



**Maso v Leopard Point Luxury Beach Management Ltd (Cause
56 of 2018) [2022] KEELRC 1604 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1604 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE 56 OF 2018
BOM MANANI, J
JULY 29, 2022**

BETWEEN

ILLARIA DI MASO CLAIMANT

AND

LEOPARD POINT LUXURY BEACH MANAGEMENT LTD RESPONDENT

JUDGMENT

Introduction

1. The claimant is an Italian national currently resident in Malindi within Kilifi County in the Republic of Kenya. She has sued the respondent for alleged wrongful termination. It is her case that the respondent constructively and therefore unlawfully terminated her employment. As a result, she seeks compensation for this alleged transgression against her.
2. The respondent disputes the claim. It is the respondent's position that the claimant was never the respondent's employee. And hence the claim is without merit and should be dismissed.

Claimant's Case

3. According to the claimant, she was first engaged by the respondent in the year 2014. However, she resigned in March 2015 after the respondent failed to remunerate her for services rendered.
4. The claimant states that in November 2016, she was re-engaged by the respondent to serve as the respondent's acting Resident Manager. Her starting monthly salary was initially Ksh. 50,000/= before rising to Ksh. 150,000/= in March 2017.
5. The claimant states that all this time, she had not procured a work permit. She was waiting for the respondent to process one for her in terms of the alleged agreement between the parties. Meanwhile, the claimant indicates that she was relying on the acknowledgement for a special pass application issued to her by the government of Kenya on April 18, 2017 to continue working.



6. The claimant states that despite the promise by the respondent's management to get her a work permit, this never came to pass. Instead, the respondent employed another person in August 2017 in the same position that the claimant was serving.
7. According to the claimant, these developments signaled to her the fact that the respondent was not keen to retain her services. And hence the conclusion that she had been constructively terminated.
8. The claimant contends that her termination was abrupt and without the benefit of any discussions between her and the respondent's management. And hence her contention that the termination was unlawful.
9. It is the claimant's case that the respondent's actions were calculated towards frustrating the contract of service between the parties. According to the claimant, the failure by the respondent to procure a work permit for her was intended to deprive the claimant the legal standing to continue working for the respondent.
10. The claimant states that the respondent has neglected to pay her terminal dues as particularized in the Memorandum of Claim. Consequently, she prays for judgment in terms of the Memorandum of Claim.

Respondent's Case

11. The respondent filed a response to the claim. It is dated May 14, 2019.
12. The gist of the defense is that the respondent never quite employed the claimant. That the claimant's engagement with the respondent was a voluntary non-contractual one as the respondent awaited the claimant to obtain a valid work permit. According to the respondent, it only permitted the claimant to report to its premises under probation awaiting the work permit. Any payments made to the claimant during this period were not a salary but ex-gratia payments meant to motivate the claimant as the relevant documentation permitting her to be employed in Kenya were awaited for.
13. The respondent denies that it was under legal obligation to procure a work permit for the claimant. In the respondent's view, this responsibility lay with the claimant.
14. The respondent denies that the claimant is entitled to claim for compensation for wrongful termination against it as the claimant was never in the respondent's employment. In the premises, the respondent denies obligation to pay the claimant the damages particularized in the Memorandum of Claim.

Issues for Determination

15. The parties did not frame the issues for determination at the pretrial stage. However, the court considers the following as the fundamental questions to be addressed: -
 - a. Whether there was an employer-employee relationship between the claimant and the respondent.
 - b. If the answer to question a) is in the affirmative, whether the relationship was vitiated by the absence of a valid work permit for the claimant.
 - c. Whether the contract of service between the parties, if at all, was constructively terminated.
 - d. What reliefs are appropriate in the circumstances?



Analysis and Determination

16. Both parties gave evidence in support of their case. The claimant testified as the sole witness in support of her case whilst the respondent's witness was one Antonio Colleluori.
17. The evidence of the parties basically reiterates their case as set out in their pleadings. I must however state that there was considerable variance between the defense statement filed by the respondent and the evidence presented by its witness. For instance, whilst in the statement of defense, the respondent appears to suggest that the claimant was permitted to interact with the respondent only on probationary basis, RW1 appeared to suggest in court that the claimant came in to lend a hand to the respondent in arranging documents in the respondent's office.
18. On the first (1st) issue, although the respondent vehemently denies having engaged the claimant as its employee, the available evidence suggests otherwise. It is clear from the defense evidence for instance that the claimant served in the respondent's offices to assist in arranging documentation. In fact, RW1 states that he allowed the claimant to assist him manage the respondent establishment as RW1 continued to look for a substantive manager to run the hotel business. He also states that he used to make some payments to the claimant in return for her service but denies that this was a salary. RW1 states that the claimant only left the establishment after RW1 had secured the services of a manager for it.
19. In the defense, it is also noted that the respondent states that the claimant was in the respondent establishment on probation. That she was paid some token not as salary but for motivation.
20. The [Employment Act](#) recognizes probationary employment. Consequently, the fact that the respondent states that the claimant was engaged on probation pending processing of her work permit can only be understood to mean that the parties had entered into an employment contract whether the same was legal or otherwise. This position is fortified by the respondent's own evidence that it used to make payments to the claimant in return for her services at the respondent establishment. It is further fortified by the testimony of RW1 that the claimant was allowed to assist him manage the establishment pending the hiring of a manager. The answer to the first question is therefore that there was a contract of employment between the claimant and the respondent.
21. On the second (2nd) issue, it is clear to me from the evidence of both the claimant and RW1 that the claimant did not have a work permit at the time the parties entered into the employer-employee relation aforesaid. According to the claimant, she continued working on the basis of the acknowledgement of special permit application issued to her by the Ministry of Interior and Co-ordination of National Government dated April 18, 2017. The document appears as document one (1) on the Claimant's list of documents dated July 19, 2018 and produced as exhibit in court.
22. Whilst the claimant states that it was the duty of the respondent to procure a work permit for her, the respondent denies that this obligation lay with it. Section 45 of the [Kenya Citizenship and Immigration Act](#) prohibits any person from employing a foreign national who has no work permit. Section 45 (2) of the Act specifically 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 subsection (1).”



23. From the foregoing it is clear to me that the respondent was prohibited from employing the claimant without a valid work permit. And the duty to procure the work permit for the claimant lay with the respondent in the event that the respondent desired to engage her services at the hotel establishment.
24. The fact that the respondent allowed the claimant to engage in any form of work related activities at its establishment without first obtaining a work permit for her violated statute and the respondent ought to know that such conduct is punishable at law. I mention this specifically because it is important for employers to know that it is unlawful for them to manipulate the requirement of work permit to exploit unsuspecting foreign nationals to work for them only for the employers to seek to avoid obligations under such contracts on the basis of their illegal action and hope to avoid criminal responsibility for it. Such employers must be warned that such behavior can easily result in criminal sanctions against them in the event the relevant agencies of government elect to pursue this line of action.
25. It is therefore plain that the contract of service between the parties to this action was vitiated by illegality. The fact that the claimant was issued with an acknowledgement slip for her application for a special pass could not take away the obligation to obtain a work permit before engaging in any form of employment relationship.
26. As the illegality afflicting the contract happened at its inception, the legal position is that the contract was rendered illegal ab initio. It is incapable of donating any enforceable rights to the parties. That being the case, it cannot be enforced by this court (see *Five Forty Aviation Limited v Richard Oloka* [2015] eKLR).
27. The position would perhaps have been different had the illegality happened as a supervening event to an otherwise legitimate contract of service. In such case, it may be possible to present a case for frustration of contract with a remote window for compensation to the innocent party (see *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR and *Justin Beswick v Local Ocean Conservation (LOC) Kenya Ltd* [2022] eKLR).
28. On the basis of the evidence before me I answer question two in the affirmative. The employment relationship between the parties to this dispute was vitiated due to the absence of a work permit. It therefore became illegal and incapable of enforcement.
29. Having found in the affirmative in respect of issue number two (2), it follows that there was no valid contract of service between the parties that would be capable of termination by the subsequent acts of either of the parties. The contract had already been rendered inoperative by illegality. Consequently, the question whether the claimant was constructively dismissed does not arise.

Determination

30. The foregoing being the position I find that the claimant has no enforceable cause of action against the respondent. Accordingly, I dismiss the suit herein. However, as it is clear to me that the respondent actively participated in engineering the current state of affairs, I decline to grant costs to the respondent.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JULY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Mwandilo for the Claimant



Michira for the Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on April 15, 2020, this judgment 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

JUDGE

