Mohamed v Jetlite Air Limited (Cause E429 of 2022)
[2024] KEELRC 1811 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1811 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E429 OF 2022

BOM MANANI, J

JULY 11, 2024

BETWEEN

JUMA YUSUF MOHAMED ..... CLAIMANT

AND

JETLITE AIR LIMITED ..... RESPONDENT

JUDGMENT

Background

1. The Claimant instituted the instant suit through a Statement of Claim dated 20th June 2022 to claim for his terminal benefits. It is his case that by the letter dated 30th April 2021, the Respondent employed him as its Director of Maintenance. The contract was expressed to be for two years commencing 6th May 2021. The Claimant contends that his salary under the contract was agreed at USD 6,500.

2. It is the Claimant's case that the Respondent failed to live up to the terms of the agreement between the parties. Instead of paying him the agreed salary of USD 6,500 per month, the Respondent unilaterally varied this amount to USD 4,450. Further, payment of salary would often delay.

3. The Claimant contends that he tried to have the Respondent address the matter to no avail. As a result, he was forced to tender his resignation from employment on 11th April 2022.

4. The Claimant contends that after he resigned from employment, the Respondent did not settle his terminal dues. As a result, he was forced to seek the intervention of his lawyers to resolve the issue.

5. It is the Claimant's case that when his lawyers issued a demand letter to the Respondent to settle the outstanding terminal dues, the Respondent summoned him to its premises for a meeting at which he was asked to sign a document accepting an amount which he considered understated. He contends that his lawyers advised him not to accept the payments. And hence this suit.

6. On its part, the Respondent admits that the parties entered into an employment relationship on 6th May 2021. The Respondent avers that the relationship came to an end on 11th May 2022 when the Claimant resigned from employment.

7. The Respondent contends that although the parties had initially agreed on a monthly salary of USD 6,500, this became impossible to honour owing to the ravaging effects of the COVID-19 pandemic. As a consequence, the parties entered into a subsequent oral agreement by which the Claimant's salary was reduced to USD 4,450.

8. The Respondent contends that the Claimant continually received an amount of Ksh. 450,000.00 to cover his salary in terms of the oral agreement between them. As such, there is no outstanding salary that is due to him.

9. The Respondent's witness stated that although the written agreement between the parties provided for the Claimant's salary in USD, the Respondent had converted the amount due into Kenyan shillings using an exchange rate of Ksh. 100 to one USD. It is the Respondent's case that applying this rate, it considered the Claimant's monthly salary as Ksh.450,000.00 which it settled in full.

10. The Respondent contends that when the Claimant tendered his resignation, the parties agreed that he serves his notice period whilst on his annual leave. As such, there are no outstanding leave days due to him.

Issues for Determination

11. The parties agree that they had an employment relationship which came to an end when the Claimant resigned. As such, the only issue for resolution in this matter is whether the Claimant's terminal dues, including salary arears if any, were settled in full when he exited from the Respondent's employment.

Analysis

12. The record shows that the parties entered into a written contract of employment dated 30th April 2021. Clause 4 of the agreement fixed the Claimant's monthly salary at USD 6,500. Clause 14(e) of the agreement provided that the contract could only be varied by an instrument in writing.

13. It is also important to keep in mind the requirements of section 10(5) of the *Employment Act* regarding variations to a written contract of service. It provides as follows:-

> ''Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.''

14. The Claimant avers that the Respondent unilaterally changed the quantum of the agreed salary between them to his detriment. On the other hand, the Respondent argues that the changes to the Claimant's salary were made by consensus following an oral agreement between the parties.

15. The Respondent's contention that the parties agreed to vary the Claimant's salary from USD 6,500 to USD 4,450 is not supported by cogent evidence. There is nothing on record to suggest that the Claimant agreed to this variation.

16. As has been indicated above, clause 14(e) of the contract between the parties expressly required variations to the contract to be by an instrument in writing. Thus, it was not open to the parties to effect oral amendment to the agreement. As the record shows, there is no write up between them to support the purported oral discussions which allegedly sanctioned the changes to the Claimant's salary.

17. Section 10(5) of the *Employment Act* specifically obligates an employer who has entered into a written employment contract with an employee to consult the employee regarding any proposed changes to the agreement. Further, the employer is required to notify the employee in writing regarding the agreed changes.

18. It is evident that the agreement between the Claimant and Respondent had been reduced into writing. Therefore, variations to it had to be by consensus and in writing in line with the requirements of the aforesaid provision of statute. As such, the Respondent's contention that the parties orally agreed to alter the Claimant's salary flies in the face of this express provision of statute.

19. The Respondent has argued in its submissions that the Claimant acquiesced to the impugned variations to his salary. It contends that the Claimant's conduct during the currency of their contract fortifies this truism.

20. The Respondent further argues that although the contract between the parties provided that changes to it were to be in writing, the parties were free to overlook this requirement and vary the terms of the contract through oral agreements on account of the principle of freedom of contract. As such, nothing turns on the fact that the contract had a clause requiring that changes to it be evidenced by an instrument in writing. The Respondent relies on the English case of *Globe Motors Inc. v TRW Lucas Variety Electric Steering Ltd* (2016) EWCA Civ 396 to advance this argument.

21. With respect, I do not think that the aforesaid decision can be relied on to justify oral variations to a written contract of service in Kenya. I say so because section 10(5) of the *Employment Act* specifically obligates employers with written contracts of service to notify employees to such contracts in writing of variations to the contracts.

22. As such, I do not think that it was open to the Respondent to ignore this express provision of statute and seek to justify its action based on foreign case-law which was not rendered in the context of Kenyan law. Having regard to the express provisions of statute in Kenya on the subject, the decision that the Respondent has sought to rely on is inapplicable to cushion its position.

23. In any event, I understand the court in *Globe Motors Inc. v TRW Lucas Variety Electric Steering Ltd* (*supra*) to have been saying that parties to a contract may adopt the course proposed by the Respondent where there is no express statutory or common law restriction. In Kenya, section 10(5) of the *Employment Act* specifically provides a statutory restriction to a decision to vary a written contract of service. Such variation must be accompanied by a memorandum in writing to that effect addressed to the employee. As such, it was not open to the Respondent to have proceeded in the manner that it did.

24. The Respondent has also relied on the decision in *Joseph Ngungu Wairiuko v Tassia Coffee Estate Limited* (2022) eKLR, to argue that it was open to it to effect oral variations to the contract between them. I do not think that this is the position expressed in the case. As a matter of fact, the court in the aforesaid decision acknowledged that variations to a written contract of service require the concurrence of the employee and must be evidence in writing in line with section 10(5) of the *Employment Act*.

25. In that case, the court proceeded on the premise that the employer had written to the employee to notify him that his salary increment was supposed to be at the rate of 10 % per annum and not 10% per month as had been purported in the contract. The employee did not expressly object to the employer's contention. On the contrary, he wrote on 11th April 2013 admitting that his salary increment was to be at the rate of 10% per annum essentially agreeing with the employer's position on the matter. As such, the court arrived at the conclusion that the employee had acceded to the proposed variation to the contract and was estopped from changing his position on the matter.

26. Unlike in the case of *Joseph Ngungu Wairiuko v Tassia Coffee Estate Limited* (*supra*), the Respondent in the instant case did not write to the Claimant to propose variations to his salary. Similarly, the Claimant did not write to the Respondent acceding to the purported reduction to his salary. Thus, the Respondent cannot argue that the Claimant acquiesced to the alleged oral request to step down his salary in contravention of the express requirements of section 10(5) of the *Employment Act*.

27. I have also looked at the letter of resignation by the Claimant and it does not suggest that he acquiesced to the impugned salary reduction as suggested by the Respondent. In the second last paragraph of the letter, it is apparent that the Claimant asked the Respondent to settle his outstanding wages on or before 11th May 2022 when the resignation was to crystalize. In my view, this is an affirmation of the fact that the Claimant did not at any time during the currency of the contract between them consider and or accept that the sum of USD 4,450 paid to him by the Respondent constituted his full salary. As such, it cannot be argued that he had by his conduct waived his right to the full salary of USD 6,500.

28. Commenting on the issue of adverse variation to an employee's salary, George Ogembo in his publication titled ''*Employment Law Guide for Employers*, Second Edition, LawAfrica Publishing (K) Ltd, 2022'', makes the following observations which I concur with:-

> ''However, when it comes to pay variation, the change is handled differently. The salary payable to an employee is a fundamental term of the contract and cannot be varied unilaterally. For its reduction to be valid, the employer ought to obtain employee approval by communicating the reduction in writing and causing it to be accepted by the employee. It is not open for an employer to assume that the employee had accepted the change on the fact of continued working based on the subsequent lower pay.''(See page 47).

29. The above position has also been considered by this court in earlier decisions. In *Jackline Wakesho v Aroma Café* [2014] eKLR, the parties had entered into an employment contract in which the employee's salary was agreed at Ksh. 15,000.00. Subsequently, the employer unilaterally stepped down the salary to Ksh. 10,000.00. The employee did not expressly accede to the adjustment. However, she continued to work at the reduced salary for close to ten months. In an action to recover the salary arrears, the employer contended that the employee had consented to the reduction through her conduct of accepting the reduced pay. Rejecting the argument, the trial court pronounced itself as follows:-

> ''The burden was upon the employer to secure a consent of the new term of the contract from the employees. Instead she made an assumption based on the fact that the employee accepted the subsequent lower pay.
>
> Consequently, the court finds in favour of the claimant by holding that the reduction of the salary from ksh.15000 to ksh.10000 per month was unlawful for want of express consent form the employee. A written contract cannot be amended by assumptions on the part of any party to the contract.''

30. Importantly, the law does not permit a party to an action to rely on parol evidence to contradict a written instrument (*Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR). Consequently, the Respondent cannot rely on oral evidence to suggest that the parties had varied the salary clause in the written agreement between them to the detriment of the Claimant.

31. The Respondent has further relied on the English decision of *Meek v Port of London Authority* (1918) Ch. D 96 to suggest that variations to an employee's salary do not amount to an amendment to his

contract. Therefore, such variations need not be captured in writing as if they were a new contract between the parties.

32. This argument misses the intention of the *Employment Act*. The purpose of this law is to protect employees who are the weaker party in an employment relation. As such, what it (the law) is concerned with are variations which are adverse to an employee's rights. All such variations must be made in consultation with the affected employee and captured in writing.

33. The law is not concerned with alterations that favour the employee such as salary increments. These need not be captured in writing. Commenting on this, Ogembo in the fourth edition of the publication referred to earlier indicates that variations to a contract of service that are favourable to an employee or those that affect flexible terms in the contract need not be reduced into writing or counter-signed by the employee (see page 77 of the publication).

34. The Respondent's alteration to the Claimant's salary from USD 6,500 to USD 4,450 was certainly adverse to the Claimant. It was not an upward salary review which ordinarily would not have required a write-up in order to be effective.

35. The decision in *Meek v Port of London Authority* (*supra*), was rendered in the context of upward revision of salary. As such, it cannot be relied on by the Respondent to argue that it was entitled to reduce the Claimant's salary outside the express dictates of section 10(5) of the *Employment Act*.

36. In view of the foregoing and taking into account the fact that the Respondent admits that it paid the Claimant USD 4,450 as opposed to USD 6,500 which had been agreed on earlier, it is apparent that the Respondent underpaid the Claimant for the entire period of their employment relationship. Consequently, the court arrives at the conclusion that the Claimant is entitled to recover from the Respondent the sum of USD 2,050 per month for the period between May 2021 and March 2022 being underpayments for every month. This totals USD 20,500.

37. The Claimant has prayed for pay in lieu of his accrued leave days. The evidence on record shows that at the time that he resigned from employment, he had served the Respondent for one year. This means that he had earned leave of twenty one (21) days in terms of section 28 of the *Employment Act*.

38. The Respondent stated that when the Claimant tendered his resignation on 11th April 2022, he was allowed to proceed on his annual leave during the notice period. This means that the Claimant was on leave between 11th April 2022 when he tendered his resignation and 11th May 2022 when the resignation crystalized. As such, he utilized his accrued leave days during this period. Therefore, the claim for leave pay is misguided and is rejected.

39. From the record, the Claimant served the Respondent for a full calendar year between May 2021 and May 2022. Thus and in terms of section 35 of the *Employment Act*, he is entitled to service pay for one year.

40. Case law has fixed service pay that is payable to an employee to an amount that is equivalent to his salary for fifteen days (15) for every year worked (*George M. Kirungaru v Next Generation Communications Limited* [2014] eKLR). As such, the Claimant is entitled to USD 3,250 under this head. Consequently, the court enters judgment for him for this amount.

41. The Claimant has also claimed for salary for the month of April 2022. The record shows that he remained in the Respondent's employment until 11th May 2022 when his resignation crystalized. Thus, he was entitled to earn full salary up to 11th May 2022.

42. There is no evidence that the Respondent paid the Claimant's salary for the month of April 2022 and for the eleven (11) days in May 2022. As a matter of fact, the Respondent's letter of 13th April 2022 accepting the Claimant's resignation acknowledges that the Claimant's salary for April 2022 was outstanding and would be processed as part of his final dues. The Respondent states that when it offered the Claimant two cheques to settle his terminal dues, he rejected the amount on account of it being less than what he had anticipated. In my view, this affirms the fact that the Claimant's salary for April 2022 remains unpaid to date.

43. As indicated above, the Claimant is entitled to salary for April 2022 and for the eleven (11) days in May 2022. However, he has only prayed for salary for April 2022. As such, the court enters judgment for him for USD. 6,500 being salary for April 2022.

44. The amount awarded above attracts interest at court rates from the date of this decision. However, it is subject to the applicable statutory deductions.

45. The Claimant is awarded costs of the case.

46. The Claimant has prayed for a Certificate of Service. However, the evidence on record shows that the Respondent issued him with this certificate. As such, the court will not issue an order requiring the Respondent to re-issue the certificate.

Summary of the Award

47. The court finds that the Respondent underpaid the Claimant's salary by a margin of USD 2,050 per month for the period of their engagement in contravention of the agreement between them. As such, the Respondent is ordered to pay the Claimant the shortfall in salary totaling USD 20,500.

48. The court finds that the Claimant utilized his accrued leave days during the currency of the employment contract. As such, the claim for pay in lieu of leave is declined.

49. The court finds that the Claimant is entitled to service pay in the sum of USD 3,250. Accordingly, judgment is entered in his favour for this amount.

50. The court awards the Claimant salary for April 2022 in the sum of USD 6,500.

51. The above amounts attract interest at court rates from the date of this decision.

52. The award is subject to the applicable statutory deductions.

53. The Claimant is awarded costs of the case.

54. The prayer for a Certificate of Service is declined.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE