



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1698 OF 2016

MICHAEL MUHUKO NGIGI.....CLAIMANT

VERSUS

SWIVEL MARKETING LIMITED.....RESPONDENT

JUDGMENT

1. This suit was filed on 24.8.2016 and it seeks the following reliefs:

- a. A declaration that the Respondent's actions were too hostile for the Claimant to work under and thus subjecting him constructively desert employment.
- b. An order that the Claimant is entitled to the amount of Kshs. 7,786,350/- as pleaded at paragraph 14.
- c. Cost of the suit together with interest thereon at court rate.
- d. Any other relief as the Court may deem just.

2. The Respondent opposed the Claimants claims in its defence and lodged a counterclaim seeking Kshs. 350000 being one month salary in lieu of notice.

3. The suit proceeded to full hearing where both parties tendered evidence and thereafter filed written submissions.

CLAIMANT'S CASE

4. The Claimant testified as CW1 and he told the court how through a written contract dated 10.7.2014 he was employed by the Respondent as a Creative Director effective 1.10.2014 that his consolidated salary was Kshs. 35000 per month and he was to report to COO East Africa and dotted reporting to COO West Africa; that he was entitled to a per diem allowance of up to USD 40 per night out of base and USD 130 out of country/international travel and that he was also entitled to 21 leave days and a medical cover. His station was Nairobi.

5. It is further Claimant's case that in October 2014 he was sent to Accra Ghana for short time of 3 weeks to help jump start the company business there. He went heir on a visitors visa and he was put in a Hotel for a few days before being moved in a house rented by the company. When he asked about when he would came back to Kenya, he was told that he would return after he finished the work.

6. After some time, he realized that the work was not ending soon but he returned to Kenya in Christmas after his 70 days visitors visa lapsed. The visitors visa was given to him again and he returned to Ghana but this time round he raised the issue of per diem and but he was told that the company was not doing well. Thereafter he was told that the company could not pay him the per diem of USD 130 per day.

7. The Claimant further testified that the work environment became unbearable through denial of per diem and delayed salary. He also said that he lost his marriage due to his prolonged stay abroad. He further said that he was harassed by the Ghanaian Immigration Department due to lack of a work permit. Finally he came back to Kenya for a training and refused to return to Ghana. He further testified that although his boss allowed him to work from Kenya, he was sent to DR Congo for a week and again he was paid Kshs. 51000 instead of USD 130 per day.

8. He went on to say that due to the poor payment schedule, he fell into loan arrears and became the subject of harassment by Auctioneers. The delay in salary persisted upto 2 months and on 4.4.2016 he was for forced by circumstances to resign. As at that time he had no wife, no food and no electricity among others.

9. Finally he testified that he never went for his official leave during his employment and the only reason he came to Kenya was when his visa lapsed between 21.12.2014 – 11.1.2015, 3.4.2015-13.4.2015 and then 20.6.2016 to join Kenya office.

10. On cross-examination he admitted that, during his inter view he was told that the Respondent was an international company. He further admitted that he was the only Creative Director in the company. He maintained that he was based in Nairobi but he could serve other countries on short time basis. He confirmed that he was sent to Uganda and D.R. Congo. He reiterated that he was initially going to Ghana for 3 weeks.

11. He admitted that he wrote the email dated 20.11.2014 proposing for an extension of 6 months from January 2015 and offered to stay longer if the need arose. He contended that under the contract of employment he was entitled to a per diem of USD 130 per day while abroad. However, he admitted that by the said email dated 20.11.2014 he proposed a reduction of the per diem to Ghanaian cedis 1700 per day. According to him he proposed the said reduction out of desperation due to the tough conditions he was facing in Ghana after being put in the same house with strangers.

12. He maintained that his salary was constantly paid late and made a reference to page 9 of the documents filed by the Respondent. He clarified that he refused to return to Ghana in 2016. He admitted that he was paid all his salary arrears after resignation. He further admitted that the resignation letter indicated the reason for termination as personal issues and not hostile working environment.

13. However, he maintained that he was divorced for his extended stay in Ghana according to the divorce papers filed by his wife. He admitted that when he sought permission to go home to be with his family in December 2014 he was allowed.

14. He contended that after the lapse of 3 months' probation he was never given any letter confirming his appointment. He admitted that he resigned with one month's notice.

15. On re-examination he confirmed that his proposals in the email dated 2011, 2014 were never accepted and no response was given by the Respondent. Finally he contended that his resignation was accepted without any reservations.

DEFENCE CASE

16. Mr. Raymond Ngala is the Respondent Director Supply Chain and he testified as RW1. He stated that the Respondent is a Multinational Marketing Agency operating in Kenya, Ghana, Nigeria, Zambia, Uganda and D.R. Congo.

17. He further testified that the Claimant was appointed by the Respondent and the Group Creative Director serving all the said countries but reporting to MD East Africa and dotted reporting to MD West Africa. In the view of the RW1, the Claimant was a shared resource between East Africa and West Africa regions.

18. He contended that before the Claimant went to Ghana, there was a partial discussion and the Claimant never objected. RW1 went on to say that there was no time limit for the Claimant's stay in Ghana and that after 2 weeks stay in Ghana, the Claimant wrote a proposal to stay for 6 months or even longer and the RW1 accepted the proposal.

19. He further contended that after the lapse of 6 months, the Claimant continued with his work in Ghana without any objection. He contended that had the Claimant protested his prolonged stay in Ghana, the company would have returned her to Kenya. He contended further that whenever the Claimant requested for leave he was given as evidenced by email on page 9 of the Claimant's documents.

20. He contended that per diem out of base referred to when the Claimant was away from his work station whether in Kenya or Ghana. He contended that all the benefits payable to the Claimant were discussed before the transfer as evidence by the emails on page 6-10 of the Respondents bundle of documents. He stated that the Claimant was paid everything and denied that his salary was delayed. He further stated that the Claimant was receiving a consolidated pay and therefore the issue of housing should not arise.

21. On cross-examination he admitted that the Claimant's work station was Nairobi but he later went to Ghana after a discussion with the management team. He further admitted that there was no written evidence to prove that Claimant's work station was transferred from Nairobi to Ghana. He also admitted that no work permit was acquired for the Claimant in Ghana because his stay period was not ascertainable.

22. He confirmed that the contract of service for the Claimant provided for a per diem of USD 40 per night out of base and USD 130 for night out of the country. He denied the claim for USD 130 per night contending that his base had been moved to Ghana. He contended that it was an absurdity to pay such huge sums per diem. He reiterated that the Claimant proposed to stay longer in Ghana and the company paid to him an upkeep allowance and paid for his housing in Ghana. However he admitted that he had no evidence to prove that the upkeep allowance was paid to the Claimant.

23. He admitted that the Claimant's resignation was accepted unconditionally despite being one month's notice and in June 2016, the Claimant was paid his delayed salary together with terminal dues.

24. He reiterated that the Claimant was working both in Kenya and Ghana because he had a dotted reporting to the COO Ghana. He contended that there was no need if another contract after the initial one. He reiterated that the proposal by the Claimant in the email were not accepted. Finally he contended that the Claimant gave one month resignation notice instead of the required 2 months notice.

SUBMISSIONS

25. The Claimant submitted that based on the contract of service dated 10.7.2014, he was entitled to per diem of USD 130 for every night he spent in Ghana doing the company's assignment. He contended that his stay in Ghana was supposed to be on short term basis but it later turned out that he was required in Ghana for a longer term period.

26. He contended that after discussions with the Respondent the per diem was reduced to a monthly pay. He relied on section 10(5) of the Employment Act which provides that the employer shall change terms of employer's contract terms after consulting the employee. He further relied on **Justina Mutiti Nyaga v Kenya Civil Aviation Authority[2017]eKLR** where the court held that changes to employment status must be in writing and the employee for consent.

27. As regards the Claimant for leave, he contended that he never went for his annual leave and challenged the employer to produce any leave records.

28. Finally, he withdrew the Claim for damages for constructive dismissal but submitted that he is entitled to costs of the suit.

29. On the other hand, the Respondent submitted with respect to the claim for per diem, the court is obligated to look at the contract as a whole to deduce what the parties meant and understood the benefits and remuneration clause of the contract to mean. It submitted that the term "out of base" and "if not your home" had a special meaning referring to where the employee's long term station was.

30. It contended that stay of 6 months in Ghana meant that the Claimant posting there was long term. It further contended that the Claimant admitted in his email that his out of country per diem of USD 130 had been revised by an agreement due to the long term nature of the job. Consequently, it contended that the Claimant's change of mind after the mutual review of his per diems is in bad faith. It further contended that the working "upto" in reference to the per diem meant that the figure was not fixed but the maximum amount payable.

31. As regards to the claim for leave, the Respondent submitted that the Claimant took leave in the 12 months he worked between July 2014 and July 2015 as evidenced by emails in page 6-10 of the Claimant's documents. It contended that the only leave due is from July 2015 to May 2016 when he resigned.

32. As regards the counter-claim, the Respondent contended that the Claimant served one month's notice instead of the required 2 months and as such it prayed for salary in lieu of notice by dint of section 36 of the Employment Act. It also prayed for costs.

ISSUES FOR DETERMINATION AND ANALYSIS

33. Having considered the pleadings, evidence and submissions, I find no dispute that the Claimant was employed by the Respondent from 10.7.2014 to 4.4.2016 when he resigned by serving one month notice. After the withdrawal of the claim for Constructive dismissal, the only issues for determination are:

- (a) Whether the Claimant is entitled to per diem at the rate of USD 130 per day for period he worked in Ghana.
- (b) Whether the Claimant is entitled to the claim for leave for 2 years.
- (c) Whether the Respondent is entitled to one month salary in lieu of notice.
- (d) Who should meet the costs of the suit and counter claim?

CLAIM FOR PER DIEM

34. There is no dispute that the Claimant was sent for a short term assignment in Accra, Ghana. The assignment was initially intended to be for 3 weeks but when the situation on ground proved that more time was required the Claimant wrote a proposal for extension of his stay for a further 6 months from January 2015. The proposal was not expressly accepted but the consent can be implied from the fact that the Respondent continued to retain him there and pay the Claimant's salary while in Ghana until February 2016 when after attending a training in Kenya, he refused to rerun to Ghana and remained in Kenya where RW1 admitted to be Claimant's work station under the contract dated 10.7.2014.

35. With the foregoing background, I find that the Claimant was never posted formally to work in Accra Ghana as his official work station. He was only sent there for short term assignment of 3 weeks which ended up continuing for almost 2 years. I further find that there was no proper documents of the terms allegedly discussed between the Claimant and the Respondent about his relocation to Accra, Ghana and that is why this case is before this court in the first place. It follows therefore that the Claimant was entitled to the per diem terms spelt out in his contract no matter how huge it was.

36. However, the evidence on record from both sides show that there were discussions about a lesser figure than the per diem provided in the contract. Such compromise cannot go unnoticed because the Claimant acquiesced the same for almost two years. He cannot therefore turn round after such a long period and demand the arrears. I gather support from the Court of Appeal decision in **748 Air Services Limited V. Theuri Munyi [2017]eKLR** where the court held as follows concerning acquiesced reduction of salary for 8 months:-

“ . . .even where the contract contained a 'no oral variation' clause, the parties are at liberty to make a new contract varying the original contract by an oral agreement or by conduct. And so it is in this case. The variation of salary by the act of both parties was a new term which bond them. It was erroneous therefore for the trial court to find and hold that the original contract was not capable of variation and was not varied in respect of the salary clause.”

38. In addition to the foregoing the Claimant has not pleaded his claim with precision. He just pleaded a global sum of Kshs. 2,886,360 as per diem while in Ghana and D R Congo without indicating how he arrived at the said sum. It is well settled principle of pleadings that special damages must not only be pleaded specifically but must also be specifically proved. In this case the Claimant has neither pleaded the particulars of the days he is claiming the per diem nor has he proved the same. Consequently, the claim fails due to the compromise between the parties, and also due to lack of particulars.

CLAIM FOR LEAVE

39. The Claimant prayed for leave for 2 years totalling to Kshs. 700000. His contract of service provided for annual leave of 21 days. He admitted that he sought permission to return to Kenya to be with his family in December 2014. He further admitted that he come home from 21.12.2015 and from 3.4.2015 to 13.4.2015 but contended that the reason he came home is because his visitors visa had expired.

40. Having considered the evidence on the issue, I find that from 21.12.2014 – 11.1.2015 the Claimant rested for 12 days net of the public holidays and weekends. As from 3.4.2015 -13.4.2015, the claimant rested for 6 working days net of public holidays and weekends. Therefore the leave days taken were 18 days for the entire period of service. According to the Respondent the leave due is for less 9 ½ months. However, the said period is in addition of the 3 leave days taken in the initial 12 months ending July 2015. Hence the total leave owing are 15.75 plus 3 equalling to 18.75 days. Using Kshs. 350000 x 18.75/22 + Kshs. 298,295.45 for which I enter judgement in favour of the Claimant plus interest at court rate from the date of filing suit.

COUNTER CLAIM

41. The Respondent contended that it was served with a termination notice of one month instead of the 2 months provided in the contract. The Claimant admitted that he served one month notice and it was not challenged. I have perused the contract dated 10.7.2014 and confirmed that it provided for a notice of 2 months before termination. However RW1 admitted that the termination notice was accepted unconditionally.

42. Having considered the evidence it is clear that the Respondent did not protest against the Claimant serving one months' notice. It also did not raise any claim for the same or deduct the same from the salary and terminal dues which it paid the Claimant after separation. Consequently, I find that the counter claim by the Respondent is an after thought provoked by the claimants suit. It is estopped from raising the issue of notice at this juncture, and therefore it stands dismissed.

43. In conclusion I enter judgement for the Claimant in the sum of Kshs. 298,295.45 plus interest at court rates from the date of filing this suit. The award is less statutory deductions but in addition to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF AUGUST, 2021.

ONESMUS N. MAKAU

JUDGE

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.

ONESMUS N. MAKAU

JUDGE