



Maxmillano v Leopard Point Beach Management Ltd (Employment and Labour Relations Claim E11 of 2021) [2022] KEELRC 1670 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1670 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
EMPLOYMENT AND LABOUR RELATIONS CLAIM E11 OF 2021**

BOM MANANI, J

JULY 29, 2022

BETWEEN

BETTA ROBERTO MAXMILLANO CLAIMANT

AND

LEOPARD POINT BEACH MANAGEMENT LTD RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation for unlawful termination. The Claimant who alleges to have been an employee of the Respondent asserts that he was terminated without regard for the law. And hence his prayer that he be compensated.
2. The Respondent filed a defense dated June 16, 2022 admitting that the Respondent was its employee. However, it denied that it terminated him unfairly.

Facts of the Case

3. According to the Statement of Claim, the Claimant is an Italian national currently residing in Malindi within the County of Kilifi. He was employed by the Respondent on May 23, 2019. He was to receive a monthly salary of Ksh. 100,000/= and share in the profits of the hotel business he was overseeing at the ratio of 10% of the net profits for the period he was to serve.
4. It is the Claimant's case that he was terminated verbally in September 2019. This was after he asked for settlement of his salary for September 2019.
5. The Claimant contends that his termination was in breach of the contract of service between the parties dated May 23, 2019. Accordingly, he prays for compensation for breach of contract. The Claimant has set out the particulars of damages that he seeks in the Statement of Claim.



6. At the trial, the Claimant adopted his witness statement filed in the cause and dated August 30, 2021 as his evidence in chief. He supplemented this evidence with his oral testimony. He also produced in evidence as exhibits all the documents attached to his list of documents dated 30th August 2021. The documents are marked as exhibits 1 to 7 in line with their numbering in the list of documents filed.
7. The Claimant reiterated the content of his Statement of Claim that he was an Italian national majoring in hotel management. He stated that previously, he was working in his motherland before the Respondent's management approached him with an offer to come and manage the Respondent's hotel business in Malindi, Kenya. It was the Claimant's evidence that he negotiated a deal with the Respondent's management before he relocated to Kenya.
8. It was the Claimant's further evidence that the parties agreed on an initial monthly salary of Ksh. 100,000/= . As well, the Claimant stated that the parties agreed that the Respondent will share with the Claimant part of its net profit from the business at the rate of 10% in favour of the Claimant for the duration of the contract between the parties.
9. The Claimant also testified that the parties agreed that the Respondent will refund the Claimant's airfare from Italy to Kenya. And that the Respondent will also reimburse the Claimant's expenses incurred towards procuring a work permit.
10. It was the Claimant's case that in breach of this arrangement, the Respondent's management terminated the employment contract between the parties in mid-September 2019 just about three months after the Claimant had taken up the assignment. That the termination was without lawful reason. In the Claimant's view, the termination appeared to have been motivated by his demand for the September 2019 salary.
11. It was the Claimant's case that the Respondent's management had perennially engaged in similar conduct against other staff. That often, the Respondent would engage foreign nationals only to drag their work permit processing procedures with the singular intent of getting rid of them. In a sense, the Claimant was stating that the Respondent's management was perhaps engaged in the practice of exploitation of labour from foreign nationals through dubious means.
12. The Claimant prayed that he be compensated for wrongful termination and that the Respondent be compelled to reimburse his airfare, and other expenses as agreed in the contract between the parties. He also prayed for an order that the Respondent pays him 10% of the profits earned by the Respondent during the period the Claimant was in the Respondent's employment.
13. The defense did not testify. However, it filed a defense admitting having employed the Claimant.

Analysis and Determination

14. Of immediate note is that the Claimant is a foreign national. This position is clear from the Claimant's own oral testimony. It is further corroborated by a copy of the passport he produced in evidence as exhibit five (5).
15. Thus, the issue of whether he was eligible to work in Kenya becomes a matter of central concern to the court. The court has to be sure that if it is to grant him any orders, it will be acting in furtherance of a legally enforceable contract between the parties. This is because section 45 of the [*Kenya Citizenship and Immigration Act*](#) forbids employers from employing a foreign national whose status does not permit him to be in employment in Kenya.
16. I have considered the evidence on record on this issue. According to the Claimant, he was employed at the Respondent's establishment in May 2019. He stated in his evidence that he was working for the



Respondent on the basis of a Special Pass issued to him by the relevant Kenyan Ministry entrusted with executing this mandate.

17. However, the Claimant did not produce evidence to demonstrate that he had authorization to work in Kenya between May 2019 when he was allegedly engaged by the Respondent and September 2019 when he was allegedly terminated. The only document relating to the Claimant's authorization to work in Kenya is the Special Pass he produced as exhibit 6. The Special Pass shows that he had authority of the Kenyan government to work in Kenya for three (3) months as from 14th January 2020, the date of issue of the Special Pass. No other Pass to cover March 2019 and September 2019 was produced in evidence. As a matter of fact, the Claimant's own letter to the Respondent dated September 28, 2019 and produced as exhibit 10 confirms that the Claimant did not have a work permit as at the time he was in the Respondent's employment when he says thus: -

“At the same time I kindly ask you to proceed with my work permit-still pending-as per the contract.”

18. It follows therefore that between March 2019 and September 2019, the Claimant has not proved that he possessed a valid work permit. As a result, he has not demonstrated that he was entitled by law to be in employment in Kenya.
19. In the Court of Appeal case of *Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited* [2015] eKLR, the court expressed itself as follows on the duty of the court when its attention is drawn to an arrangement whose legality is questioned: -

“.....once an issue of a breach of a statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the Court must investigate it because the court's fundamental role is to uphold the law.”

20. The court went further to quote with approval the decision in *Holman v Johnson* (1775-1802) All ER 98 where it is indicated that no court of law should lend its hand in enforcing an illegal arrangement. It stated as follows: -

“No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

21. It is true that the Claimant's case was not defended. However, from his own evidence, it is clear that he is seeking to enforce a contract that is not legitimized by section 45 of the *Kenya Citizenship and Immigration Act*. That being the position, and the court's attention having been drawn to this state of affairs by the Claimant's own evidence, it is bound not to enforce any rights flowing from the contract.
22. I understand the Claimant's plight as he was apparently led into an illegitimate arrangement by a party who may have been keen to exploit the law to evade its legal obligations. This is regrettable. In law, the obligation to procure work permits for foreign employees lies with the employer. To the extent that the Respondent did not discharge this mandate but went ahead to permit the Claimant to start working was out rightly illegitimate.
23. I note that it is not just in this case that the Respondent is accused of engaging in this illegitimate practice. The same complaint appears to have been the basis of the dispute in Malindi ELRC No. 56 of 2018, *Illaria Di Maso vs. Leonard Point Luxury Beach Management Ltd* (unreported). Further, the



Claimant has testified on the rampant nature of this practice in the Respondent institution. In my view, it is high time the authorities charged with regulating this sector inquired into the handling of foreign employees by the Respondent in order to nip in the bud any illegitimate activities in this respect.

24. Counsel for the Claimant has sought to rely on the Court of Appeal decision in *Five Forty Aviation Ltd –vs- Erwan Lance* (2019) eKLR to perhaps advance the position that the contract of employment between the parties ought to be considered as frustrated and not illegal. It is to be appreciated that in the Five Forty Case, the contract between the parties was valid before it was vitiated by the changes in law. In the case before me, the contract was ab initio void for want of compliance with Section 45 of the new Law.

Determination

25. I will accordingly dismiss this action. I will however not grant the Respondent costs of the action for reasons that it actively participated in setting up the current state of things.

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

B. O. M. MANANI

JUDGE

In the presence of:

Mwadilo for the Claimant

No appearance 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 15th April 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

