



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Admiralty Claim 12 of 2004**

ADMIRALTY ACTION IN REM AGAINST THE OWNERS OF THE MOTOR VESSEL “ALPHA MANYARA”

CLAIMANTS:.....LEONARD SANDE NGWABE

DEFENDANTS.....THE OWNERS OF VESSEL “ALPHA MANYARA”

**Coram:**

Mwera J.

Mrs. Maina for Claimant

Kinyua for Defendants

**JUDGMENT**

When the claim first found its way to this court on 04.10.2004, the claimant herein Leonard Sande Ngwabe was seeking orders to arrest the M/V “ALPHA MANYARA.” In the brief details of the claim it was pleaded that:

**“The claimant’s claim is for Shs. 1,250,700/= being a claim for salary arrears, leave allowance off – days, Sundays and holidays worked and not paid for, over-time wages, pay in lieu of notice, discharge cargo supervision wages, refund on food, accommodation and transport, uniform and mess allowances and aggravated damages for pain, fear and risk of death after exchange of fire in their vessel with pirates for being unlawfully taken by the defendants to the war-torn Somali Coast and Tanzania for fishing voyage expedition aboard their motor vessel “Alpha Manyara” without prior consent from the claimant from November 2003 until 12<sup>th</sup> July 2004 together with interest and cost. There (sic) voyage was deliberately planned and executed by the defendants. The aggravated damages are estimated at Kshs.500,000/=”**

On the very claim form it was endorsed that particulars of claim would follow in the event there was intention to defend. Such intention was manifested in this court’s view, when the defendants filed an application dated 5<sup>th</sup> October, 2004 to dispute the arrest of the motor vessel and in the affidavit sworn by Arif Kurji on 5<sup>th</sup> October, 2004 they put forth what they considered constituted the claimant’s claim:

i. Balance of wages; April, May,

June, July 2004..... Shs. 4.558/=

ii. Payment for Saturdays

and holidays..... Shs.23,813/ =

iii. Food, Accommodation and Transport

at Dar es Salaam..... Shs.25,856/=  
Shs.54,227/=

Less Taxes approximate Shs.10,000/=  
NET Shs.44,227/=

Some approximate court fees, Shs.30,000/= plus party and party costs put at Shs. 60,000/=.  
Then that with a caution against the arrest lodged, the defendants had given an undertaking for security not exceeding Shs.140,000/=.

On 16<sup>th</sup> December, 2004 the claimant filed particulars of claim:

i. Wages: April 2003 to July 2004 at

Shs. 8225/= p.m. .... Shs. 131,600/=

ii. Off days..... Shs. 42,206/=

iii. Overtime

(a) Week days..... Shs. 472,184/=

(b) Saturdays..... Shs. 84,632/=

(c) Sundays, holidays..... Shs. 135,412/=

iv. Refund: Transport, Accommodation in

Tanzania..... Shs. 26,074/=

v. Mess Allowance:

April to June @ Shs.7,500/= ..... Shs. 22,500/=

vi. Salary in lieu of Notice .....Shs. 20,225/=

TOTAL Shs. 934,834.13/=

vii. Aggravated and punitive damages for

fishing in unsafe waters.....

On 17<sup>th</sup> May, 2005 the claimant filed an application for judgment in default of filing defence.

The defendant's application of 5<sup>th</sup> October, 2004 that was heard with effect from 7<sup>th</sup> October, 2004 was for orders:

i) that the claim for Shs.500,000/= or any other sum

against the subject ship for pain fear and risk of death be struck out and the warrant of arrest issued on that basis be discharged/lifted

ii) the claim for payment in lieu of notice, discharge care,

refund on food, accommodation and transport expenses, uniform and mess allowances set against the suit ship be struck out and the warrant of arrest issued on that account be discharged/lifted

iii) the warrant of arrest issued on 4<sup>th</sup> October, 2004 be discharged for non-compliance with mandatory procedural provisions; or

iv) in the alternative the subject ship be released on deposit of Shs. 140,000/= as security to be deposited in an income earning account of the advocates.

The above prayers were based on some nine (9) grounds which were argued along with the affidavits from both sides. The substance of the arguments were incorporated in the ruling of this court dated 3<sup>rd</sup> December, 2004. The centrality of that ruling in this judgment is that it disposed of most of the particulars of the claim herein on account of jurisdiction, and the parties referred to it *in extenso*, in their respective submissions regarding the judgment. Accordingly, parts of it will of necessity feature in the determination to follow. In his submission the claimant reemphasized why the court should award him the sums set out above as particulars ((1) to (vii)) and added leave allowance. The arguments were supported by the various exhibits annexed to the affidavits filed as well as authorities. The summary of the claim was put at Shs. 1,327,701/= at the end of the submission, having excluded the item of leave allowance.

On their part the defendants' submission went over each particular of the claim, discounting most and ended by drawing the court's attention to the uncertainty of the claim herein; just at Shs. 1,252,700/= on 4<sup>th</sup> October, 2004, and reduced to Shs. 934,834/13 in the particulars filed on 16<sup>th</sup> December, 2004. And if the court may add the total summary in the submission, Shs. 1,327,700/=. Also to be added is the feature that the claimant estimated that the court would award him Shs. 500,000/= in aggravated damages if it agreed with him that such an award was warranted for pain, fear and apprehension when the subject ship was sent to fish in the hostile Somali territory. Such an award where warranted, is left to the assessment of the court and not added to quantifiable items forming the basis upon which a warrant of arrest is sought and granted. So in the circumstance of this case, the court will extract from the ruling of 3<sup>rd</sup> December, 2004 what touches on the particulars of the claim, awarding or declining as the case may be and making findings on those items/particulars that may not have been addressed in the said ruling. At the end of the day that ruling, in essence, concluded what items the court had jurisdiction to adjudicate on under the relevant provision, section 20 (1) (2) of the Supreme Court Act (1981) of the UK which is applicable in Kenya by virtue of the Judicature Act (Cap 8) regarding admiralty jurisdiction of the High Court. Without doubt the claimant was a seaman (a quality controller) who was hired on contract to work on the subject ship "*Alpha Manyara*". His services were terminated and he moved to court to obtain relief. He began by obtaining a warrant of arrest of the ship which he claimed could otherwise sail out of the jurisdiction of this court, whereupon he could not have an asset against which to lay claim/execute his dues. During the proceedings the defendants issued a caution against the intended arrest of the ship but nonetheless the claimant proceeded to do just that. The defendants even put up a security of up to Shs. 140,000/= but to no avail. Now the relevant parts of the ruling of 3<sup>rd</sup> December, 2004 pertinent to determining the particulars of the claim herein.

The first point that the parties agreed on and the court noted was that the ship was let to sail, with the defendants depositing Shs. 600,000/.

In the ruling of 3<sup>rd</sup> December, 2004 (pp. 10, 11) this court focused on what claims fall under section 20 (1) of the Supreme Court Act (1981), of UK. It was under that provision of law that this court would exercise admiralty jurisdiction over:

**“(o) any claim by a master or member of the crew of a ship for wages (including any sum allotted**

**out of wages or adjudged by as Superintendent to be due by way of wages.)”**

And moving to Halsbury's Laws of England, Vol. 1, 3<sup>rd</sup> Edition, paragraph 118 the court found that a claim for damages for wrongful dismissal can be prosecuted under the admiralty jurisdiction. And:

**“Certain payments to seamen, though not strictly wages are by statute recoverable as wages for example the allowance which has to be made by way of compensation for short or bad provisions is recoverable as wages. Claims by seaman for additional payment by agreement will not however be allowed as wages in the ordinary course, unless entered on the ship's articles.”**

So only wages, that regular payment agreed to be paid in return for services rendered by a seaman, is the so called wages which can be validly claimed in a case like this. Add to that any allowances which may be recovered as wages. Such allowance is for instance compensation for short of bad provisions. This should be limited to food essentially and nothing else. The same authority added that seamen are not entitled to additional wages in respect of services rendered in the course of the period of engagement even though the master has agreed to pay them, the contract being considered void for absence of consideration as well as from public policy (paragraph 261, Halsbury's above).

The claimant agreed on 23<sup>rd</sup> January, 2003 to be employed (pp. 12 ruling).

**“.....for one voyage (till the Bunkers are over) and will serve on board the said vessel during the period when it is at sea for fishing and any extension of this contract will be mutually agreed upon on a 3 months probation period.**

**I will agree to work on Basic wages of Kshs. 10,200/= plus Housing Allowance of 15% which will be Kshs.1,800/= per month.”**

Having noted above that a seaman can validly lay a claim for wages and allowances as stated, any other allowances should be limited to those which stand in compensation for short or bad provisions.

As to whether the particulars of the claim being omitted from the pleadings that led to the issuance of the warrant of arrest, and which omission the defendants took as fatally unprocedural this court stated:

**“At this point and for this case, this court will not take it for granted that a seaman's claim ought to be quantified on an item to item basis before moving this court to issue a warrant to arrest a ship; on account of that claim. That is what the claimant did here. All items of the claim were given a total sum of Shs. 1,252,700/= and the application to arrest made on that.”** (“pp 13 ruling).

The court then proceeded to note that the breakdown of the claim by items, was later filed as has been remarked upon earlier. Then:

**“Assuming that the initial move was correct (in ordinary civil causes one has to specifically plead items comprising the quantified sum), this court's opinion as regards its jurisdiction, the claimant included many items that do not fall under its admiralty powers. What it considers under the present claim as proper items can be said to be monthly salary and arrears if any. To this add work done on public holidays and Sundays. The court was told that a seaman is also entitled to basics like food, accommodation and transport particularly when he was at Dar-es-Salaam. And some vouchers were shown to have been paid/refunded there. Otherwise the whole of other items fall outside this court's jurisdiction and the claimant may do well to invoke section 120 of the Merchant Shipping Act to recover them in a subordinate court.”**

The court then proceeded as per the contents of the contract of employment only, to determine the claim against the defendants, and nothing else. On this aspect the court observed that the contract was for one voyage only. There was no evidence of mutual agreement to extend it to allow the claimant to draw Shs.20,225/= p.m. Thus if he continued on the job on that rate of wages, it was probably on a month – to – month basis because there was no other contract in force and/or exhibited.

**“So if what the original contract be and was the basis of the warrant of arrest, it did not contain all the items of the claim which in any event did not constitute wages at all. The warrant of arrest thus should not have been issued”. (pp. 14 ruling).**

So far it should be getting clear that the claim herein be and is limited to the original monthly wages of Shs. 10,200/= plus house allowance of Shs. 1,800/= p.m. or if any of this had fallen in arrears by the time the claimants’ services were terminated. It was added in Arif Kurji’s supporting affidavit that the claimant was entitled to Shs. 23,813/= for working on Sundays and holidays. As for allowance as a way to compensate him for provisions, accommodation, transport etc at Dar-es-Salaam he had produced receipts that payments/refunds were made by the “*employer*” there. They cannot be claimed all over again.

In the same manner the court dealt with the claim for aggravated damages for pain, fear and risk of death. That this court cannot entertain because Section 20 (2) of the Supreme Court Act (1981) encompasses only:

**“(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment or in consequence of the wrongful act, neglect or default of.....”**

**But that is not what the claim is about.”**

With that, this court cannot entertain any claim not linked to death or personal injury as a consequence of the defect in a ship or its equipment etc. So the pleas by the claimant that he suffered pain, fear or risked death is not justiciable before this court. Accordingly, having concluded that the claim quantified at Shs. 1.2 million to seek and obtain a warrant of arrest, was unjustified the court went on to reduce the security deposit from Shs. 600,000/= to Shs. 200,000/= until the determination of the claim herein.

The conclusion as at this point is that the claim should be limited to wages – salary, salary arrears and allowances for provisions. It has been found that accommodation, transport, mess expenses were paid/refunded to the claimant while he was in Dar-es-Salaam. Having taken off claims for refund of food and accommodation, aggravated damages and a month’s salary in lieu of notice (the claimant was working on a month – to – month basis when his contract was not renewed) then we are left with the following item only to consider:

i) Salary arrears.

For the other items e.g. compensation for off – days pay, working on Sundays and holidays and overtime pay the claimant may consider to litigate those in the subordinate court since this court has no jurisdiction to entertain them.

Regarding salary arrears the defendants said that a sum of Shs. 4,558/= covering April, May, June, July 2004 was admitted right from the beginning. They added that the initial wages per month were never altered upwards to Shs. 20,600/= and over to create arrears of Shs. 8,255/ p.m. The court has found that even with the correspondences the claimant exhibited from Capt. Esposito, Giuseppe, none could form a basis of renewal of the initial contract with increased wages. Those exchanges did not constitute a new contract. The court also cited **Halburys** on the issue of extra wages. They are not usually payable even though the ship’s master could have agreed. Doing so could be without consideration and contrary to public policy. Thus even if the captain would have sanctioned higher wages in such circumstances they were not payable by the defendants.

Having concluded as above it should be added that much reliance was placed on the ruling of 3<sup>rd</sup> December, 2004 first because the parties relied/referred to it much and that it had gone along way in determining what part of the claim this court had jurisdiction to entertain and most importantly that that ruling was never appealed against.

Final orders are:

- (i) the claimant to be paid Shs. 4,558/= salary arrears for April to July 2004.
- (ii) the claimant may consider whatever other item he may be entitled to to litigate the same under the Merchant Shipping Act or probably the defendants will pay on demand and without litigation..
- (iii) the claim herein is dismissed with costs.

Delivered on 23<sup>rd</sup> October, 2012

**J. M. MWERA**  
**JUDGE**