



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2084 OF 2016

1. SABINA GATHONI WAMBUI

2. JANE WAMBUI GATHURU (suing as Administrators of the Estate of

John Kiunuhe Njega (Deceased)).....CLAIMANTS

VERSUS

ALIOS FINANCE KENYA LTD.....RESPONDENTS

J U D G M E N T

1. The claim before me is brought by Sabina Gathoni Wambui and Jane Wambui Gathuru (the Claimants) in their capacity as administrators of the estate of the late John Kiunuhe Njega (the deceased). The claim is against Alios Finance Kenya Limited (the Respondent).

2. Vide an employment contract titled employment proposal and signed by both the deceased and the Respondent on 26th February 2013, the deceased was employed by the Respondent as its Credit Manager, earning a net salary of ksh.150,000 per month which was also shown to be the gross. Probationary period was capped at six months. The insurance clause in the said employment contract stated as follows:-

“Insurance: consisted with the local medical policy. The policy includes the spouse and a maximum of three children. The policy will include the mandatory WIBA requirements for personal accident cover in Kenya, which will cover disability and accidents both on and off duty accidents.”

3. The Claimants pleaded in their statement of claim dated 10th October 2016 and filed in Court on the same date, that:-

a) the Respondent was under a contractual obligation to take out an insurance policy for the deceased's benefit.

b) the policy was to include the mandatory Work Injury Benefits Act requirements for personal accident cover in Kenya which would cover disability and accidents both on and off duty accidents by the deceased.

c) on 24th November 2013 at 6.10am, whilst the deceased was driving home in Athi River from work in Nairobi, the deceased was involved in a car crash along Mombasa Road near General Motors and the deceased succumbed to his injuries.

d) the Respondent took out an insurance policy with CIC General Insurance Limited that only covered the deceased from accidents occurring when the deceased was on duty. The Claimants averred that this was a breach of the express provisions of the deceased's employment contract.

e) the Respondent was under statutory obligation to provide to the deceased at all times during the deceased's employment, at the Respondent's own expense, reasonable housing accommodation either at or near the place of employment, or pay to the deceased such sufficient sum, as rent, in addition to the salary of the deceased, as would enable the deceased to obtain reasonable accommodation.

f) in spite of the deceased's statutory and contractual entitlement between 1st March 2013 and 24th November 2013, the Respondent neglected, refused or otherwise failed to provide the deceased with reasonable housing accommodation either at or near to the place of employment or pay to the deceased such sufficient sum as rent, in addition to the salary of the deceased, as would enable the deceased to obtain reasonable accommodation and ***a fortiori***, it was an implied term of the deceased's employment agreement that the deceased was entitled to a house allowance of at least 15% of the deceased's basic salary per month.

g) between 1st March 2013 and 24th November 2013, the deceased's accrued and unpaid house allowance was ksh.202,500.00

h) as a consequence of the Respondent's failure to take out an appropriate insurance policy as stipulated in the employment agreement, the deceased's estate had suffered loss of ksh.16,560,000.00

i) Respondent was in breach of the terms of the deceased's employment agreement.

4. Along with their Statement of Claim, the Claimants filed a witness statement by the 1st Claimant (Sabina Gathoni Wambui) dated 10th October 2016, and the Claimants' List of Documents listing and annexing copies of the following documents.

(i) the employment Proposal (contract) dated 26th February 2013.

(ii) abstract from Police on road accident.

(iii) death certificate of the deceased.

(iv) letter dated 19th June 2014 from CIC General Insurance Limited to the Respondent.

(v) deceased's payslips.

(vi) demand letter by Claimants advocates to the Respondent.

(vii) autopsy report dated 25th November 2013.

(viii) joint affidavit by the deceased and the 1st Claimant (Sabina Gathoni Wambui).

(ix) a copy of the 1st Claimant's Identity Card.

5. On 8th November 2016, the Respondent filed its Reply to the Claimants' claim (dated 3rd November 2016). At paragraph 3 of the said Reply to Claim, the Respondent admitted the capacity in which the Claimants brought the claim and further pleaded, *inter-alia*:-

a) that the deceased was in its employment as a Credit Officer and his working hours were strictly between 8a.m to 5pm from Monday to Friday.

b) that the Work Injury Benefits Act (WIBA) with regard to the deceased was for accidents arising out of and in the course and scope of his employment as envisaged both in the contract and under the WIBA.

c) that the deceased was involved in an accident on 24th November 2013 at 6.10am, the day being Sunday early in the morning.

d) that at the time of the accident, the deceased was not involved in any undertaking in the course and scope of his employment as the Respondent's Credit Officer but was on a frolic of his own unrelated to his employment as Credit Officer with the Respondent.

e) that in the circumstances of the accident, WIBA and the contract of insurance would not apply to the Claimant since the WIBA and the insurance only provided for compensation to employees for work related injuries and deceases contracted in the course of their employment and for connected purposes.

f) that the Claimant's salary of ksh.150,000 was gross and the same was accepted by the deceased, and was inclusive of housing.

6. Along with its Response to the Claimants Claim, the Respondent filed a witness statement by one Esther Ndeto, the Respondent's Chief Accountant, dated 4th November 2016 and copies of documents which included:-

(i) Work Injury Benefits Insurance Policy between CIC General Insurance Limited and the Respondent.

(ii) ML/DOSH/WIBA/Form 4 duly filled by County Occupational Health and Safety Officer (Nairobi) on 14/2/2014 and addressed to the Respondent, putting the deceased's permanent disablement at 100% and assessing compensation at 14,400,000 (100% of 96 months total earnings).

(iii) DOSH/FORM1 filled by the Respondent regarding the deceased, indicating the deceased's monthly salary as Ksh.150,000 and stating that the deceased was travelling home at the time of the accident.

(iv) abstract from police on a road accident.

(v) a letter by CIC General Insurance Ltd, dated 19th June 2014 informing the Respondent that the claim regarding the deceased

was not admissible as the deceased was on his way to his area of residence and not in the course of duty at the time of the accident.

(vi) the contract/proposal of employment signed by the Respondent and the deceased on 26/2/2013.

(vii) copies of the deceased's pay slips.

7. When the claim came up for hearing on 26th July 2021, counsel for the Claimant made an opening statement, upon which the 1st Respondent, Sabina Gathoni Wambui (CW1) testified. She told the Court that the deceased, who was her husband, was employed by the Respondent, and was earning ksh.150,000 per month, and that they were living in Kitengela. She further testified that on 24th November 2013, she woke up at 2.00am and found that the deceased, who had earlier told her that he would be attending an official party with his colleagues who had come from Tunisia, was not yet home. That she called the deceased and he told her that the official party would end at 3.00am upon which he would take his colleagues to the airport before going home. The witness (CW1) testified that she called the deceased again at 6.am and that he told her that he was on his way home. She however received a call from a different number and was informed that the deceased had been involved in an accident. She went to the accident scene at General Motors along Mombasa Road and found the deceased being removed from his car while unconscious. The deceased was taken to Nairobi Hospital where he was pronounced dead. That he died because of the accident.

8. It was the evidence of the 1st Claimant (CW1) that under the insurance clause in the deceased's contract of employment, the Respondent was supposed to take out an insurance cover to cover the deceased both on and off duty. That the Respondent's Insurers however refused to compensate on the accident because the deceased was off duty. She prayed both in her evidence in chief and under cross examination to be awarded a total sum of ksh.16,560,000 made up of:-

(i) the deceased's unpaid house allowance at the rate of ksh.22,500 per month (15% of his monthly salary) from March 2013 to November 2013 (nine months).

(ii) the deceased's 96 months salary (ksh.150,000X 96 plus house allowance of ksh. 22,500 x(96) based on the insurance policy that the Respondent was supposed to take to cover the deceased for on and off duty accidents, a total of kshs. 16,560,000.00

(iii) ksh.300,000 being funeral expenses.

9. CW1 also adopted her filed witness statement as part of her evidence, and produced the documents listed in her filed list of documents as exhibits.

10. Cross examined by counsel for the Respondent, the 1st Claimant (CW1) told the Court that the deceased never received any house allowance, and that his ksh.150,000 monthly salary was gross. That the claim had been rejected by the Respondent's insurers because the Respondent had taken out an on-duty cover only. That the accident occurred when the deceased was on his way home. The witness admitted that the Ksh300,000 funeral expenses claim was neither pleaded in her Statement of Claim nor stated in her filed witness statement.

11. Re-examined, CW1 told the Court that the deceased's ksh.150,000 monthly salary was both gross and net, and that the exhibited payslips of the deceased did not show that he had ever received house allowance. The Claimant's case was then closed.

12. The Respondent's case was also closed without any witness being called. Counsel for the Respondent told the Court that the Respondent was not calling any oral evidence. He requested for a date for submissions.

13. The Court directed counsel for both parties to file written submissions, and this was done.

14. From the pleadings filed and evidence presented, the Claimants are basically seeking damages for breach of the deceased's contract of employment by the Respondent, a finding by the Court that the deceased was entitled to house allowance at the rate of ksh.22,500 per month, and payment of the deceased's accrued but unpaid house allowance for nine (9) months amounting to ksh.202,500.

15. To the aforesaid extend, the Claimants' claim falls within the jurisdiction of this Court as enshrined in Section 12(1) (a) of the Employment and Labour Relations Court Act.

16. Section 9(2) of the Employment Act 2007 provides as follows:-

“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).”

17. The provisions of Section 9(2) and (3) of the employment Act brings into contracts of service the general principle of offer and acceptance in the law of contract. Once a contract of service is signed by the employee in acceptance thereof, neither the employer nor the employee can attempt to run away from the terms and conditions thereof.

18. As already stated in paragraph 13 of this judgment, counsel for both parties filed written submissions pursuant to the Court's directions in that regard.

19. Counsel for the Claimant presented detailed and well researched submissions, possibly cognizant of the fact that in a case where issues are complex, or even appear to be complex, it is unreasonable to expect judges to be able to probe their depths by the light of nature.

20. Parties did not file a statement of agreed issues for determination. The Claimants' issues for determination were however framed in the submissions filed on their behalf as follows:-

- a) what is the legal implication of the Respondent not calling any witness to testify in its defence at the trial.
- b) how should any ambiguity in the contract of service be interpreted and resolved.
- c) did the Respondent provide the deceased employee with housing or pay him such sufficient sum as rent, in addition to the wages or salary of the employee as would (sic) enable the employee to obtain reasonable accommodation.
- d) did the Respondent have a contractual obligation to take out an insurance policy for the benefit of the deceased employee which would cover disability and accident occurring while the deceased employee was off duty.
- e) was there privity of contract between the deceased employee and the Respondent's putative insurers, messrs. CIC General Insurance Ltd?
- f) what is the appropriate remedy due to the Claimants for the breach by the Respondent of the contract of service.

21. On the first issue, the Claimants cited two authorities:-

- a) Elizanya Investments limited –vs- Leon Energy Solutions [2021]eKLR
- b) Interchemie EA Limited –vs- Nakuru Veterinary Centre Limited [2001]eKLR.

It was held in Interchemie EA Limited –vs- Nakuru Veterinary Centre Limited [2001]eKLR that where no witness is called to testify on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. It was submitted that as held in the Interchemie EA Limited case (supra), issues raised by the plaintiff (Claimant) cannot be resolved by submissions.

22. I agree with submission by the Claimants' counsel that the evidence adduced by the Claimants was neither rebutted nor controverted.

23. On the second issue, it was the Claimants' submission that any ambiguity in the deceased's contract of service should be interpreted against the Respondent who had the statutory duty to draw the contract. They referred the Court to the case of Mwangi Ngumo –vs- Kenya Institute of Management [2012] eKLR where it was held:-

“...any ambiguities in the contract should be construed against the party who drew the contract and that party is the Respondent. This is what has been referred to as contra proferentem rule and which was applied in the case of Horne Coupar-vs- Velletta & Co. 2010 BCSC, relied by the Claimant.”

24. It is my finding that there was no ambiguity in the deceased's contract of service, which clearly provided that the deceased had been hired at a net monthly salary of ksh.150,000 gross, and that the Respondent would take out an insurance policy that would include the mandatory WIBA requirement for personal accident cover in Kenya, covering the deceased against disability and accidents in Kenya both on duty and off duty accidents.

25. On the third issue, the Claimants' evidence that the deceased's monthly salary was ksh.150,000 and that this amount did not include house allowance was neither rebutted nor controverted. The contract of employment stated that the deceased's monthly net salary was ksh.150,000 **gross**. There is no provision or mention of house allowance. Further, the deceased's payslips produced by the Claimants in Court did not show any payment of house allowance. Failure by the Respondent to either provide the deceased with housing accommodation or pay him such a reasonable amount, in addition to his salary, as would enable him to obtain reasonable accommodation, was in breach of the statute. The deceased was in the Respondent's employment for nine(9) months and the Claimants have claimed house allowance at the rate of ksh.22,500 per month, being 15% of the deceased's monthly salary of ksh.150,000. They claim a total of ksh.202,500. This liquidated claim has been proved and I allow it.

It was held in Jubilee Jumbo Hardware Ltd –vs- Rogaciana Rading Ogwang [2021]eKLR that:-

“Section 31 of the Employment Act 2007 obligates the employer at the first instance to provide housing to its employees. Where the employer cannot provide housing, it should pay the employee an allowance to cover housing. The requirement to provide housing and/or housing allowance however does not apply where there is a proviso in the contract that the remuneration is consolidated, or where a collective bargaining agreement provides for consolidation of wages...”

26. On the fourth issue, the Claimants proved, on a balance of probability that the Respondent was under a contractual obligation to take out an insurance policy for the benefit of the deceased which would include the mandatory WIBA requirement for personal accident cover in Kenya, which would cover disability and accident both on and off duty accidents. The Respondent breached this contractual obligation. The deceased died in a road accident on his way home from an official function. The Respondent's insurers refused to compensate the Claimants and or the deceased's estate on ground that the insurance cover taken out by the Respondent only covered the deceased for on duty accidents. The Claimants are entitled to damages/compensation for breach of contract.

27. In assessing damages (compensation) for breach of contract payable to the Claimants, it is important to look at the Work Injury Benefits Act (WIBA) and see what compensation would have been paid to the deceased's estate had the Respondent performed its contractual obligations set out in the deceased's contract of employment.

28. Section 30(1) of the Work Injury Benefit Act provides that compensation for permanent disability shall be calculated on the basis of ninety six months earning subject to minimum and maximum amounts determined by the Minister in consultation with the Board and set out in the Third Schedule of the Act. Section 30(2) and the First Schedule to the Act categorise death as a 100% permanent disablement.

29. It was held in the case of Consolata Anyango Ouma –vs- South Nyanza Sugar Co. Ltd [2015] eKLR as follows:-

“as a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the Claimant is to be put as far as possible in the same position he would have been if the breach complained had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd –vs- Natex Distributors Ltd Milimani HCC No. 704 of 2000[2004]eKLR. The measure of damages is in accordance with the rule established in the case of Hadley –vs- Baxendale (1854) 9. Exch.341 that the measure of damages is such as may be fairly and reasonably considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach. (see Standard Chartered Bank Limited -vs- Intercom Ltd & Others NRB – CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages, but are in the nature of special damages and they must be pleaded and proved. (see Coast Bus Services Ltd –vs- Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande –vs- Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992(UR).”

30. The Claimants pleaded in their statement of claim referred to in paragraph 3 of this judgment that as a result of the Respondent's breach of the deceased's contract of service, the Claimants suffered loss to the tune of ksh.16,560,000. The Claimant (CW1) testified both in chief and under cross examination and re-examination that this amount is made up of the deceased's monthly salary of ksh.150,000 added to ksh.22,500 monthly house allowance entitlement and multiplied by 96 months. This claim was well pleaded and was proved on a balance of probability.

31. On the fifth issue, the Claimant (CW1) told the Court, under cross examination by counsel for the Respondent, that the Respondent's insurer is not a party to the claim herein and that the Claimants claim was rejected by the insurer because the Respondent had an on duty cover only and the accident in issue occurred when the deceased was on his way home. This raised the issue of whether there was privity of contract between the deceased and/or the deceased's estate and the Respondent's insurer. On this issue, counsel for Claimants referred the Court to the Court of Appeal decision in the case of Savings & Loan (k) Limited –vs- Kanyenje Karangita & Another [2015] eKLR where it was held as follows:-

“in its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In the DUNNLOP PNEUMATIC TYRE CO. LTD –vs- SELFRIDGE & CO. LTD [1915] AC 847, Lord Haldane, LC rendered the principle thus: “my Lords, in the Law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it”. In this jurisdiction, that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION –VS- LENGETIA LTD (SUPRA), KENYA NATIONAL CAPITAL CORPORATION LTD –VS- ALBERT MARIO CORDEIRO & ANOTHER (SUPRA) and WILLIAM MUTHEE MUTHAMI –VS- BANK OF BARODA (SUPRA). Thus in Agricultural Finance Corporation vs- Lengatia Ltd (supra), quoting with approval from Halbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, restated: “As a general rule, a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

32. It was submitted on behalf of the Claimants that the deceased employee was not a party to the contract for insurance between the Respondent and its putative insurers, Messrs. CIC General Insurance Ltd, that as such it was not upon the Claimants to sue the insurers, and especially after the insurers pointed out that the policy taken out by the Respondent did not cover disability and accident occurring while the deceased employee was off duty. I agree with this submission, and hold that there was no privity of contract between the deceased and the Respondent's Putative insurers, CIC General Insurance Ltd.

33. On the sixth issue, it is my finding that the Claimants are entitled to the reliefs sought. Consequently, having considered the evidence on record and the rival submissions filed by counsel for both parties, I enter judgment in favour of the Claimants against the Respondent as follows:-

a) it is hereby declared that the Respondent is in breach of the provisions of the Employment Act and the law by failing to provide the deceased with reasonable housing accommodation or to pay the deceased such sufficient sum, as rent, as would have enabled the deceased to obtain reasonable accommodation.

b) the Respondent is ordered to pay the Claimants ksh.202,500 being the deceased's accrued but unpaid house allowance for nine(9) months, being March 2013 to November 2013.

c) the Respondent is ordered to pay the Claimants ksh.16,560,000 being loss suffered by the deceased's estate as a consequence of the Respondent's failure to take out an appropriate insurance policy as stipulated in the deceased's employment agreement.

d) the Claimants are also awarded costs of the claim and interest at Court rates from the date of this judgment until payment in full.

34. The claim for ksh.300,000 being alleged funeral expenses was neither pleaded nor proved. The same is declined.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF OCTOBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Mr. Omollo for the Claimants

No Appearance for the Respondent