administration director stated that the employee was stopped from making further claims. This was due to the signing of the declaration to the employer that no further claim would be made.

12. The suit was nonetheless filed out of time and outside the required period of the Limitation of Actions Act.

13. The employee stated he was entitled to the benefit.

14. The Hon. Magistrate after considering the evidence before her held that the employee was entitled to the benefits, namely:

Projects:

a) Bomb blast

AFK 84

12 months Ksh. 720,000/-

b) Turkana Phase 1

AFK 01

14 months Ksh. 376,000/-

c) Turkana Phase 2

AFK 02

12 months Ksh. 300,000/-

Total Ksh. 1, 396,000/-

15. Judgment was accordingly entered in favour of the employee on the 19th November 2009.

16. Being dissatisfied with the decision, the employer filed appeal on

18th December 2009 (dated 16th December 2009). The appeal was admitted to hearing under Section 79B Civil Procedure Act on the

20th September 2011 (Ang'awa J) and directions thereafter on the

11th November 2011 (Ang'awa J). The hearing of the appeal was held on 16th July 2012.

II APPEAL

17. The employer's appeal was that the Hon. Magistrate erred in law and fact:

17.1 ... in finding that the plaintiff had proved his claim on a balance of probabilities.

17.2 ... *in failing to appreciate the prayer effect and purpose of evidence in arriving at a decision which is not supported ... by evidence ... thereby arriving at wrong decision.*

17.3 ... *in finding that the Final Benefit Declaration Form was NOT in respect of all dues owed by defendant to plaintiff thereby arrived at the wrong decision.*

17.4 ... *misdirected himself when she held doctrine of estoppel not applicable in circumstances of this case.*

17.5 ... *in finding that work done under the ACT appeal project was extra work rather than that it was within the respondent's scope of his term of employment and within the capacity of his job title.*

17.6 ... *finding that the issues of Limitation of time could not be determined because it was not pleaded.*

III SUBMISSIONS

A) By the Appellant/Employer

18. To prove its case, the employee had relied on the documents known as ACT. This document was a known document between the employer and the donors. There was therefore no privity of contract between the employee and the employer under this document. As the employee was not party to the contract he can therefore not rely on it.

19. Whereas it was true that under ACT, payments had been made to two other staff and not to the employee and wherein as the two staff paid were working under the employee this issue was irrelevant.

20. The issue herein is, whether the employee is entitled to his normal salary claim or should the claim, also under ACT programs, be paid to him?

21. The employer was of the view that even if the employee is entitled to the ACT program fund, he has come too late to request for these funds. This is because the employee had already signed a declaration form upon his departure from his employment stating he had no claim whatsoever against his employer. The employee is therefore estopped or not permitted again to claim these funds.

22. The employer prayed that “the appeal be allowed with costs.” That “the whole of the judgment/decree of the Honourable Senior Principal Magistrate dated 19th November 2009, be discharged and set aside and a judgment in this court dismissing the suit be entered in its place.” A further prayer was that “such further orders may be made as this Honourable Court may deem fit to grant.”

B) By the Respondent/employee

23. It was the argument of the employee that there was nothing to stop the employee from doing normal work and extra work.

24. Payments would normally be made for extra work over and above the usual duties assigned to the employee.

25. Looking at a document by ACT, it would and did include payments to the employees of the respondent/employer, within its budget. Unfortunately, an audit report that was carried out much later on the employer by Delloite & Touche reflected that the employer had misappropriated the funds. This was done when the employer took ACT funds and used it in their day to day business. These funds may have

included the employees payment.

26. On the issue of the declaration signed, that there indeed was no further claim by the employee to the employer upon leaving his employment, the employee explained that the declaration was referring to the original contract of employment with the employer, the wording being that the further claim referred to “terminal benefits of employment of contract.” This did not include the extra work for ACT donor funded project.

27. He worked on the project and whereas the funds for his payment catered for under the said ACT Project/program, he had not been paid.

28. Likewise, there is therefore nothing to stop him from making the said claim.

29. The employee prayed that appeal be dismissed.

IV OPINION

30. This is an employment contract claim. Whereas it had been established in the subordinate court by evidence that the employee was correctly paid his dues under his contract of employment and duly discharged by the employer, the said court held that the employee was indeed entitled to the payments of the funds due under the ACT project program.

31. The trial magistrate court was within its mandate to refer to the ACT project document that is said to be available to the public at large. From this document the following was provided:-

Staff salary & related support costs

31.1 NCKK (employer) - Development Unit Director

(50%)USD 9,000 budget to be paid

1998 – USSD 3,000

1999 – USD 1,479/-

Total USD 4,479

31.2 NCKK - Field Officer

Budget USD 9,000

1998 – USD 2,000

1999 – Nil

Total USD 2,000

31.3 NCKK - Desk Officer

Budget USD 6,000/-

1998 USD 2,000

1999 – Nil

Total USD 2,000

32. This budget was shared 50% with the Lutheran World Federation. Whereas the employer was identified to implement the program due to its network throughout the country and the capacity of manpower it was stated that there would be two liaison persons, one from the employer (NCCK) and the other from the Lutheran World Federation (LWF) Kenya. Their task would be to co-ordinate activities within the two respective organizations together with others.
33. The employer's accountant was to donate 50% of its time for the project whilst the employer's secretary was to be full time and give secretarial services.
34. The trial magistrate was entitled to refer to this document that was within the public domain.
35. Turning now to the issue as to whether payment to the employee would amount to double increment? I would agree with the trial magistrate that this was not a double increment on the part of the employee.
36. The employee explained that judicial officers if assigned a special duty would be paid additional sums over and above the sum paid as their salary.
37. A more direct example would be under the workman's compensation. An employee would be paid under the workman's compensation for injuries sustained in the course of employment but this would not preclude the employee to sue in a court of law for additional finances.
38. In this case, the employee was on a special project. The employer assigned him to this said project and as a result, he is entitled to be paid.
39. The budget showed the funds were provided but never paid to the employee.
40. The other aspect was that the said claim was time barred. The trial magistrate dealt with this by relying on the case law of:

Achola & Another – Vs – Hongo & Another
(2004) I KLR 462

41. There was no comment made by the employer of this court of appeal decision.
42. According to law, a party is bound by their pleadings. If you file a plaint and not clearly plead your claim, your relief ought not to be granted. In this matter before the subordinate courts, the defence did not plead limitation of time. Even in an amended defence this was never pleaded.
43. The decision of the court of appeal held that "*the second respondent having failed to specifically [plead] the issue of limitation in its defence it was not entitled to rely on that issue ... unless it amends its defence.*"
44. I would therefore uphold the trial magistrate's decision on this point. Nonetheless, I would go further to state that the relationship between the parties under contract allows a suit to be filed within 6 years. The appellant had filed suit within 5 years.
45. The appeal herein is dismissed with costs to the respondent/ employee to be paid by the appellant/employer in this appeal. There would be costs in the subordinate court to the employee/original plaintiff to be paid by the employer/original defendant.
46. I award interest from the date of filing suit.

DATED THIS 19TH DAY OF JULY 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

i) V

.M. Mulwa instructed by M/s Kairu & McCourt & Co Advocates for the appellant/ original defendant

ii) *J.M. Njenga instructed by M/s J.M. Njenga & Co Advocates for
the respondents/original plaintiff*