



REPUBLIC OF KENYA



KENYA LAW
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Laberty & 13 others v Odera & another (Employment and Labour Relations Cause 93 of 2017) [2024] KEELRC 284 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 284 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 93 OF 2017

MN NDUMA, J

FEBRUARY 15, 2024

BETWEEN

ISSA MBWANA LABERTY 1ST CLAIMANT
MILDRED OCHIENG 2ND CLAIMANT
EDWIN OCHIENG OYUGI 3RD CLAIMANT
ERIC MUSEE MWENDWA 4TH CLAIMANT
MODESTA MWITA 5TH CLAIMANT
AUSTINE NDOLO MAKAU 6TH CLAIMANT
IBRAHIM DAUDI OSMAN 7TH CLAIMANT
BENARD N. MUTISYA 8TH CLAIMANT
LENNET SHIKANGA OYALO 9TH CLAIMANT
ZAKARIA JUMA 10TH CLAIMANT
GODFREY MAASE EKADA 11TH CLAIMANT
ASHA KADZO CHANGAWA 12TH CLAIMANT
MARTHA WANGUI KIHARA 13TH CLAIMANT
OMBACHI EVANS BOSIRE 14TH CLAIMANT

AND

SAM O ODERA 1ST RESPONDENT
CROSSLINK SERVICES LIMITED 2ND RESPONDENT



JUDGMENT

1. The 14 claimants filed suit against the respondents seeking the following reliefs:
 1. Payment of unpaid salary.
 2. Payment of incurred expenses before, during and after engagement with the respondents
 3. General damages
 4. Interest and costs
2. The claimants executed verifying affidavits in support of the statement of claim and the 3rd claimant testified in support of the claim on behalf of all the claimants. CW1 told the court that the 2nd respondent hired persons including the claimants to serve in various capacities in the Democratic Republic of Congo. CW1 resigned from his work at DHL Supply Chain as MHE Operator lured by lucrative offers made to them. Other claimants had also resigned from their employment to go to the Congo.
3. The claimants were duly recruited and were informed by the 1st respondent that since the 2nd respondent had not received payment from United Nations, the claimants were to foot all their expenses including travel expenses to the Congo and were to be refunded upon arrival at the work station.
4. Upon arrival, their expenses were not refunded there was no proper accommodation; no food or money to cater for the basic needs. The 1st respondent convinced the claimant that things would change as soon as the United Nations paid the respondents.
5. CW1 told court that the claimants were not paid salary for three (3) months. They shared accommodation and lived on loans gotten from local residents. Things did not change and the 1st respondent convinced the claimants to get back to Kenya to await things to stabilize. The claimants came back on different dates.
6. The claimants received part payment of their salary and paid the locals who had advanced them loans. The balance they used on payment of transport back to Kenya.
7. That since the claimants returned to Kenya they were not recalled by the respondents. That they've suffered loss and damage which they now claim.
8. CW1 produced contracts of employment which set out conditions of service including USD 4000 salary per month for a period of one year; 24 leave days and medical cover for all the claimants that eleven of the claimants were paid three (3) months' salary. Modesta Mwita, the 5th claimant was paid 1 ½ months' salary, whereas, Ibrahim Daudi Osman the 7th claimant and Zakaria Juma, 10th claimant received no salary at all.
9. CW1 said he stayed in the Congo for 4 months from February to June 2016. CW1 said under cross-examination that he was not aware that the claimants were denied visas to work in the Congo. CW1 conceded that the claimants did not get work permits until they left the Congo. CW1 said that they signed their contract in Kenya before they left for the Congo. That the 1st respondent was the agent who recruited the claimants on behalf of the 2nd respondent. CW1 said that they did not know who were the directors of the 2nd respondent. They only knew the 1st respondent as their employer.



10. CW1 said that they were made to sign other documents in the Congo. CW1 said the claimants raised travel fees and gave to the respondents to pay for the tickets.
11. CW1 said that there was no written agreements on reimbursement. That it was only verbal agreement. CW1 said that they were not aware that visas were given and then annulled. CW1 said they did not commit any offence in the Congo to warrant cancellation of the visas if they were ever granted. CW1 said all claimants were given facilitation fees to return to Kenya, with a promise that they would be brought back.
12. CW1 said they were on 3 months' probation. CW1 said they all came back around the same time in June 2016.
13. CW1, the 1st respondent testified and denied the particulars of claim stating that he was a director of the 2nd respondent and was not an employer of the claimants. RW1 said that the claimants were employed by a sister company of the 2nd respondent namely Crosslink Services (Rwanda) Limited in the Democratic Republic of Congo.
14. RW1 stated that he was not aware that the claimants had resigned from lucrative positions to join the respondents in the Congo. RW1 stated that the claimants did not travel to the Congo at their own expense and put them to strict move thereof.
15. PW1 said that the claimants' did not work faithfully and diligently. That claimants' number 3 and 6 were ordered out of the Congo for engaging in criminal activities. That the rest of the claimants were unable to produce documents required for visa application.
16. RW1 said that the claimants were repatriated back to Kenya because they had no legal documents to work in the Congo.
17. RW1 said that except for the 7th and 10th claimants who absconded within less than one month of their arrival at the Congo and claimant no. 3 and 6 who were deported in April 2016, and their salary paid, all the rest were paid their salary upto to 30th June 2016 when they all departed from the Congo. That they all signed for the salary paid.
18. RW1 said there was no agreement on reimbursement of transport costs or any other expenses incurred by the claimants in the Democratic Republic of Congo.
19. RW1 stated that the claims have not been proved, lack merit and they be dismissed.
20. Under cross-examination by counsel for the claimant, RW1 reiterated that each of the claimants had signed a contract between themselves and the 1st respondent for payment of USD 400 per month. That they reported to DRC on 25/2/2016. That the 1st salary was due on 31/3/2016 and was paid accordingly. That they were subsequently paid on 31/4/2016 and 30/5/2016.
21. That they signed upon receipt of the salary. That the last payment to them was on 30/6/2016. That was the day they left Congo. RW1 produced documents signed by some of the claimants upon receipt of their salary.
22. RW1 said that the employment records of the claimants were in the Congo. That they were not owed any arrear salary. That those who absconded were paid for the period they had worked.
23. RW1 said that the claimants were supported while in the Congo before their salaries were paid. That they were housed in hotels while others rented houses. RW1 denied that the claimants were abandoned and that they had suffered any harm at all.



24. RW1 denied that the respondent's defrauded the claimants. He said the respondents were settling in the Congo and the had applied for visas for the claimants. RW1 said that the claimants were employed by Crosslink Rwanda Limited and were not his employees or that of the 2nd respondent. RW1 said he was a Director of the 2nd respondent based in Kenya and not in DRC.
25. RW1 said he never hired the claimants in his personal capacity. That the written contracts are clear that they were employees of Crosslink Services RWanda Limited. That Crosslink Services Kenya Limited is a separate legal entity and RW1 was not a Director of that company. RW1 said he was only hired by Crosslink Services RWanda Limited to recruit the claimants on their behalf.

Determination

26. The parties filed written submissions which the court has carefully considered together with the evidence by CW1 and RW1. The issues for determination are:
 - a. Whether the 1st and 2nd respondents were the employers of the claimants.
 - b. If answer to (a) is in the affirmative, whether the claimants have proved the claims set out in the statement of claim against the respondents.
27. The claimants have sued Sam Odera, the 1st respondent, the person who recruited them from Kenya to go and work in the Democratic Republic of Congo in various capacities. The claimants have also sued Crosslink Services Limited, who they claim was their employer.
28. The claimants rely on contracts of employment dated 17th March, 2016 duly signed by the claimants and one Ruth Atieno, Director Human Resource. These contracts were signed in Kenya and were on the letter head of "Crosslink Services." In terms of the said letter head the company operate in Kenya – Rwanda – Burundi – Democratic Republic of Congo – Tanzania – Uganda – Senegal and Zambia.
29. The contracts state contrary to the testimony by RW1 that the contract was

...made in accordance with the *Employment Act*...and is" between yourself and Crosslink Services of P. O. Box 117 0 006606 Nairobi."
20. Clearly, the employer of the claimants is the 2nd respondent, Crosslink, Services Kenya. The evidence by RW1 that the claimants were employed by Crosslink Services Rwanda, is not supported by any tangible evidence and lacks merit.
21. RW1 has admitted that he was a director of Crosslink Services Kenya Limited and he personally recruited the claimants. This admission does not make him personally liable to the claimants, unless there is justification to lift the veil of the company. The contracts of employment were between the claimants and the 2nd respondent period.
22. The next question for determination is whether the claimants have proved on a balance of probability that they are owed any specific liquidated special damages by the 2nd respondent.
23. The claimants did not plead any specific liquidated amounts owed to them by the 2nd respondent in the memorandum of claim dated 19th January 2017.
24. Indeed, the memorandum of claim does not disclose how much each of the claimants earned per month, and in respect of how many months the claimants were not paid salary by the 2nd respondent.
25. The claimants did not in the memorandum of claim specify for how long they remained in the DRC and in respect of which months they were paid salaries and for what months no salaries were paid.



26. To the contrary, RW1 adduced evidence that except for claimants' no. 7 and no. 10 who absconded within less than one month of their contract and claimants' no. 3 and 6 who were deported in April 2016, and their salary paid, all the rest of the claimants were paid and signed for their salaries up to 30th June 2016. The claimants did not adduce any tangible evidence to counter this credible evidence adduced by RW1.
27. In terms of section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya he who alleges must prove. The claimants failed to discharge this onus.
28. In respect of claimed reimbursement of travel expenses no documentary evidence was tendered by the claimant to substantiate the alleged expenses and agreement by the respondent to reimburse the said. The claim for travel expenses remained largely, unproved, lacks merit and is dismissed.
29. The claimants admitted that they never obtained any work visas/permits to remain and work in the Democratic Republic of Congo (DRC). The claimants on their own admission worked for four (4) months in the Congo without any valid work permits. It follows that the claimants worked in the Congo illegally and the court cannot therefore enforce their contracts of employment to work and remain in the Congo with respect to the claims for general damages in respect of the remainder of the unserved periods of contracts.
30. The court finds that the contracts were validly terminated, the claimants having failed to obtain lawful authority to remain and work in the Congo.
31. Accordingly, the prayers for grant of general damages by the claimants is also without merit and is dismissed.
32. The court finds that the claimants did not carry out proper due diligence before they offered themselves for employment in the Congo. The court notes that the claimants had indeed forfeited good jobs in Kenya in search of greener pastures. What befell the claimants was largely their own doing having failed to properly investigate the viability and requirements of the offers they took up with the respondent.
33. The respondent also should obtain necessary authorization for persons recruited from Kenya, to be able to work in the destination, intended before asking them to travel to those respective countries. It is wrong for the 1st respondent even as an agent of the 2nd respondent to cause people to relocate to another country without assurance that they would obtain valid work permits.
34. This was indeed unfortunate misadventure, by all the parties involved.
35. Accordingly, the suit is dismissed and each party to meet their own costs of the suit.

MATHEWS N. NDUMA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024

Appearances

Mr. Mungai for petitioner

Mr. Orenge for Respondent 1

Ekale: Court Assistant

