



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 160 of 2003

FRANK MWANGI WANYEKI.....PLAINTIFF

VERSUS

BATA SHOES (K) LTD.....DEFENDANT

JUDGMENT

This is a claim for the balance of the terminal benefits on a contract of employment. The plaintiff claims that by an oral contract of employment he entered into with the defendant on 12th January 1997, the defendant engaged him as Security and Estate Officer, a position from which he rose to that of the Chief Security. He further claims that, without prejudice to the terms therein contained, the oral contract of employment was, on 1st July 1986 and 9th July 1993, reduced into writing.

It is the plaintiff's case that contrary to the terms of that contract of employment and the provisions of the **Employment Act** and the Regulations made there under and in discrimination of the plaintiff, the defendant paid him only Kshs.5,670,622.55 out of the sum of Kshs.8,704,449.45 that he was entitled to on retirement. The plaintiff also claims that the defendant refused to honour him for the 25 years of dedicated service. He therefore claims from the defendant the balance of his dues of Kshs.3,033,826.90; a declaration that like other employees of the defendant he is entitled to a share of the defendant's profits for the 1st quarter of 2003 at the rate of 15% of his salary and Christmas bonus for December 2003; an order compelling the defendant to account for and pay to him the amount held by the defendant in his personal account; an order compelling the defendant to honour him for the 25 years service; general damages for breach of contract as well as costs and interest.

In its amended defence the defendant denies the plaintiff's claim in toto. It in particular denies having discriminated against the plaintiff; that the provisions of the Employment Act apply to its contract of employment with the defendant and avers that the plaintiff is not entitled to any payments outside the written contract of employment of 9th July 1993 and that it has paid the defendant all his terminal dues. As regards the certificate of service the defendant avers that it is the plaintiff who has refused to go and collect it.

The plaintiff testified but did not call any witness. The defendant called two witnesses. The thrust of the plaintiff's evidence was that he was not paid all his terminal dues. Besides the Christmas bonus which he claimed to have been paid previously, he also claimed service gratuity at 18 days salary for every year served amounting to Kshs.1,426,596.80.

The plaintiff also claimed Kshs.12,150.40 for the services he allegedly rendered on public holidays during the election days on 27th and 30th December 2002 when, like the other employees he was supposed to be off. He further claimed Kshs.11,391/00 for work services rendered on 18th May 2002 which was a Saturday and 1st June 2002 which was a public holiday. He conceded that these amounts are not payable under his contract of employment but claimed they are based on **Legal Notice No. 24 of 1998 – Regulation of Wages (Protective Security Services) Order 1998**. He relied on **Regulation 17** of that Legal Notice which he produced as Exhibit 10.

He further claimed ex-gratia payment amounting to Kshs.394,888/- asserting that it was the practice of the defendant to pay and did pay ex-gratia to its retired employees. He maintained that there was a deficit in payment of his Provident Fund amounting to Kshs.1,229,171.70. He also sought to be given a golden watch on account of his 25 years of service and lastly claimed the right to share profits and Christmas bonus.

Relying on extracts from the case of **Hulton Vs Warren (1836) MW 466** quoted by G. C. Chesire and M.P. Furmston in their book – **The Law of Contract 8th Edition** and Gryneeth Pitt in his book – **Employment Law 6th Ed**, counsel for the plaintiff submitted that from the long settled practice custom and usage in commercial and other transactions there are some terms that are implied into written contracts. In employment contracts like the one in this case, they said such terms include gratuity and ex-gratia pay. They contended that the defendant in this case made gratuity and ex-gratia payments as is clear from the plaintiff's evidence to all its employees despite the lack of their provision in the employees' contracts of service. That became an established custom of the defendant. The defendant therefore discriminated against the plaintiff by refusing to make those payments to him.

In the same vein, counsel also submitted that the plaintiff is entitled to pay for the public holidays of 18th May, 1st June and 27th and 30th December 2002 that he worked. They said the plaintiff's evidence on the payment for those days as well **Ex. 9** on the payment for the profit share equivalent to 15% of his salary for first quarter of 2003 and 2003 Christmas bonus is uncontroverted. In conclusion counsel contended that there is evidence that despite demand the defendant refused to give the plaintiff the certificate of service.

For the defendant it was submitted that as is clear from clause 1 of the letter of appointment dated 9th July 1993 **Ex. 1** previous contracts of service were varied and nullified and that letter constituted the plaintiff's entire contract of service with the defendant. As that letter did not provide for gratuity, ex-gratia payment, bonus and profit share as well as an award of any medal or golden watch, counsel dismissed the plaintiff's claims in those respects as baseless. At any rate, they further submitted, the plaintiff did not provide evidence of the profit, if any, that the defendant made in that quarter. They said as the Chief Security Officer, the plaintiff was not a unionisable employee to be entitled to payment for overtime and working on public holidays. They said Clauses 5 and 6(b) of **Ex.1** specifically excluded pay for overtime and such days.

Counsel for the defendant also submitted that the plaintiff having conceded that the alleged underpayment of the provident fund appearing on **Ex.14** represented the tax M/S Alexander Forbes, the Administrators of the Provident Fund paid to Kenya Revenue Authority (KRA), his claim in that regard should be dismissed. They also dismissed the plaintiff's claim for service gratuity and ex-gratia payment based on what the plaintiff termed "practice" or "custom" as misconceived. They said the term "*Ex-gratia*" does not denote an obligation but rather a discretion to be exercised by the donor of that privilege.

Regarding the certificate of service counsel submitted that the plaintiff having conceded in cross examination that he had not gone to collect it, his claim in that regard should also be dismissed.

Finally counsel for the defendant cited the case of **Ombaya Vs Gailley & Roberts Ltd [1974] EA 522** and submitted that general damages are never awarded for breach of employment contracts. And with that they urged me to dismiss the plaintiffs entire claim with costs.

From these submissions and the evidence on record, six issues arise for my determination. They are:-

1. Whether or not the defendant refused to give the plaintiff a Certificate of Service;
2. Whether or not the plaintiff is entitled to general damages for breach of contract;
3. Whether or not the plaintiff was entitled to payment for overtime and work done during public holidays;
4. Whether or not the plaintiff was underpaid in respect of the provident fund.
5. Whether or not the plaintiff was entitled to Christmas bonus and a share of the defendant's profits?
6. Whether or not it was the practice and custom of the defendant company to share its profits with its employees and to pay Christmas bonuses, service gratuity and/or ex-gratia to its retiring employees and if so whether or not the defendant discriminated against the plaintiff in refusing to make those payments to him.

I will deal with these issues seriatim and where appropriate combine some.

The plaintiff's claims for the Certificate of Service and general damages for breach of contract can be disposed of straight away. The plaintiff did not adduce any evidence of having demanded his certificate of service leave alone being denied the same. The defendant averred in its defence that the certificate is ready for the plaintiff's collection. Other than for the direction that the defendant forwards it to him through his advocates I find no merit in that claim and I accordingly dismiss it.

As regards the claim for general damages, it is trite law that general damages are not awarded for breach of contract. This is because damages arising from breach of contract are usually quantifiable and are not at large – **Habib Zurich Finance (K) Ltd. –vs- Muthoga & Another [2002] I EA 81** See also **Dharamshi –vs- Karsam [1974] EA 41**. I therefore also dismiss the plaintiff's claim in that regard.

Besides the fact that Clauses 5 and 6(b) of **Ex. 1** expressly state that the plaintiff is not entitled to pay for overtime and public holidays, I agree with counsel for the defendant that the plaintiff's post of Chief Security Officer was not

unionisable. Even if it was, his claim for service gratuity based on **Clause 17 of Legal Notice No. 24 of 1998** is totally misconceived. That Legal Notice reads:-

“This Order shall apply to all persons employed directly or indirectly by an undertaking or part of an undertaking which is involved in the carrying [out] of any of the following activities-

- (a) Private investigations or security consultancy**
- (b) Guarding of industrial plants, banks, warehouses, shops, private homes or any other property or establishment against theft, illegal entry or fire, and**
- (c) Escort of money or other valuable property.**

Provided that persons employed in an undertaking or part of an undertaking which is operated by the Government, local authority, a quasi- governmental body, a charitable or religious organization or an educational body, or a medical institution shall be excluded.”

It is obvious that Notice applied to junior employees of firms undertaking private investigations, security consulting, and guarding of industrial plants, banks, warehouses, shops, private homes or any other property or establishment as well as escort of money. The defendant in this case was in the business of footwear manufacturing. Consequently, I dismiss the plaintiff's claims for overtime and work done during public holidays.

It is clear from the evidence of Antony Kilavi, DW2, that the difference of Kshs.1,193,749.00 or thereabouts due to the plaintiff under the Provident Fund (see **Ex. 14**) represented withholding tax that M/S Alexander Forbes, the managers of the defendant's Provident Fund paid to KRA. In cross examination the plaintiff conceded as much. In the circumstances I agree with counsel for the defendant that the plaintiff's claim in this regard has absolutely no basis and I therefore also dismiss it.

The plaintiff's last claim is that of discrimination resulting in underpayment to him. He bases his claims for service gratuity, ex-gratia payment, a share of the defendant's profits for the 1st quarter of 2003 and Christmas bonus as well as being honoured for 25 years' service on the defendant's established custom.

As I have pointed out, the defence to these claims is that the **Employment Act** does not apply to its contract of employment with the plaintiff and that the plaintiff is only entitled to what flows from the written contract of employment dated 9th July 1993.

I agree with counsel for the plaintiff that as stated by G.C. Chesire, C.H.S. Foot and M.P. Furmston in their book—**The Law of Contract, 8th Edition, from p. 141**, it is a well-established rule that a contract may be subject to terms that are sanctioned by custom, whether commercial or otherwise, although they have not been expressly mentioned by the parties. This is because the normal contract is not an isolated act, but an incident in the conduct of business or in the framework of some more general relation such as that of landlord and tenant. It will frequently be set against a background of usage, familiar to all who engage in similar negotiations and which may be supposed to govern the language of a particular agreement. In addition, therefore, to the terms which the parties have expressly adopted, there may be others imported into the contract from its context; and they, like their prototypes, may assume the character of conditions or of warranties. These implications may be derived from custom or they may rest upon statute or they may

be inferred by the judges to reinforce the language of the parties and realize their manifest intention.

It is, however, also an established rule that the usage, as it rests on the assumption that it represents the wishes of the parties, must be excluded if the express language of the contract discloses a contrary intention. The parties must then be supposed, while appreciating the general practice, to have chosen to depart from it.

In **Les Affreteurs Reunis Societe Anonyme v. Walford, [1919] AC ...at p. 809** it is reported that despite the incompatibility of any such custom with the clause in the contract requiring payment as soon as the parties signed, Bailhache, J., accepted the plea and gave judgment for the defendants. Lord Birrenhead, reversing him, castigated the decision as an unhappy error.

“The learned Judge ... has in effect declared that a custom may be given effect to in commercial matter which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter.”

Custom thus comes not to destroy but to fulfill the law. It must not contradict the express terms of a contract but must rather serve to reinforce them and assist their general purpose and policy. In **London Export Corporation Ltd Vs Jubilee Coffee Roasting Co., [1958] 2 All ER 411**, Lord Jenkins emphasized both the negative and the positive test to be applied before a custom is to be admitted thus:-.

“An alleged custom can be incorporated into a contract only if there is nothing in the express or necessary implied terms of the contract to prevent such inclusion and, further, a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole.”

Therefore a particular practice or custom to be applied to contracts, it must be shown to exist and that the parties to a contract relied upon it. It must also be shown to be assumed by the courts and to be so prevalent in a trade or locality as to form the foundation of all contracts made within that trade or locality, unless expressly excluded.

As Amin J stated in **Koinange Vs Koinange [1986] KLR 23 at p.43**, “It is a well established rule of evidence, that whoever asserts a fact is under an obligation to prove it in order to succeed”. This rule is also promulgated in **Section 107 of the Evidence Act**, Cap 80 of the Laws of Kenya.

In this case it is the plaintiff who is claiming that it is the defendant’s established practice and custom to share its profits with its employees, pay them Christmas bonuses every year, pay its retiring employees service gratuity, ex-gratia as well as honour them for long service. Has he discharged the above stated burden of proof?

Other than his verbal claim, the plaintiff has not provided any evidence of the defendant’s alleged practice and or custom to make payment in respect of the alleged claims. In such claim one would have expected the plaintiff to call one or two of his fellow former employees to testify of such payments having been made to them or to produce copies of documents in support of such payments. He did not. The copies of the Long Service Awards of other former employees do not provide any specific payment or criteria for the awards, if any, the defendant gave its employees. Similarly the state in the Memo **Ex. 9** that “Following the normal annual review your salary has been revised for 1999 to Kshs.71,365/- per month plus profit share of 15%” is not proof of any established custom. In my view if there were any long service

awards or share, they were entirely at the discretion of the defendant and could not have been the basis of any contractual claim. Even if the plaintiff had adduced evidence of such an established custom or practice he would still have failed in those claims. Clause 1 of the letter of appointment, **Ex. 1**, would have tied the courts hands. It confirms:-

“The Company [the defendant] has employed the Employee [the plaintiff] and the Employee has served the Company since 1977. The Employee is currently serving in the capacity of SECURITY OFFICER. It is hereby agreed that this Agreement shall be treated as a variation of any previous contract of service between the Company and the Employee so that this Agreement shall be the operative agreement concerning the Employee’s terms of service with effect from the date hereof.”

By specifically stating that “...this Agreement shall be the operative agreement concerning the Employee’s terms of service ...,” I agree with counsel for the defendant that exhibit formed the entire contract of employment between the parties and left no room for importation of any implied terms into it, however arising. The claims for service gratuity, ex-gratia payment, sharing of the defendant’s profits, Christmas bonuses as well as honouring the plaintiff for long service have therefore no basis and are hereby dismissed.

In the result and for the reasons I have given I find no merit in all the plaintiff’s claims in this suit. I accordingly dismiss this suit with costs to the defendant.

DATED and DELIVERED this 22nd day of July, 2010.

D. K. MARAGA
JUDGE.