



Mureriwa v Salvation Army Leaders' Training College of Africa and Resource Centre Limited (Employment and Labour Relations Cause E325 of 2022) [2024] KEELRC 2642 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2642 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E325 OF 2022
BOM MANANI, J
OCTOBER 31, 2024**

BETWEEN
DAGOBERTH MUSIWA GRAME MURERIWA CLAIMANT
AND
THE SALVATION ARMY LEADERS' TRAINING COLLEGE OF AFRICA AND RESOURCE CENTRE LIMITED RESPONDENT

JUDGMENT

Background

1. The Claimant has instituted these proceedings to challenge the legality of the Respondent's decision to terminate his contract of service. According to him, the Respondent's action violated his constitutional rights and provisions of the *Employment Act*. As such, it was unlawful.
2. On the other hand, the Respondent contends that performance of the contract between them was rendered impossible due to the inability of the parties to procure a work permit for the Claimant. Consequently, the employment relation could not be legitimately sustained. As such, it was brought to a close.

Claimant's Case

3. The Claimant avers that he is a national of Zimbabwe. He avers that the parties to the action first entered into a two year contract of service whose tenure ran between 15th April 2019 and 15th April 2021.
4. He contends that the Respondent hired his services as a Child Protection Specialist Strategist for Africa. His duty station was Nairobi, Kenya but he reported to the International Child Protection Specialist in London.



5. The Claimant contends that on his appointment, the Respondent processed a work permit for him in terms of section 25 (2) of the *Kenya Citizenship and Immigration Act*, 2011. As such, the first contract between them was executed flawlessly without hitches.
6. The Claimant contends that when the aforesaid contract lapsed, the Respondent offered him a fresh contract for a further two years. As a result, the parties executed a new contract of service which was to run from 16th April 2021 to 15th April 2023. The terms of engagement remained substantially similar to those in the first contract with the Claimant retaining the same job title.
7. The Claimant contends that under the new contract, he was entitled to: consolidated salary of Ksh. 450,730.00 per month; annual leave of 21 days with leave allowance of Ksh. 10,000.00; medical insurance cover and social fund contribution; and a repatriation package comprising of air tickets and shipment of personal belongings.
8. The Claimant contends that the Respondent having re-engaged his services was obligated to procure a fresh work permit for him in terms of section 45(2) of the *Kenya Citizenship and Immigration Act*, 2011. However, it failed to do so within reasonable time notwithstanding that he had supplied it with all the material required for the exercise.
9. The Claimant contends that around 19th August 2021, he received a telephone call from one of the Respondent's officers informing him that he was required to raise a bribe to be paid to officers at the Immigration Department, Nairobi to enable him secure the work permit. He contends that having regard to his values and principles and taking into account that the Respondent was a Christian organization, he declined the request.
10. The Claimant avers that he promptly drew the attention of the Respondent's management to this development. However, the management allegedly indicated that it did not see anything wrong with the proposal that the officers at the Immigration Department be facilitated to fast track processing of the work permit.
11. The Claimant further contends that the Respondent's officers suggested to him that he makes a personal visit to the Immigration offices to follow up on the work permit despite the fact that the law places this obligation on the employer. He avers that he rejected the unethical suggestions that he procures the permit through corrupt means.
12. The Claimant avers that when he resisted the proposal by the Respondent's officers, the Respondent suspended him from work for an indefinite period allegedly because he did not have a valid work permit. He contends that the Respondent indicated that he will remain suspended from duty until the work permit was procured.
13. The Claimant avers that although the Respondent suspended him from work, it assured him that it will not withhold his emoluments. However and contrary to this assurance, the Respondent allegedly stopped payment of his salary as from September 2021.
14. He contends that shortly after being informed of the decision to stop his salary on 9th September 2021, the Respondent issued him with a letter dated 23rd September 2021 terminating his services allegedly because he did not qualify to work in Kenya without a valid work permit. He contends that the Respondent informed him that efforts to procure the permit had been unsuccessful thus rendering it necessary to terminate his employment.
15. The Claimant contends that the Respondent's decision to terminate his contract of service was without lawful cause. He avers that by the time the decision was made, the Immigration Department



had already issued the Respondent with a notification indicating that the application for the work permit had been approved. This notification was allegedly issued to the Respondent on 23rd August 2021 and it (the Respondent) was asked to pay the renewal fees but failed to do so.

16. The Claimant further contends that the Respondent terminated his services without according him the opportunity to be heard. As such, the decision violated the procedural protections that are accorded to him under the *Employment Act*.
17. The Claimant contends that even if it had become difficult to procure the work permit as alleged, the Respondent ought not to have resorted to the drastic measure of terminating his employment. According to him, the Respondent had the option of changing his work station from Kenya to Harare, Zimbabwe where it had a presence.
18. The Claimant contends that following the termination of his employment, the Respondent forced him to exit the country hurriedly without facilitation. He contends that this forced him to hurriedly give up his residence and dispose of his household belongings at throw away price since it was not possible to ship them to Zimbabwe. As such, he prays that the Respondent pays him for the loss.
19. The Claimant avers that the Respondent's actions were discriminatory and violated his constitutional rights to: equal treatment and freedom from discrimination; human dignity; and fair labour practice. He contends that the Respondent's actions subjected him to extreme mental anguish.

Respondent's Case

20. On its part, the Respondent denies that it unlawfully terminated the Claimant's contract of service. According to it, the parties entered into a two year fixed term contract commencing 15th April 2021 which was subject to obtaining a work permit for the Claimant.
21. The Respondent asserts that prior to this, the parties had a previous employment relation which commenced on 15th April 2019. This earlier relation was evidenced in a contract which was executed on 1st June 2019 but backdated to the effective date.
22. The Respondent avers that the work permit it procured for the Claimant under the previous contract ran for two years until 15th April 2021. As such and in order to facilitate re-issue of the permit for purposes of the renewed contract, it was forced to secure an extension of the first work permit for a period of three months until 15th July 2021.
23. The Respondent avers that concurrent with taking these steps, it lodged an application for a fresh work permit for the Claimant. However, the State agency in charge of issuing the permits failed to promptly act on the application. As a result, the anticipated permit had not been processed at the time that the temporary one which was to run up to 15th July 2021 lapsed.
24. The Respondent contends that it made every effort to pursue the new permit but to no avail. It contends that throughout the process, it kept the Claimant informed of the progress.
25. The Respondent avers that the procedure for processing work permits is such that the State agency charged with the responsibility of issuing the permits notifies the applicant once the application for the permit has been approved. This is meant to trigger the process of payment for the document before it can issue.
26. The Respondent contends that since it was the applicant in the instant case, the foresaid notification was supposed to have been channeled to it. However, it did not receive it (the notification). It denies receiving the notification dated 23rd August 2021.



27. As a result of the delay, the Respondent states that it suspended the Claimant from performing his duties in order to remain compliant with the law. It also contends that it stopped the Claimant's salary since it would have been illegal to continue remunerating him when he was not a holder of a valid work permit.
28. The Respondent contends that in the meanwhile, it requested the Claimant to try and secure a temporary permit as it pursued issuance of the two year permit. The Respondent avers that it made this request since it had been advised that it would be easier to secure the temporary permit if the Claimant visited the Immigration Department in person. The Respondent contends that the temporary permit was to enable it to resume paying the Claimant's salary as the parties awaited issuance of the two year permit.
29. The Respondent avers that when it became apparent that the Immigration Department was nonresponsive to its request to issue the Claimant with a work permit, it became obvious that the latter would not be eligible to work in Kenya since he had no work permit. As such, it terminated the employment relation between them.
30. The Respondent contends that it acted in accordance with the law in making the aforesaid decision since it would have been illegal to retain the Claimant in its employment in the absence of a work permit. It contends that it paid the Claimant: his salary for September 2021; pay in lieu of leave; pay for two months in lieu of notice to terminate his contract; and an equivalent of USD 1000 to cover his relocation expenses.
31. The Respondent denies that it was responsible for the losses that the Claimant allegedly suffered as a result of his abrupt relocation. It contends that it did all that was reasonable in the circumstances to ensure the ease of his relocation to Zimbabwe.
32. The Respondent contends that the contract between them did not provide for repatriation fees for the Claimant. However and notwithstanding this, it provided him with financial assistance to relocate to Zimbabwe.
33. The Respondent denies that the Immigration Department asked for a bribe in order to issue the Claimant with the work permit or that its officers asked him to corruptly procure the permit. It contends that the process of renewal of the permit was above board and the only reason why the Immigration Department was reluctant to renew the instrument was that it (the Immigration Department) was not convinced that the Claimant's services were of a specialized nature which required the engagement of a foreign national.
34. The Respondent contends that the Claimant's employment was terminated by operation of law when the Immigration Department failed to renew his work permit after the temporary permit expired on 15th July 2015. As such, its letter of 23rd September 2021 was to merely communicate this reality.

Issues for Determination

35. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues for determination in the cause:-
 - a. Whether the Claimant's contract of service was legitimately terminated.
 - b. Whether the Respondent's actions violated the Claimant's constitutional rights as claimed in the Statement of Claim.
 - c. Whether the Claimant is entitled to the reliefs that he seeks in the action.



36. There is no dispute that the Claimant was a Zimbabwean national engaged to work in Kenya. As such, it is not in dispute that he required a work permit in order to lawfully perform his services in the country.
37. The requirement for a work permit for foreign nationals seeking to work in Kenya is anchored on section 45 (1) & (2) of the *Kenya Citizenship and Immigration Act*, 2011. It provides as follows:-
- i. No person shall employ:-
 - a. a foreign national who entered Kenya illegally;
 - b. a foreign national whose status does not authorize him or her to engage in employment;
 - c. a foreign national on terms, conditions or in a capacity different from those authorized in such foreign national's status.
 - ii. 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 subsection (1).
38. Section 45 (6) as read with section 53 (1) (m) & (n) of the Act makes it an offense for one to permit a foreign national to work in Kenya without a valid work permit. It also makes it an offense for a foreign national to offer his services in Kenya without a valid work permit.
39. The evidence on record shows that the parties renewed their employment relation for a further term of two years as from 16th April 2021. The Claimant signed the instrument evidencing the renewal of contract on 6th April 2021 whilst the Respondent signed it on 29th April 2021.
40. The parties are in agreement that prior to this renewal, they had a two year contract which ran from 15th April 2019 to 15th April 2021. They also agree that they had procured a work permit for the contract which expired on 15th April 2021.
41. The Respondent contends that when the aforesaid permit expired, it applied for its extension for a period of three months until 15th July 2021 in order to cover the Claimant's activities as it pursued the permit for the new contract. It contends that this application was granted.
42. The record does not suggest that the Claimant contested the foregoing averment by the Respondent. As such, the court takes it that the Claimant's work permit which was to expire on 15th April 2021 was temporarily extended for a period of three months until 15th July 2021 to enable the parties procure a work permit for the proposed renewed contract.
43. Therefore, when the parties renewed their contract on 29th April 2021, the Claimant had a subsisting work permit whose validity was to expire on 15th July 2021. As such, the parties acted within the purview of section 45(1) of the *Kenya Citizenship and Immigration Act* when they renewed the contract.
44. It is therefore apparent that the parties validly renewed the contract of service between them on 29th April 2021. This is because they were working on the basis of the temporary work permit at the time.
45. The evidence on record shows that on 15th April 2021, the Respondent made a request for a new work permit for the Claimant to cover their anticipated renewed contract. Although the application was



- open ended, it is apparent that it was intended for the Immigration Department since it is the only government agency in Kenya which is charged with the responsibility of issuing work permits.
46. Section 45 (2) of the [Kenya Citizenship and Immigration Act](#) places the obligation of applying for a work permit for a foreign national on the employer. As such, it was the Respondent's duty to apply for a work permit for the Claimant. In my view, the Respondent discharged this obligation when it made the aforesaid application to the Immigration Department.
 47. Although the Claimant's contract of service was validly renewed on 29th April 2021 on the basis of the temporary work permit, it ran into headwinds when this permit expired on 15th July 2021 before the permit for the extended term of the contract was issued. Technically therefore, the contract between the parties suffered frustration by operation of law. It could no longer be lawfully performed after 15th July 2021 in the absence of a work permit.
 48. The foregoing was declared to be the case by the Court of Appeal in the case of Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR. The court observed that failure to secure a work permit under the [Kenya Citizenship and Immigration Act](#) had the potential of frustrating a contract of service particularly if non-issuance of the permit was due to no fault of either of the parties to the contract.
 49. The evidence on record demonstrates that the Respondent did what was required of it to procure a work permit for the Claimant. As indicated earlier, it (the Respondent) applied for the permit as required under section 45 (2) of [Kenya Citizenship and Immigration Act](#).
 50. The parties agree that once the Respondent lodged the application, the Immigration Department was required to review it (the application) and send the Respondent a notification showing that it (the application) had been approved. This was to enable the Respondent to move the process further by paying the requisite fee for the permit.
 51. No evidence was tendered to demonstrate that the Immigration Department send the aforesaid notification to the Respondent. Although the Claimant says that when he visited the Department, he was informed that the application had been approved, there is no evidence that the Department relayed this information to the Respondent.
 52. There is no evidence to suggest that notification of approval of the Respondent's application was sent to its (the Respondent's) portal. The screenshots of the purported approval dated 23rd August 2021 which the Claimant produced in evidence were not authenticated by an official from the Immigration Department. Besides, they (the screenshots) do not constitute evidence of dispatch of the notification to the Respondent.
 53. Importantly, the screenshots were supposedly copies of extracts of public documents which are alleged to be in the custody of a government agency. However, they were not certified as true copies of the physical records at the Immigration Department. As such, they do not meet the evidential threshold set by section 81 of the [Evidence Act](#). Consequently, the court is unable to rely on them to return a verdict that the Immigration Department had approved the Respondent's work permit application.
 54. The Claimant also produced an extract of his passport to anchor his contention that the work permit was renewed and evidence thereof endorsed on the passport. However, it is noteworthy that the endorsement in the passport appears to have been made on 21st October 2021 long after the decision to terminate the Claimant's contract for lack of the permit had been made.
 55. Importantly, the entries in the passport suffer the same challenge that afflicted the documents that were purported to have emanated from the Immigration Department. Like the other documents, the endorsement on the passport is supposedly meant to speak to entries in original records held by the



Immigration Department. However, the extract of the endorsement was not certified as a true copy of the document it was extracted from. As such, it bears no evidential value in view of the requirements under section 81 of the *Evidence Act*.

56. In view of the contested nature of the screenshots and the endorsement on the Claimant's passport, it would have been helpful if the Claimant had called an official from the Immigration Department to speak to them. Such witness would not only have clarified whether the entries in the copies tally with the records that are held by the Department but also verified if the notification was sent to the Respondent's last known email or postal address. However and as the record shows, no such witness was presented.
57. Having regard to the foregoing, I am not convinced that when the Respondent wrote to the Claimant on 23rd September 2021 informing him of the decision to terminate their relation because of lack of a valid work permit, it had information from the Immigration Department that the latter had approved its (the Respondent's) application for a work permit for the Claimant. As such, the critical question at this juncture is whether the Respondent was entitled to close the relation between the parties and if so, whether it was entitled to close it in the manner that it did.
58. In my view, the contract between the parties though valid, was frustrated by operation of law from 15th July 2021 when the Claimant's temporary work permit expired before they obtained the new permit. From this point in time, the contract could no longer be performed for want of a valid work permit. The Respondent's letter to the Claimant on 23rd September 2021 merely communicated this reality.
59. How was the Respondent to have closed the frustrated contract between the parties? The answer to this question was suggested by the Court of Appeal in the case of *Five Forty Aviation Limited v Erwan Lanoe* (supra). In the aforesaid case, the court observed as follows on the subject:-

“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.”

60. In effect, the Court of Appeal was of the view that a contract of service which has been frustrated by supervening events ought to be formally closed by the parties to it. The court suggested two ways of closing such contract.
61. First, if the contract has an express termination clause, the parties may either invoke the clause by issuing the requisite notice to terminate it or by making payment in lieu of such notice. Alternately, they may invoke the procedure under sections 41, 43 and 45 of the *Employment Act* to close their relation.
62. It appears that the aforesaid dual procedure applies where the contract in question has an express clause on termination. However, where the contract does not have such clause, the parties can only fall back to sections 41, 43 and 45 of the *Employment Act* to close it.



63. In order to determine the validity of the Respondent's action, the court needs to examine whether it (the Respondent) terminated the Claimant's employment using either of the aforesaid approaches. The evidence before court shows that the contract between the parties had a termination clause. Clause 8 thereof provided for the manner in which the contract could be terminated midstream. This was by either party giving the other one month's notice to terminate it (the contract) or paying an amount which is equivalent to the notice period.
64. The record shows that the Respondent paid the Claimant salary in lieu of notice to terminate the contract. As such, it does appear that the Respondent opted to terminate the contract by invoking the termination clause. This appears to fall within the parameters that were set by the Court of Appeal in the *Five Forty Aviation Limited v Erwan Lanoe* case (supra).
65. The Claimant has relied on the case of *Justin Beswick v Local Ocean Conservation (LOC) Kenya Ltd [2022] eKLR* to contend that the Respondent should have subjected him to a hearing before closure of the contract as required under section 41 of the *Employment Act*. However, the facts in the two cases are distinguishable.
66. The decision in *Justin Beswick v Local Ocean Conservation (LOC) Kenya Ltd [supra]* was rendered in the context of a contract of service which had been renewed through the conduct of the parties as opposed to their express agreement. As such, it could not have been possible for it (the contract) to have had an express provision regarding the mode of its termination. Consequently, the parties thereto did not have the luxury of electing whether to terminate the contract by reference to a termination clause in it or by invoking the provisions of sections 41, 43 and 45 of the *Employment Act* as suggested by the Court of Appeal in the *Five Forty Aviation Limited v Erwan Lanoe* case (supra). They could only have closed it by invoking the provisions of sections 41, 43 and 45 of the *Employment Act*.
67. Conversely, in the instant case, the parties had an express contract of service with an express termination clause. As such and in terms of the *Five Forty Aviation Limited v Erwan Lanoe* case (supra), they had the option of either following the procedure under sections 41, 43 and 45 of the *Employment Act* or issuing notice to terminate the frustrated contract in terms of section 35 of the Act as read with clause 8 of the contract.
68. The Claimant's counsel has submitted that the Respondent has not demonstrated that it had received communication from the Immigration Department confirming rejection of the application for the work permit before it took the decision to terminate the Claimant's services. As such, it had no valid reason to justify its decision.
69. The record shows that the application for the work permit was lodged in April 2021. From this date when the application was lodged to 23rd September 2021 when the decision to terminate the Claimant's employment was made, the Immigration Department had not formally communicated to the Respondent regarding the fate of the application.
70. As noted above, the Claimant's situation was aggravated further as from 15th July 2021 when his temporary permit expired. From this date, his status as an employee of the Respondent was in conflict with the law.
71. The parties agree that after lodging the application for the work permit, the Immigration Department was to have communicated to the Respondent regarding its fate. However, as the record shows, it did not.



72. What was the Respondent expected to have done in the circumstances? Was it expected to have compelled the Immigration Department to dispatch the notification to its email address? Such suggestion would be outrageous.
73. The Respondent was reasonably entitled to expect that the Immigration Department will do its part once it decided on the fate of the application without being prodded. As such, I find that the Respondent's decision to await official communication from the said Department after it lodged the application was not unreasonable.
74. As the record shows, the Respondent awaited a response on its application from the Immigration Department for more than two months to no avail. Meanwhile, the parties were still holding onto an employment contract which could not be implemented due to absence of a work permit.
75. In my view, it was not unreasonable, in the circumstances, for the Respondent to have considered the relation as having failed. As such, it was not unreasonable for it to have taken the decision to close the said relation by issuing the Claimant the letter dated 23rd September 2021.
76. The Claimant has accused the Respondent of having violated his right to equal treatment and protection from discrimination. However, he did not present evidence to demonstrate how the Respondent's actions amounted to discriminatory action against him.
77. The Claimant has also accused the Respondent of having violated his rights to fair labour practice and human dignity. However, it is doubtful that these rights were violated as asserted.
78. The evidence on record suggests that the Respondent suspended the Claimant's duties and salary before terminating his services because of inability by the parties to procure a work permit for the Claimant. Section 45 (1) (b) of the Kenya Immigration and Citizenship Act prohibits anyone from employing a foreign national whose status does not authorize him or her to engage in employment in the country. The Claimant ceased to enjoy the right to work in Kenya when his temporary work permit expired on 15th July 2021. Therefore, the law expressly prohibited the Respondent from retaining his services.
79. As such, the Respondent was obligated to suspend the Claimant from duty and stop payment of his salary until the latter's work permit was renewed. Once it became apparent that the permit was unlikely to be renewed, the Respondent was obligated in law to terminate the employment relation between the parties.
80. The Respondent's actions were, in the circumstances, dictated by law. The Respondent had to take the steps it did in order to avoid running afoul of the law. As such, I do not agree that by the Respondent acting as it did, it violated the Claimant's aforesaid constitutional rights.
81. The Claimant has argued that the Respondent's decision to terminate his services was in any event too drastic. According to him, the Respondent should have considered less drastic measures such as deploying him to work in Harare, Zimbabwe where the issue of work permit would not have arisen.
82. In response, the Respondent contends that the Claimant's services were required in Kenya, not Zimbabwe. It further contends that its Zimbabwe post was closed in 2021. As such, it would not have been possible to have the Claimant work from Zimbabwe.
83. Ordinarily, the employer retains the right and discretion to determine where an employee will perform his duties from. It is the employer who knows best where the employee's services are required. Therefore, it is not open to the employee or indeed the court to choose a workstation for the employer.



84. The Claimant has blamed the Respondent for the loss he allegedly suffered as a result of his hurried relocation to Zimbabwe. He contends that the Respondent forced him out of the country by buying him an outbound air ticket without consulting him. As a result, he was forced to dispose of his household goods at throw away price and give out others for free.
85. In response, the Respondent contends that its decision was dictated by the fact that the Claimant's right to remain in Kenya had terminated after his work permit expired. As such, it became necessary to make arrangements for his exit in order to avoid exposing him to possible conflict with the law.
86. I have considered the contrasting arguments on this matter. I am in agreement with the Respondent that the circumstances obtaining at the time the Claimant was asked to relocate to Zimbabwe justified that decision. Although the Claimant states that he was entitled to be in Kenya for a further three months, he did not provide cogent evidence to support this contention. In any event, if this was the case, then he had the liberty of rescheduling his travel itinerary in order to create sufficient time to dispose of his household goods.
87. In effect, I do not think that the Respondent was responsible for the Claimant's decision to hurriedly dispose of his household goods. As such, I do not agree that it (the Respondent) should be compelled to make good any loss that the Claimant may have suffered as a result.

Determination

88. The upshot is that I find that the Claimant's case against the Respondent is devoid of merit.
89. As such, the suit is dismissed.
90. Costs of the case are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 31ST DAY OF OCTOBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

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

