



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 2008 OF 1997

CHRISTOPHER KAZIBWE PLALINTIFF

VERSUS

VYUMA VYA MAGARI 1ST DEFENDANT

KENYA REVENUE AUTHORITY 2ND DEFENDANT

JUDGMENT

The Plaintiff filed a plaint dated 10th August, 1997 against the 1st Defendant who entered appearance on 28th of August, 1997 and filed its defence on the 11th of August, 1997. In an application dated 8th June, 2000 the Plaintiff applied to have the 2nd Defendant enjoined to the suit which orders were granted. The Plaintiff filed an amended plaint on the 17th of November, 2000 on their part the 1st Defendant filed an amended defence on 14th December, 2000 and the 2nd Defendant entered appearance on the 1st of December, 2000 and filed its defence on the 14th of December, 2000.

In the amended plaint the Plaintiff seeks release of Motor Vehicle bearing Chassis **No.YH51G - 0004158** by the 2nd Defendant. As against the 1st defendant he claims for unpaid leave, salary for months between March and July, 1997, expenses incurred by the him while out of the country on Company business to the tune of **US\$21 ,000/=** and costs.

In its defence the 1st Defendant generally denies the allegations. It further contends that the Plaintiff became unemployable as the Plaintiff's application for a work permit was refused on the 23rd March, 1997. It also denies having taken the Plaintiff's vehicle and states that the said vehicle was offered by the Plaintiff to the 1st Defendant as compensation for the loss of **US \$ 5,000/=** belonging to the 1st Defendant. The 1st Defendant further denies owing any money to the Plaintiff as claimed and urges the court to dismiss the plaint.

On its part the 2nd Defendant in its defence states that in exercise of its Statutory responsibilities and in accordance with the provisions of Cap 472 it seized the motor vehicle subject matter herein as it was found to be uncustomed, therefore, there are no triable issues disclosed against it and urges that the suit

against it be dismissed with costs.

I have considered the pleadings and submissions by counsel for the Plaintiff and the 2nd Defendant. Although the 1st defendant participated at the hearing they did not file any submissions.

For consideration before the court are the following issues:-

- 1. Whether the 2nd Defendant ought to release motor vehicle bearing Chassis No.YH51G-0004158 to the Plaintiff if so,**
- 2. Who is to pay for the custom duty payable on the said motor vehicle?**
- 3. Whether or not the 2nd Defendant owes the Plaintiff the sum of US \$ 21,000/= being travel expenses incurred by the Plaintiff while travelling abroad on behalf of the 1st Defendant, salary for March, to July, 1997 & unpaid leave.**
- 4. Costs of the suit.**

From the evidence on record, there is no doubt that the Plaintiff herein was an Employee of the 1st Defendant between an unspecified time in 1994 and 23rd July, 1997. His job description included travelling to Japan to check on spares being imported, giving mechanical advice to customers and mechanical supervision. On the 19th of December, 1996 the 1st Defendant applied to the Principal Migration Officer seeking for a work permit for the Plaintiff, on the 14th of March, 1997 the 1st Defendant received a letter from the Principal Migration Officer notifying it of the refusal to issue a work permit for the Plaintiff. The 1st Respondent wrote a letter dated 20th March, 1997 to the Plaintiff advising him of the said refusal and informing him to keep away from its premises. The Plaintiff in his evidence stated that the said letter was given to him on 23rd of July, 1997 a fact that the 1st Defendant has not controverted.

While in the course of his employment the Plaintiff travelled to Japan on the 8th of March, 1997. He was entrusted with US\$5,000 which he purportedly lost while on transit. To make good the loss, the Plaintiff on the 12th of March, 1997 requested his wife through a note sent to her to deliver vehicle chassis No. **YH 51G - 00004158** and all its documents to one **Medison Kibirige** an employee of the 1st Defendant. Indeed from the exhibits on record the said **Medison Kibirige** took possession of the vehicle and on 18th of March, 1997 transmitted into Kenya through the Busia border. At the said border he obtained a declaration of temporary importation and a declaration of importation form.

In his evidence in chief the Plaintiff stated that he wrote to his wife to release to the 1st Defendant's representative the said **Medison Kibirigi** vehicle Chassis No. **YH 51G - 0004158**. The note states as follows:-

“Dear Pr

Deliver that Hiace to Mr. Medison Kibirige (for sale),

YH 51G-0004158

I lost the 5,000 \$ Company money which I had to deliver to Japan.

Give him with all its documents”

On reading the note I find that the Plaintiff's intention was to give the 1st Defendant the said motor vehicle in exchange for the lost money. I also find that the 1st Defendant accepted the offer and sent its

employee one **Mr. Medison Kibirige** to collect the said vehicle, hence the same was found by the 2nd Defendant's at 1st Defendant's premises. I find further that there was no indication in the said note or anywhere in evidence that the 1st Defendant was to sell the said vehicle in Uganda to recover its **US \$ 5,000/=** and to give the balance thereof to the Plaintiff. Indeed if the vehicle was to be sold in Nairobi duty was payable. I therefore dismiss the prayer seeking that the 1st Defendant do return the said vehicle to the Plaintiff.

The Plaintiff also claimed to be reimbursed dues alleged owed as follows:-

(i) Special damages of US \$ 40 a day from March 1997 as loss of income from the said vehicle. I am inclined to dismiss this claim based on the reasons stated above that the Plaintiff gave the said vehicle to the 1st Defendant in exchange for money lost and therefore ought not to expect income from the same at the same time.

(ii) Travel Expenses: As regards the sum of US \$21,000/= being travel expenses incurred by the Plaintiff while travelling on the 1st Defendant's business, I note that in his evidence & more specifically on page 15 of the typed proceedings the Plaintiff stated.

“Whenever I travelled the first defendant would pay my travelling expenses”

Meaning that the 1st Defendant was obliged to reimburse travelling expenses. This amount if proved ought to be paid to the Plaintiff's. It should be noted however that the court can only make an award based on evidence placed before court. The Plaintiff did not in his evidence in chief or by way of the exhibits produced place before the court any evidence in support his claim for the said amount of **US \$ 21,000/-** and as such I have no basis upon which to award the same. This claim therefore fails.

(iii) Salary Arrears & Unpaid Leave

The Plaintiff has claimed salary for the months of March, April, May, June, & July, 1997. In his evidence in chief the Plaintiff stated that he earned **Kshs.15,000/=** a month which amount he was paid in cash. He did not produce any payslip or document in support of the claim. I Note however that the 1st Defendant did not specifically deny this and I therefore find that the Plaintiff did earn the said Sum of **Kshs.15,000/=** a month The issue before the court is whether the Plaintiff is owed salary arrears & unpaid leave days as he claims. **Charles Peter Mutonyi** the defence witness on page 21 of the typed proceedings stated in evidence that the 1st Defendant does not owe the Plaintiff any moneys.

However the defence did not produce any evidence in support of their denial. From the evidence on record the Plaintiff was not furnished with any payslip he was paid in his salary in cash. The defendant as the employer was better placed in my view to produce documents in support of their assertion that it paid the Plaintiff his salary for the 4 months. This was not done. I therefore find that the plaintiff is owed his salary for March-July, 1997 at the rate of **Kshs.15,000/=** a month.

On the claim for unpaid leave the Plaintiff did not compute the leave days claimed, neither was he specific in terms of days or years when he did not take his leave, and as such in the absence of sufficient evidence I am unable to give specific orders under the said claim.

It is a requirement that all imported goods are to have duty paid on them save those that are specifically exempted. The 2nd Defendant claims that duty on the said vehicle Chassis **No. YH 51G 0004158** was not paid for, a fact that both the Plaintiff & 2nd Defendant do not dispute. I find that the confiscation of the said vehicle by the 1st Defendant was lawful and justified and I therefore dismiss with costs the claim against the 2nd Defendant. I also find that the vehicle having been given to the 1st Defendant, the 1st Defendant ought to pay duty in the event its wish to salvage the same.

Having considered the above the sum total of my Judgment is as follows:-

- 1. I dismiss the claim against the 2nd Defendant with costs.**
- 2. I dismiss the Plaintiff's claim against the 1st Defendant for the return of motor vehicle Chassis No. YH 51G -0004158, reimbursement for Kshs.US\$21,000/= & loss of income and for unpaid leave.**
- 3. I enter Judgment in favour of the Plaintiff for his salary for the months of March-July, at the rate of Kshs.15,000/=**
- 4. The Plaintiff and the 1st Defendant each to bear their own costs of this suit.**

Dated and delivered at Nairobi this 6th day of October, 2009.

ALI-ARONI

JUDGE