



Kihu v Optisafe (K) Ltd (Employment and Labour Relations Cause E201 of 2021) [2024] KEELRC 527 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 527 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E201 OF 2021**

BOM MANANI, J

MARCH 7, 2024

BETWEEN

LYDIA NANCY NJEKE KIHU CLAIMANT

AND

OPTISAFE (K) LTD RESPONDENT

JUDGMENT

Background

1. Through this action, the Claimant seeks to recover money that was allegedly not paid to her on account of salary for the period under review. In addition, she prays for an order that the Respondent issues her with a Certificate of Service. She also prays for costs of the suit and interest.
2. The claim is contested by the Respondent. It is the Respondent’s case that the Claimant’s dues were all settled except for those which relate to the period when performance of the contract had been frustrated by the Covid 19 pandemic.

Claimant’s Case

3. The Claimant avers that she was engaged by the Respondent to serve in the position of Health and Safety Supervisor as from 18th December 2019. It is her case that the contract required her to work in Nigeria. She further avers that her salary was agreed at Ksh. 230,000.00.
4. The Claimant avers that the Respondent failed to pay salary for the days she worked in December 2019 and the period between 1st and 10th January 2020. Further, she avers that the Respondent failed to pay salary for April, May and June 2020. She further contends that the Respondent declined to issue her with a Certificate of Service.
5. The Claimant also accuses the Respondent of failing to ensure that their contract was concluded in accordance with the provisions of law on foreign contracts. She further argues that it is not open to



the Respondent to plead frustration of the contract between them since the possibility of the contract being terminated on account of force majeure is not contemplated in their contractual instrument.

Respondent's Case

6. On its part, the Respondent admits that the parties had a contract of service as asserted by the Claimant. Further, the Respondent admits that the Claimant was posted to work in Nigeria for the duration of the Respondent's project which was expected to run for six months from 18th December 2019.
7. Contrary to the Claimant's assertion that she was not paid part of her salary, the Respondent contends that she was paid all her salary for the period running between 18th December 2019 and end of March 2020. The Respondent avers that after March 2020, its project was shut down due to the breakout of the Covid 19 pandemic. As a result, the contract between the parties was allegedly frustrated by this development which it (the Respondent) considers as a force majeure.
8. The Respondent avers that following the breakout of the pandemic, many countries including Nigeria closed their skies to international travel. This meant that the Claimant could not leave the country for Kenya.
9. The Respondent contends that despite having shut down its project due to the pandemic, it was forced to cater for the accommodation and subsistence of its employees who were in Nigeria including the Claimant as it awaited for resumption of international air travel. This did not happen until June 2020.
10. It is the Respondent's case that on arrival in Kenya, the Claimant presented her claim which was processed and paid. She thereafter executed a release voucher thereby closing the matter.

Issues for Determination

11. After evaluating the pleadings and evidence on record, I am of the opinion that the following are the issues that present for resolution:-
 - a. Whether the contract between the parties was concluded in compliance with the law and what are the attendant consequences?
 - b. Whether the contract was frustrated by supervening events beyond the control of the parties.
 - c. What is the legal effect of the Discharge Voucher that was executed by the parties?

Analysis

12. The Claimant tendered in evidence the contract between the parties. According to the instrument, the Claimant was engaged to work for the Respondent in its Water Recovery Project in Benin City, Nigeria. The parties are in agreement that the contract was signed in Kenya before the Claimant was asked to travel to Nigeria for the assignment.
13. In *Kamurasi v Absa Bank Kenya PLC & another (Employment and Labour Relations Cause E612 of 2021) [2023] KEELRC 3229 (KLR) (7 December 2023) (Judgment)*, the court described a foreign contract of service as follows:-

“...a foreign contract of service is an employment contract which is concluded in Kenya but which is to be performed outside Kenya either wholly or partially. This includes a contract of employment with a foreign state which is concluded in Kenya.”
14. The instant contract fits the above description. It was concluded in Kenya but was to be performed in Nigeria. It is therefore a foreign contract of service.



15. Section 83 of the *Employment Act* provides as follows in regard to foreign contracts of service:-
“A foreign contract of service shall be in the prescribed form, signed by the parties thereto, and shall be attested by a labour officer.”
16. The above provision is couched in mandatory terms. It requires foreign contracts of service to be:-
- Prepared in the prescribed form.
 - Signed by the parties to it.
 - Attested by a labour officer.
17. The Schedule to the *Employment Act* has the format of a foreign contract of service that the law prescribes. Among other things, the contract must contain provisions on: transport of the employee whilst in the foreign State; the procedure to be followed in case of death, desertion of or serious injury to the employee; and repatriation of the employee at the close of the contract.
18. The contract of service in the instant case does not meet these statutory threshold. It does not address the matters mentioned above. Neither was it attested by a labour officer from the Ministry of Labour in Kenya.
19. What then is the effect of the foregoing? In my view, the failure by the parties to formalize their contract in terms of the provisions of the law on foreign contracts renders the contract contrary to law. In effect, the contract became invalid for want of compliance with the aforesaid mandatory provisions of statute. Thus and for all purposes and intents, the contract became an illegal contract.
20. Can the court enforce a contract that is contrary to law? The answer to this question is to be found in the Court of Appeal decision of *Kenya Airways Limited vs. Satwant Singh Flora* [2013] eKLR.
21. Quoting from the *Halsbury's Laws of England (4th Edition)*, volume 16 (1A) page 29, the court expressed itself on the issue as follows:-
“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.”
22. The court went further to observe as follows on the issue of enforceability of a contract procured in contravention of the law:-
“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.”



23. In the instant case, the Claimant acknowledges that she entered into the foreign contract outside the provisions of the *Employment Act*. She consciously participated in the process of concluding the contract knowing it to be contrary to the law. Therefore, she cannot now turn around and ask the court to enforce the contract.
24. But even if I was wrong on the foregoing, it is evident that the contract, if it was valid, was frustrated by the supervening outbreak of the Covid pandemic. The Respondent has testified that at the close of March 2020, its project was shut down as part of the containment measures to control the spread of the virus.
25. This fact was confirmed by the Claimant during her cross examination. She stated that her work required her to visit the project site. She confirmed that this was rendered impossible after the site was closed to contain the spread of the virus. The Claimant affirmed the Respondent's position that the outbreak of the virus was an unforeseen occurrence.
26. The Claimant does not deny that the Covid 19 pandemic led to the shutdown of her workplace rendering it impossible for her to continue working. However, she argues that the Respondent cannot invoke this as the reason to plead frustration of their contract because force majeure is not recognized as one of the reasons that could occasion closure of the relation in the contractual instrument.
27. Force majeure or indeed any other frustrating event can result in closure of a contract notwithstanding that the parties did not specifically allude to it in their contract. Therefore, the Claimant's assertion that the Respondent cannot, in the circumstances, rely on the doctrine to plead discharge of their contract holds no water.
28. Finally, the Respondent contends that the Claimant released it (the Respondent) from further claims arising from the contract after she executed a discharge instrument through which she acknowledged some payments. To fortify this contention, the Respondent tendered in evidence a Deed of Discharge dated 25th August 2020.
29. Through the instrument, the Claimant acknowledged receipt of Ksh. 26,785.00 in full and final settlement of all terminal dues and benefits arising from her employment with the Respondent. Further, she affirmed that she had no other claims of whatever nature against the Respondent relating to her employment whether in respect of service pay, payment in lieu of notice, pension, overtime, unpaid salary, leave, allowances or otherwise.
30. Whilst the Respondent contends that this instrument absolved it from further claims by the Claimant, the latter holds a different view. According to the Claimant, she was coerced into signing the instrument. Therefore, it did not release the Respondent from further claims.
31. Apart from making bare assertions of coercion, the Claimant did not table cogent evidence to fortify her contention. Further, she did not provide particulars of the alleged coercion. The contention that she needed finances and that she was not going to get the money if she did not sign the instrument is not evidence of coercion.
32. In *Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR)* the Court of Appeal stated as follows regarding proof of vitiating elements for a contract:-

“It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically [be] proved by cogent evidence and not on



the balance of probabilities as wrongly held by the trial court. Proof has to be higher than on the balance of probabilities but slightly lower than proof beyond reasonable doubt.”

33. The Claimant has not met this threshold. She has neither provided particulars of her assertion of coercion nor presented evidence in support of it.
34. A discharge voucher is a contractual document that binds those who have executed it. Once signed, it has contractual force until it is set aside on the usual terms that will be invoked to vitiate a contract (*Barasa v Opibus Ltd (Cause E1008 of 2021) [2022] KEELRC 13119 (KLR) (9 November 2022) (Judgment)*).
35. As indicated earlier, it is this court’s finding that the contract between the parties was rendered incapable of enforcement because it was entered into in contravention of express provisions of statute. However, even if this was not the case, I would still have declined to entertain the claim on the ground that, by signing the Deed of Discharge, the Claimant discharged the Respondent from further liability under the contract.

Determination

36. The upshot is that I find that the Claimant’s case is without merit.
37. As a result, I dismiss the suit with no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

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

