



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 54 OF 2005

BETWEEN

KENYA AIRWAYS LIMITED APPELLANT

AND

SATWANT SINGH FLORA RESPONDENT

**(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nyamu, J)
dated 1st October, 2004**

in

HCCS NO. 232 OF 1999)

JUDGMENT OF THE COURT

The appeal herein has been brought by **KENYA AIRWAYS LTD**, hereinafter the appellant, against **SATWANT SINGH FLORA**, hereinafter the respondent following the judgment and decree of the High Court of Kenya by Nyamu, J [as he then was] delivered on 1st October, 2004, in High Court Civil Suit No. 232 of 1999. The said judgment partially allowed the respondent's claim and awarded him a sum of KShs.76,698/= plus interest at court rates. It is that decision that has triggered the present appeal.

The respondent was employed on expatriate terms by the appellant as an Avionics Engineer with effect from 1st March, 1977. Since he was not a Kenyan citizen, it was imperative that he obtained a work permit under the **Immigration Act, Cap 172, Laws of Kenya (now repealed)**. Subsequently, during the duration of his employment, the appellant applied for and obtained a work permit on behalf of the respondent. Each contract was for a duration of two years. His last contract commenced on 1st September, 1995 and was to expire on 30th August, 1997. The appellant claims that due to change in policy, the Immigration Department was reluctant to renew the respondent's work permit.

It is notable that the employment contract dated 23rd January, 1996, between the parties, expressly provided that his employment was subject to renewal of his work permit. Consequently, vide a letter dated 11th October, 1996, the appellant terminated the respondent's contract on grounds that it had been unable to renew his work permit. He was thus given three [3] months' notice and his last day of employment was to be on 14th January, 1997.

However, the duty rosters clearly indicate that the respondent continued working up to 30th June, 1997. However, the appellant contends that this was without its knowledge and authority since the rosters were not signed by the relevant authorities. The appellant thus submitted that it paid the respondent for the extra period worked, as an act of grace. In his plaint, the respondent contended that it was the duty of the appellant to apply for his work permit but it negligently failed to do so. He further alleged that the earlier notice of termination was waived by the appellant after it impliedly accepted his service and even paid him up to 30th June, 1997. This was disputed by the appellant which claimed that the respondent rendered his services without any authority and was duly compensated for the same.

Indeed the duty rosters from the month of February to June 1997, indicate that the respondent worked as an employee of the appellant. The respondent's engagement with the appellant was finally terminated by a letter dated 24th June, 1997, titled "**Termination of Contract**" from the appellant's Personnel Manager. This letter is what triggered the suit at the High Court.

The High Court set out five (5) issues for its determination. The same are as follows:

- (i) *Whether the Plaintiff continued in employment without authority and whether as an act of grace the defendant paid the plaintiff's salary up to 30th June, 1997.*

- (ii) *Whether the notice of termination was waived as alleged.*

- (iii) *Whether the sums pleaded in the plaint are payable and based on the contract of employment.*

(iv) Whether the plaintiff was paid all the remuneration due as pleaded in the defence.

(v) Who shall pay the costs of the suit.

The learned Judge found in favour of the respondent and awarded him a sum of KShs.76,698/= being three (3) months' salary in lieu of notice plus interest at court rates. The appellant being dissatisfied with the said decision, has preferred the present appeal. His memorandum of appeal contains five (5) grounds of appeal, which can be compressed into 3 as follows:

1. That the Judge erred in law and in fact in holding that upon termination of the employment contract, the parties entered into a "new contract of employment" and that the same could only be terminated by a three (3) months' notice or in lieu thereof, three (3) month's salary;
2. That the Judge erred in holding that the Appellant had a contractual duty to obtain a work permit on behalf of the Respondent; and
3. That the learned Judge erred in subsequently awarding the Respondent KShs. 76,698/=.

When the learned counsel for the parties' appeared before this Court on 30th April, 2013, they consented to have the appeal disposed of by way of written submissions.

In its submissions, the Appellant through the firm of Ngatia & Associates, highlighted three [3] issues for determination by this Court to wit:

- i. Effect of the respondent's illegal status in Kenya;
- ii. Intervening events leading up to the termination of the Respondent;
- iii. When a contract can be said to be implied.

On the first issue regarding the Respondent's illegal status in Kenya, the appellant submits that by the respondents' own admission, he did not have a work permit from 1995 hence he was in contravention of **section 4 (2) as read together with section 13 (2) (c) of the Immigration Act**. The appellant, therefore, contends that any employment contract entered into subsequent to 1995 was founded on an illegality and hence, no rights can accrue therefrom.

To buttress its argument, the appellant relied on the **Law of Contracts** by **Cheshire, Fifoot and Furmston, 8th edition** at page 334 which states that:

"No person can claim any right or remedy whatsoever under an illegal transaction in which it has participated. The court is bound to veto the enforcement of a contract once it knows that it is illegal, whether knowledge comes from the statement of the guilty party or from outside sources".

The appellant further contended that its contract with the respondent was under the category of contracts expressly or implicitly prohibited by statute. To support this argument, the appellant relied on the words of Devlin, J in the case of **ST. JOHN SHIPPING CORP V JOSEPH RANK LTD, [1957] 1 Q.B. 267**, where he stated thus:

"if the contract is of this class it does not matter what the intent of the parties is; if the

statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.”

The appellant thus argues that since the respondent did not have a valid work permit, the contract of employment was unenforceable and hence he is not entitled to any interest or right arising therefrom. To this end, the appellant has cited the case of **HOLMAN V JOHNSON** as cited in **HALL VS. WOOLSOTN HALL LEISURE LTD, EATRF/1998/0297**.

The appellant thus faulted the learned Judge’s finding and consequent award of three (3) months’ salary in lieu of notice to the respondent, arguing that the contract itself was illegal, hence not capable of performance or any party benefiting from the same.

On the second issue of intervening events, the appellant has based its argument on the fact that there was an intervening event in the subsistence of the employment contract which led to the frustration of the contract rendering the same incapable of performance. It has, therefore, argued that the doctrine of frustration led to the dissolution of the contract. It contends that since it was a condition of the contract that the respondent obtained a work permit from the immigration department, failure to obtain the same from September, 1995 constituted an intervening event beyond the control of the appellant. To this end, the appellant has sought to rely on the Indian case of **SATYABRATA GHOSE V MUGNEERAM BANGUR & CO, 1954 AIR 44 1954 SCR 310, SUPREME COURT OF INDIA**.

It is the appellant’s submission that the refusal by the immigration department to issue a work permit for the respondent amounted to frustration of the contract which should have subsequently discharged the contract.

On the last issue, the appellant submits that the learned Judge erred in holding that there was “*an implied contract*” after the expiry of the notice given to the respondent based on the fact that the respondent continued working and his name appeared in the duty rosters. It thus submitted that even if there was an implied contract, the same was illegal since the respondent did not have a valid work permit.

In concluding its submissions, the appellant has urged this Honourable Court to allow the appeal by setting aside the award of the High Court.

In his submissions through the firm of S. Ndege & Company Advocates, the respondent raised five [5] issues as follows:

(1) *Whether or not the parties entered into a new contract after termination of the appellant’s employment on 14th January, 1997.*

(2) *Whether or not the learned Judge considered the evidence by the appellant’s witnesses that there was no evidence of a new contract of employment entered into by the parties.*

(3) *Whether the learned Judge erred in law and in fact in holding that the new contract of employment was to commence on 14th January, 1997 upto 30th August, 1997.*

(4) *Whether or not the learned Judge erred in law and in fact in holding that the appellant had a contractual duty to apply and obtain a work permit for the respondent and*

that the appellant did not apply for the work permit.

(5) That the appellant's written submission raises issues that were not raised in the Memorandum of Appeal and the same ought not to be allowed.

On the first issue, counsel for the respondent referred to a letter dated 11th October, 1996, by which the respondent was served with a notice of termination of employment notifying him that his last day of work would be 14th January, 1997. On the second issue, counsel for the respondent referred to the record of appeal where the learned Judge considered the evidence adduced by the appellant's witness to the effect that evidence of a new contract includes, the subsequent payment of salary and leave and there was documentary evidence to support the existence of a new contract.

On the third issue, counsel for the respondent submitted that there was ample evidence that the employment contract terminated on 14th January, 1997. He further submitted that the subsequent payment of salary allowance, leave and issuance of an Identity Card by the appellant to facilitate his entry to the work place and the internal Memo dated 24th June, 1997, constituted a new contract of employment with effect from 14th January, 1997 to 30th August, 1997. Mr Ndege further submitted that the learned Judge correctly addressed the issue of period of notice of termination of the new contract to be three [3] months. On the fourth issue, learned counsel for the respondent submitted that the appellant did not produce any documentary evidence to prove that it had applied for the work permit for the period in issue. Accordingly, in his view, the appellant did not discharge its obligation under the contract to indicate that it applied for the work permit for the period in issue. Mr Ndege submitted that the learned Judge correctly found that in order to terminate the contract the appellant was required to issue three (3) months notice or 3 month's salary in lieu of notice.

On the fifth issue, Mr Ndege submitted that the appellant raised issues in its written submissions that were not raised in the memorandum of appeal. In his view, the same ought not to be allowed.

We have carefully considered the grounds of appeal, the rival written submissions of the learned counsel and the law.

In view of the facts of this case, the following issues arise for determination by this Court:

- (i) Whether there was a valid contract of employment between the parties after 14th January, 1997 and whether one can be implied; and*
- (ii) Was the contract between the parties frustrated by an intervening event?*

On the question whether there was a valid contract of employment between the parties after 14th January, 1997 and whether one can be implied, it is not in dispute that the respondent's contract was terminated on 14th January, 1997. However, the respondent continued working up to the end of June, 1997, despite there being no written contract.

Halsbury's Laws of England (4th Edition), Volume 16 (1A) page 11, paragraph 15 states that:

"In general a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such a contract was

intended although never expressed, as where there has in fact been service of the kind usually performed by employees.”

Thus, the question here is, whether despite there not being a written contract, the employment contract could be implied from the conduct of the parties.

Further, it is not in dispute that the respondent continued working for the appellant albeit without a work permit. The issue of illegality of contract was not addressed by the High Court although the same was alluded to by the appellant in paragraph 8 of its defence.

Section 4(2) of the Immigration Act provided as follows:

“Subject to this section, the presence in Kenya of any person who is not a citizen of Kenya shall, unless otherwise authorized under this Act, be unlawful, unless that person is in possession of a valid entry permit or a valid pass.”

Further, **section 13 (2) (c)** states as follows:

“A person who unlawfully enters or is unlawfully present in Kenya in contravention of this Act; or

(f) 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 an entry permit, or exempted from this provision by regulations made under this Act; or

(g) ...

... shall be guilty of an offence and is liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both. ...”

The **Oxford Dictionary of Law, 5th edition** defines an illegal contract as:

“A contract that is prohibited by statute (e.g. one between traders providing for minimum resale prices) or is illegal at common law or on the grounds of public policy:

An illegal contract is totally void, but neither party (unless innocent of the illegality) can recover back any money paid or property transferred under it.”

Further, as per **Halsbury's Laws of England (4th edition)**, volume 16 (1A) page 29, the **Formation of Contracts of Employment** paragraph 18:

“A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract, loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal. A contract may generally be illegal because it is contrary to a statute or is an immoral contract....if the illegality affects the contract only for a certain period during its currency, the contract may be unenforceable for that period.”

Hence, the question here is whether the respondent's lack of a work permit for a certain period of time invalidated the employment contract by reason of illegality.

On the question whether failure to obtain a work permit frustrated the employment contract, this was pleaded by the appellant in the plaint but was not addressed in the judgment.

According to **Halsbury's Laws of England (3rd edition)**, volume 8 pages 185 (ii), the **Doctrine of Frustration** para 320:

“...the doctrine of frustration operates to excuse further performance where (i) 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 (ii) 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.”

The modern context of frustration was first formulated by Lord Radcliffe in the case of **DAVIS CONTRACTORS LTD V FAREHAM U.D.C, (1956) A.C 696** which sets out the radical change in the contractual obligation at p. 729:

“...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. “Non haec in foedera veni”. It was not what I promised to do.”

In the instant appeal, the employment contract was expressly subject to the renewal of the respondent's work permit, hence the question is, did the non-renewal constitute an intervening event, thus leading to the frustration of the contract?

From the evidence adduced, the respondent was engaged in employment without a valid work permit after his work permit expired on 14th January, 1997. He, therefore, committed an offence under the then Immigration Act. The employment contracts that were entered between him and the appellant were, therefore, tainted with illegality and could not stand. As stated above, it is trite law that no rights accrue from an illegal contract.

In the case of **MISTRY AMAR SINGH V SERWANO WOFUNIRA KULUBYA**, 1963 EA 408 the Privy Council, on appeal from a judgment and order of the East African Court of Appeal, at page 414. Lord Morris of Borth-y-Guest, in his speech, quoted with approval the following passage from the judgment in **SCOTT V BROWN, DOERING, McNAB & CO, (3), [1892] 2 QB 724 Lindley LJ at p. 728:**

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a 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.”

See also the case of **MAPIS INVESTMENT [K] LTD V KENYA RAILWAYS CORPORATION, [2006] eKLR.**

This Court is further guided by the case of **HEPTULLA V NOORMOHAMED, [1984] KLR** page 58 where the Court held:

“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.”

Further, in the case of **HALL V WOOLSTON HALL LEISURE LTD, [supra]** it was held that:

“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 of that illegal performance and participation in it by the other party to the contract.” [Emphasis supplied]

In our view, from the circumstances of the instant case, there existed no enforceable contract between the parties by reason of illegality.

It was an express term of the contract of employment between the appellant and the respondent that the contract would be terminated if the respondent failed to obtain a work permit from the Immigration Department. Once the respondent’s permit expired, any further work he carried out was illegal. In our view, failure to obtain a work permit was an intervening event which vitiated the contract between the parties.

In the circumstances of this case and in view of the illegality of the contracts between the appellant and the respondent and the intervening events that necessitated the termination of the respondent’s employment, the learned Judge had no legal basis to enforce the illegal contract. We must, therefore, allow this appeal.

In our view, the appellant did not act honourably as an employer towards the respondent. It allowed the respondent to continue working well knowing that he had no work permit as required by law. The appellant’s conduct in this matter was, in our view, **not** exemplary at all. In view of the circumstances of this case, we make no order as to costs.

Dated and delivered at Nairobi this 19th day of July, 2013.

D. K. MARAGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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