



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WAKI, NAMBUYE & KIAGE, JJA

CIVIL APPEAL NO. 55 OF 2016

BETWEEN

FIVE FORTY AVIATION LIMITED.....APPELLANT

AND

ERWAN LANOE.....RESPONDENT

(Appeal from the Judgment/Award/Decree of the Employment & Labour Relations Court of Kenya at Nairobi. (Mathews Nduma Nderi, J) dated 9th December, 2015

in

Employment & Labour Relations Court

Cause No. 2157 of 2014

JUDGMENT OF THE COURT

The appeal arises from the judgment of **Mathews N. Nduma**, Principal Judge (as he then was), dated 9th December, 2015 in the Employment & Labour Relations Court (ELRC) of Kenya at Nairobi.

The background to the appeal is that, the respondent, a French National executed a contract of employment with the appellant dated 15th June, 2010. As a precondition for the said employment, the respondent was required to have and maintain in good and serviceable condition his own Headset and Navigation instruments; a valid Kenyan Commercial Pilots License with instruments rating and multi-engine rating; a valid passport; a certificate of vaccination/inoculation, and to undergo a comprehensive medical examination conducted by a medical officer of the appellant's choice. The contract among others also provided for a salary at the rate of USD 6,000 per month net of taxation and overtime/incentive flying payment. Either party could terminate the contract by giving the other party one month's notice or payment of one month's salary in lieu of notice. An addendum executed by the parties on the 24th January, 2012, among others, revised the basic salary to Kshs 540,000 net of tax and overtime/ incentive, flying payment at the rate of Kshs 10.00 per nautical mile covered above forty (40) flight hours; but made no explicit provision that it was a variation of the earlier terms of the contract executed on 15th June, 2010.

The contract ran for four (4) years and five (5) months before it was terminated by the appellant on 13th November, 2013, precipitating the litigation resulting in this appeal. In his statement of claim dated 28th November, 2014, the respondent sought reliefs particularized in the claim based on his allegation that the appellant had unfairly and unlawfully terminated his contract of employment with them. According to the respondent, the said termination was triggered by his demand for the payment of Kshs. 2,293,962/- being accrued overtime/incentive flying payments. He also alleged that possession of a class "H" entry permit used by the appellant as a disqualification for the continued sustenance of his employment with them was a mere excuse.

The appellant filed a statement of defence dated 20th January, 2015, in rebuttal of the respondent's claim, contending *inter alia*, that the Class "H" entry permit which the respondent held at the time the said contract was executed did not authorize him to be employed as such by the appellant; that the contract executed between them was therefore illegal, null, void and untenable in law and the appellant was therefore in the circumstances entitled to terminate the same.

In his testimony before Court, the respondent reiterated the averments in his claim. He conceded that he held a class "H" entry permit at the

time he executed the contract of employment with the appellant; that the said entry permit authorized him as a professional pilot to discharge the professional services the appellant had hired him to perform namely; to train pilots for the appellant's Aviation Industry in Kenya and also to fly the appellant's Aeroplanes in his capacity as its pilot/chief pilot; that the said contract of employment made no provision for a mandatory possession of a work permit as a precondition for his employment with the appellant; that the Immigration law which changed during the subsistence of the said contract obligated the appellant to apply and obtain a work permit for him, which obligation the appellant failed to comply with, thereby frustrating the continued sustenance of the contract between them; that the appellant having benefited from the respondent's services should not be allowed to wriggle out of its obligations to pay for those services.

In rebuttal of the respondent's evidence, **Mr. Nixon Ooko**, conceded that possession of a work permit was not a precondition for the execution and sustenance of the said contract and that the respondent's class "H" entry permit dated 10th November, 2009 was accepted by the appellant as the work permit; that it was only much later, when the appellant, acting on verbal information from an unnamed immigration officer, realized that the class "H" entry permit on the basis of which they executed the said contract was not a work permit and on that account terminated the said contract, as in their view it was illegal.

Mr. Mark Peter Reading, on the other hand stated that according to investigations carried out by him, in the appellant's operations at the instance of the appellant, the respondent had been paid his overtime/incentive flying payments in full and nothing was outstanding and owing to the respondent from the appellant as at the time his contract of employment was terminated.

At the conclusion of the trial, the learned Judge assessed and analyzed the record, and made findings thereon, *inter alia*, that the contract of employment between the disputing parties was executed on the basis of a class "H" entry permit issued to the respondent on 10th November, 2009, pursuant to the provisions of **sections 5&6** of the Immigration Act Cap 172 Laws of Kenya (now repealed); that possession of a work permit was not a precondition for the execution of the said contract; that the said entry permit authorized the respondent as a professional pilot to train the appellant's pilots, and also to fly the appellant's Aeroplanes; that the respondent met all the prerequisites set out in the said contract, which terms were binding on both parties; and that the respondent never breached any of the terms of the said contract.

It was further the Judge's findings that the appellant's reason for terminating the said contract was on account of the appellant's unwillingness to pay the respondent for the accumulated overtime/ incentives payment arrears; that the issue of the validity of the respondent's work permit was raised only as a smoke screen for the appellant to avoid its contractual obligations under the contract ; that the contents of the addendum in which the appellant purported to reduce the respondent's salary from USD 6,000 to Kshs 540,000.00 and to vary the overtime/ incentive payment provision to the detriment of the respondent was of no consequence as it did not expressly make provision that it had been executed in variation of the original contract between the parties.

On account of the totality of the above reasoning, the Judge found the appellant liable for the unfair/unlawful termination of the respondent's contract of employment and entered Judgment for the respondent as appellant as follows:

(i) Kshs 925,560.00 being one month's salary in lieu of notice;

(ii) Kshs 501,480.40 being payment for the thirteen (13) days worked in the month of November, 2014 before the termination of his contract;

(iii) Kshs 2,293,962 .00 being accrued incentive payment arrears;

(iv) Kshs 7,406,480.00 being eight (8) months' salary as compensation for unlawful and unfair termination of the respondent's contract with the appellant.

Being dissatisfied, with the above decision, the appellant filed this appeal citing a litany of twenty (20) grounds of appeal which were subsequently condensed into two, namely that the learned Judge erred both in law and fact:

(i) By enforcing an illegal contract;

(ii) By failing to properly appreciate and apply the law to the facts of the case and thereby arrived at a wrong conclusion on the matter.

The appeal was canvassed by way of written submissions, fully adopted by learned counsel **Mr. Edward Kibet Kimetto** for the appellant without orally highlighting of the same, while those filed on behalf of the respondent were fully adopted, and orally highlighted by learned counsel **M/s Judith Guserwa**.

In summary, it is the appellant's submission that the Class "H" entry permit the respondent had obtained as at the time he was employed by the appellant, only authorized him to engage in business with **M/s Higher Power Services Limited**.

Relying on the case of **Kenya Airways Limited Vs. Satwant Singh Flora [2013] eKLR** and **Archbolds (Freightage) Ltd, Vs. S. Spanglett Ltd, Randall** (third Party) [1961] QB374, the appellant urged us to fault the trial Judge, first for enforcing an illegal contract; and, second, for being biased in favour of the respondent in the assessment and appreciation of the record.

Opposing the appeal, learned counsel **Mrs. Guserwa** submitted that the contract willingly entered into by the disputing parties was a valid contract in terms of **sections 9 and 10** of the Employment Act 2007 and was therefore binding on them.

Relying on the case of **Katiwa Kanguli Vs. Bamburi Cement Limited [2015] eKLR**, counsel urged us to affirm the Judge's finding that

the contract entered into by the parties on 16th June, 2010 was silent on the requirement of a work permit, as a precondition for execution and sustenance of the same. In counsel's view, the Judge's finding was not only arrived at after a proper appreciation and consideration of the record, but was also based on the appellant's own admission through its own witness (RW1), that there was no such a precondition in the said contract. Counsel also urged that the Judge should not be faulted for allowing the respondent's claim against the appellant as the appellant failed to point out which aspects of the evidence were given prominence by the Judge to favour the respondent's case and which were left out to the detriment of the appellant's case.

Relying on **Kenfreight (E.A.) Limited Vs. Benson K. Nguti [2016] eKLR** and **Barclays Bank of Kenya Ltd Vs. Joseph Mwaura Njau [2006] eKLR**, counsel urged us to affirm both the Judges' conclusion as correct, that the respondent's contract with the appellant had been unfairly and unlawfully terminated and second, not to interfere with the reliefs awarded as these were well founded both in fact and the law.

This being a first appeal, our duty is as was aptly stated in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123**: namely to:

“Reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

We have re-evaluated and re-analyzed the record in light of the rival submissions and principles of law cited by the parties. In our view, the issues that fall for our determination are the same as those condensed by the appellant in its submissions.

With regard to the 1st issue, it is not disputed, that the respondent as a French national needed to comply with the prerequisites in the immigration law as applicable then before he could engage in any business or employment in Kenya. The immigration law applicable then is the Immigration Act Cap 172 laws of Kenya (now repealed). The class “H” entry permit on the basis of which he executed the said contract authorized him to engage in and render professional services in a profession other than that which was “prescribed” by law. Under **section 2** of the Act, “prescribed” means that which has been “prescribed” by the regulations made under the Act.

We have perused the Regulations made under the Act, but nowhere in these do we find any mention of “prescribed” profession. It therefore follows that, the respondent as a professional pilot engaged in the profession of training pilots and flying planes in the Aviation Industry in Kenya for a period of twenty three (23) years, out of the twenty five (25) years of his service in the Civil Aviation Industry was not engaged in a “prescribed” profession. Second, the respondent's uncontroverted pleadings and evidence was that he practiced that profession under the banner of **M/S Higher Power Services Limited** (the company), in which he was both a Director and a 50% Shareholder. The Memorandum/Articles of Association of the company demonstrates clearly that, the company was engaged in the provision of management, consultancy and training services and also to “work” in the Aviation Industry which in our view, included the training of pilots for the appellant as well as the flying of the appellant's Aeroplanes, the very task for which the appellant had engaged him to perform under the contract.

The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In **National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**, the

Court was categorical that:

“it is clear beyond para adventure ,that save for those special cases where equity might be prepared to releave a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

The Court in **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR**, after reviewing case law on the subject reiterated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

In light of the above guiding principles, it is our finding as contended by the respondent, that the contract executed by the parties was lawful as it complied with **sections 9 and 10** of the Employment Act, 2007. Its execution as conceded by the appellant through its witness **Mr. Ooko** (RW1), was not preconditioned on the production of a valid work permit issued under the then prevailing Immigration law. We also reiterate as correct the finding by the trial Judge that the class “H” entry permit, the respondent had obtained at the time of his engagement by the appellant authorized him to be engaged as a professional pilot for purposes of training the appellant's pilots and also to fly the appellant's Aeroplanes in his capacity as a pilot/chief pilot. In the result, we are satisfied, and we so find, that the contract executed between the parties was not illegal, null and void as contended by the appellant but valid and binding on the disputing parties as contended by the respondent. It's unfair and unlawful breach was therefore enforceable.

Turning to the issue of the alleged lack of renewal of the said entry permit between 10th November, 2011 to 10th November, 2013, it is on record that no renewal permit was exhibited by the respondent. When challenged on this issue in cross-examination, the respondent's response was that one was available and could be availed if required. The appellant did not, however, insist on its production before the respondent closed his case. The foregoing finding notwithstanding, it is undisputed that, by the time the entry permit expired on 10th November, 2011, the applicable immigration law had changed. The Kenya Citizenship and Immigration Act No. 12 of 2011, assented to on 27th August, 2011 which commenced operation on 30th August, 2011 was by then the applicable law. **Section 45 (2)** of this new Act placed an obligation on the appellant as the respondent's employer to obtain a work permit for him. It provides as follows:-

“It shall be the duty of every employer to apply for and obtain a work permit or a pass conferring upon a foreign national the right to engage in employment before granting him employment and it shall be presumed that the employer knew at the time of the employment that such person was among those referred to in section (1).”

Default in complying with section 45(2) of the new Act renders a contract affected by the above provision amenable to the sanctions provided for in **sections 45 (6), 53(m) and (n)**. These provide as follows:

45(6) “A person who contravenes the provision of this section commits an offence;

53.(1) A person who:

(m) not being a citizen of Kenya, engages in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by a work permit, or exempted from this provision by regulations made under this Act.

(n). employs any person, whether or not for reward, whom he knew or has reasonable cause to believe is committing an offence under paragraph (m) by engaging in that employment”

The ELRC when faced with similar arguments in **Nicola Romano versus Master Mind Tobacco (K) Limited [2017] eKLR**, expressed itself as follows:-

“while making that finding, the Court has considered that the need for a work permit was a statutory provision whose satisfaction was necessary towards legitimate implementation of the contract of service but in absence of express contractual provision making lack of the permit as frustrating the contract, the absence of the permit by itself, did not bar the parties from pursuing their respective rights and obligations under the contract of employment one way or the other.”

In the case of **Kenya Airways Limited versus Satwant Singh Flora** (supra), the Court set out the following guidelines when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract:-

(i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.

(ii) If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.

(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”

(iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.

(v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contract.”

Applying the above guidelines to the instant appeal, it is our finding that the appellant’s failure to comply with the prerequisites in **section 45 (2)** of the Act did not render the said contract illegal, but gave rise to intervening circumstances which rendered the continued sustenance of the said contract as initially executed between the parties impossible. This is what the Court in the same **Kenya Airways Limited case** (supra) termed “frustration of a contract”. The Court in the said **Kenya Airways case Limited** (supra), went further and set out the prerequisites for the application of the doctrine of frustration of a contract as follows:-

“...the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.

(See also **Halsbury Laws of England (3rd Edition) Volume 8 page 185(i)**, on the doctrine of frustration para 320) and **Davis Contractors Ltd versus FAREHAM U.D.C. [1956] A.C.696** for the observations *inter alia* that:

“Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract...”

In light of the above guidelines, we reiterate that the contract that the disputing parties herein executed on the 16th June, 2010 was frustrated.

The above finding now leads us to the determination of what in our view should have been the correct mode of terminating the said contract following our finding that the same had been frustrated by the appellant's default to comply with the section 45(2) of the new Act procedures. In the case of **Nicola Romano versus Master Mind Tobacco (K) Limited** (supra), the ELRC expressed the view that, parties to a frustrated contract have recourse to the contract itself. In the instant appeal, the contract itself made provision for **clause 9** of the contract whereby either party could terminate the contract by giving the other one month's notice or one month's salary in lieu thereof. The appellant therefore had an opportunity to have recourse to the said clause to terminate the frustrated contract. Alternatively, since the contract was executed in compliance with the provisions of the Employment Act, 2007, the appellant as the employer, also had an opportunity to invoke **sections 41, 43 and 45** of the Employment Act, 2007 procedures to terminate the said frustrated contract.

In **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR**, the Court summarized those procedures as follows:-

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

In light of the above, it is our finding that the Judge's finding that the appellant's failure to either invoke the binding **clause 9** procedures in the contract itself or alternatively to invoke the **sections 41, 43 and 45** procedures in the Employment Act 2007 rendered the termination of the respondent's contract with them not only unfair but also unlawful cannot be faulted. It is affirmed.

Having affirmed the trial Judge's finding, we now proceed to determine whether the reliefs awarded are within the law. The items allowed by the trial Judge of the value of the notice; entitlement to accrued overtime/incentive payments; the undisputed thirteen days worked, were all well founded both on the facts and the law and are all affirmed. The appeal against these items is accordingly dismissed.

Turning to compensation for the unfair unlawful termination of the contract, **section 49** of the Employment Act makes provision for a wide range of remedies. The mode of assessment was set out by the Court, in **Co-operative Bank of Kenya Ltd V. Banking Insurance & Finance Union CA No. 188 of 2014** as follows:

“Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, that circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations.”

See also **John Charo Ngumbo versus Amani Tiwi Beach Resort [2017] eKLR**.

The reason the Judge gave for allowing the eight (8) months' salary as compensation for the unfair/unlawful termination of the respondent's employment with the appellant were as follows:

“The claimant has also demonstrated that he had a good record of service as a pilot and leader of his team until the relationship between him and the employer became sour due to the nonpayment of duty earned overtime incentives by the respondent.

The respondent acted maliciously by failing to give the claimant notice or pay in lieu of notice upon termination. The respondent also failed to pay the claimant for days worked. This aggravated the loss and damage suffered by the claimant. The claimant was unduly embarrassed being a senior member of staff and a senior resident as such. The rule used by the respondent to get rid of

the claimant unlawfully and unfairly is a further aggravating factor in the circumstances of this case.”

In essence what the trial Judge did in arriving at the above conclusion was simply an exercise of discretion.

The principles that guide this Court in determining whether to interfere with an award by a trial court in the exercise of its discretion and which in our view are well settled are as set out in **United India Insurance Co. Ltd V. East African**

Underwriters (Kenya) Ltd [1985] E.A., in which **Madan J.A** (as he then was), expounded the applicable principles as follows:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

Bearing the above in mind, it is our finding that considering that the respondent had been fully compensated for the other items complained of, an award of eight (8) months’ salary compensation for the unfair and unlawful termination of his contract with the appellant was rather on the high side. It is reduced to five (5) months’ salary compensation which in our view, would not only be reasonable but also fair. It works out as Kshs. 925,560.00x5 which comes to Kshs. 4,627,800.00 which we allow. To this extent only does the appeal succeed.

The appellant who has not substantially succeeded on the appeal will therefore have costs taxed against it both before this Court and the court below reduced by ¼. It is so ordered.

Dated and Delivered at Nairobi this 10th day of May, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.