



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 88 OF 2017**

*(Before Hon. Lady Justice Anna Ngibuini Mwaure)*

**EDWARD LWANGU MAMBOLEO**

**CLAIMANT**

*VERSUS*

**TRISTAR TRANSPORT LIMITED**

**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant brought a claim against the Respondent for unpaid holidays and unpaid weekends totalling Kshs.1,612,902.50. This is as enumerated in the Claimant's memorandum of claim dated 18<sup>th</sup> January 2017.
2. He also gave his evidence in chief via virtual platform.
3. The Respondent put his response dated 10<sup>th</sup> February 2017 and a witness by the name Nithin Dev gave evidence in chief on behalf of the Respondent.

**Claimant's Case**

4. The Claimant states that he was an employee of Tristar Transport Limited for 5 months. He was employed as a Driver.
5. He says that he then moved to Central Africa where he signed a contract for two years. He says he was asked to relinquish his position in Kenya as he would be offered a higher position in Central Africa.
6. He says he was not resigning from Tristar Transport as his move to Central Africa was organised and paid for by his employer. He says in Central Africa he was to work for 6 days with one day of rest but he never got a day of rest.
7. After 2 years, he continued working but when he did not get a renewed contract he opted to leave employment. He says he then came back to Nairobi and lodged his case.
8. The Claimant says Tristar's Head office is in Dubai but for the two outfits in Nairobi and Central Africa. Claimant says he worked for 24 hours, 7 days of week in Central Africa.
9. In cross examination by Oketch, the Respondent's Advocate the Claimant says he wrote a resignation letter to Human Resource Office – Nairobi in order to take higher responsibilities in Central Africa. He says he signed a new contract letter and the address in the said letter is Dubai.

**Respondent's Case**

10. The Respondent's Witness avers that the Claimant resigned from the Respondent in 2014 and his record show Claimant resigned in October 2014.
11. He further said that Tristar Kenya is a different entity from Tristar Dubai. He however admitted the two entities could exchange emails and also worked together in some instances.

12. He also says he is not clear if they paid the Claimant when he resigned from Tristar Kenya.

13. Issue for Determination

(i) Was Claimant an employee of the Respondent;

(ii) Was the Claimant entitled to the reliefs sought?

### Submissions

14. The respective parties were allowed time to file their written submissions. The case was to be mentioned on 30<sup>th</sup> August 2021 to confirm the parties had complied and had filed their written submissions.

15. The Claimant had already complied by the said mention date but the Respondent's submissions were availed shortly thereafter.

16. The Court has considered the submissions by the Claimant

and the authorities referred thereto and the Respondent's submissions as well.

### Determination

17. The main issue for determination is whether the Claimant was an employee of the Respondent.

18. The main issue as even pointed out in the Claimant's submissions is whether Tristar Transport Limited who had signed an employment contract with the Claimant dated 27<sup>th</sup> May 2014 is the same as Tristar whose mailing address is indicated to be c/o Dubai. The one who had signed the first contract has its mailing address as c/o Mayfair Office Suite – Nairobi.

19. The two contracts dated 27<sup>th</sup> May 2014 and 9<sup>th</sup> October 2014 respectively are signed by Eugene Mayne (Group CEO) and are on Tristar letterheads. That in itself points out clearly an unquestionable relationship between Tristar Kenya and Tristar Dubai.

20. The Claimant produced a certificate of search from the Kenya registry dated 11<sup>th</sup> January 2017 which has brought out the fact that Tristar Transport Limited is owned by Eugene Mayne and Tristar Transport LLC. The same Eugene Mayne is referred as a shareholder of Tristar Transport Limited and is the same one who signed the two letters of contract of the Claimant.

21. The Court is persuaded to rely on the judgment quoted by the Claimant **Ultimate Laboratories v Tasha Bioservice Limited Nairobi HCCC No. 1287 of 2000** where Ringera J. observed –

*“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions of which Section 323 of the Companies Act is but one example only and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct.”*

22. In **ELRC 201 of 2012, Justine Nyambu v Jaspa Logistic**, Makau J. ruled that even though he did not pierce the Respondent's veil to order the Directors of the company to pay for a bounced cheque, however he called them to be examined and their books of account be scrutinised failure of which he would consider piercing the corporate veil among making other appropriate orders.

23. The Court is persuaded that the Respondent by whichever name it is calling itself or whichever address it prefers is one and the same and was the rightful employer of the Claimant.

24. In the Respondent's submissions are that Tristar Kenya and Tristar UAE are not one and the same. They referred to the cases of **Mosi v National Bank of Kenya Limited [2001] eKLR** where it was ruled that a holding company is distinct legal entity from its subsidiary and it cannot be sued for any breach of contract of its subsidiary.

25. They also referred to the case of **Paul Chacha Isack v Vsan Power Guard Service Another [2020] eKLR** where it was held that even if there were tell-tale signs of relationships between two companies but due to juristic personality of a registered person, it cannot find the Respondent liable.

26. In essence the Respondent avers there is no relationship between the Claimant and the Respondent. They however also state that even if there is a relationship between the parties they submit that this Court has no jurisdiction to hear the matter.

27. The Respondent's Witness during cross examination admitted that the Dubai organisation and the Kenyan one worked together in some situations. The two are not different and are not strangers.

28. If the Dubai outfit was a foreign company and being an international employer which must be well versed on legal employment matters, it should have complied with the law relating to foreign contracts and in particular use a prescribed form as provided in Section 83 of the Employment Act.

29. Section 83 further provides that the said form should be attested by the Labour Officer. Since this procedure was not followed, then the Court can only assume this was a local contract and the Claimant was on transfer but otherwise the law applicable was the local law (Kenyan Law).

30. Section 84 goes further to provide the requirements before attestation of foreign contracts. All this was not complied with. The Respondent cannot therefore as the saying goes have his cake and eat it. He is either bound by Kenyan law or if he is opting for foreign law he must comply with the law relating to the foreign contracts.

31. Section 86 of the Employment Act provides that –

**86. Offence to induce person to proceed abroad under informal contract**

**A person who—**

**(a) employs, engages, or knowingly aids in the employment or engagement of, a person with the intention that when so employed or engaged that person shall proceed outside the limits of Kenya; or**

**(b) induces or attempts to induce an employee to proceed outside the limits of Kenya, unless he has under this Act, duly entered into a foreign contract of service with that person or employee, as the case may be, commits an offence and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.**

32. The Respondent is between a rock and a hard place. He either intended this to be a local engagement or if it was a foreign contract he should comply with the law relating to foreign contracts or he is then bound to be convicted for an offence under the above section.

33. In this instant case the Respondent subjected the Claimant to a very awkward position where he did not specify to him clearly whether he was under Kenya law nor under Central Africa Republic Law or at least did not give him his rights under Labour laws and the contract they entered into in any event. No wonder the Claimant kept pleading for his rights but he did not get redress and so had to resign and head back home.

34. It is only fair and just to provide redress to the Claimant under the jurisdiction where he signed his contract in the Nairobi Office – in Kenya.

35. The Court is also inclined to consider the case of **Dorcas Kemunto Wainaina v IPAS [2018] eKLR Cause No. 165 of 2015**. This is the case where the Court interrogated the conflict of law that is U.S.A Law (North Carolina) and Kenya Labour Laws. The Claimant was offered a job in North Carolina U.S.A and was to work partly in Nairobi, partly in the US. The employment was to be governed by the Respondent's personnel policies and was for a fixed period. On 19<sup>th</sup> November 2014, the Respondent terminated the Claimant's employment citing restructuring the organisation. The issue was whether the Employment and Labour Relations Court in Kenya had jurisdiction over an international contract.

36. The Court held that dispute arose out of a contract of employment about an international one where employee operated partly in Nairobi and partly in the U.S. The Court found that Section 3 and Section 87 of the Employment Act as well as Section 12 of Employment and Labour Relations Act provided the jurisdiction of this Court.

37. The Court also noted that Article 6 of the convention or law applicable to contractual obligations (**The Rome Convention**) recognises autonomy of parties permitting a contract of employment to stand provided a choice of law made the parties does not deprive the employee the protection afforded to them by the mandatory rules of the law which would be applicable in the absence of choice.

38. The Court observed that though the aforesaid may not be applicable Kenya nevertheless it was considered to be of persuasive value. The Court applied "*the next real convention test*". I am persuaded to adopt the jurisprudence in this case.

39. The Respondent did not allude to the Central Africa Labour Law but merely insisted it was not the Claimant's employer. So there is even nothing to refer to as far as the referenced local laws referenced in the Claimant's letter of employment is concerned.

40. Having found that the Claimant was an employee of the Respondent, furthermore the Court finds that in accordance to Section 12 of the Employment and Labour Relations Court Act, this Court has jurisdiction to handle the case including handling –

**(a) disputes relating to or arising out of employment between an employer and an employee;**

So I find this case is properly before this Court.

41. The second issue is whether the Claimant is entitled to the reliefs prayed. The Claimant stated he used to work for "24/7" and would not be given days of rest or overtime.

42. Obviously nobody can work for 24 hours for seven days for over 2 years and survive so clearly there is some exaggeration by the Claimant.

43. Having said so in the email exchanges between the Claimant and the Respondent and even between the various staff from the

Respondent's company, there is an admission that the work in the organisation was very stressful. In one email dated 1<sup>st</sup> November 2016 one Rayhu Mani admitted the "guys are working under tremendous stress ..." VVM5"

44. It is evident the Claimant was working under hard conditions and had no recourse to release his pressure or to take his complaint and no legal structure to revert to. In those emails VVM5, the Claimant complained severally but the Respondent seems not to have addressed the issues raised.

45. His letter of appointment states he was bound by the local laws and policies. The Respondent as per evidence on record did not follow or avail the labour practices of either of the countries. No wonder the Claimant chose to relocate back home as it seems the Respondents were taking advantage of their employees and infringing on their rights. This was in contravention of human rights and rules of natural justice.

46. The Court's finds that the Claimant has a right a redress under the Kenyan law as the Respondent signed a contract with the Claimant in Nairobi, Kenya and they transferred him to Central Africa Republic with a promise of a better job.

47. I have critically considered the submissions by the respective parties and the pleadings and the evidence adduced in Court. I have considered that matter of whether this Court has jurisdiction to hear this matter as raised by the Respondent. I am well convinced Tristar Transport Company is one and the same company that had employed the Claimant initially and so this Court has jurisdiction over this case.

### **Remedies**

48. Having found that the Claimant was an employee of Tristar Transport Limited and further that this Court has jurisdiction to hear the case, award the Claimant the following reliefs :-

(i) The prayer for payment for unpaid weekends is declined but instead I grant one day of rest for every week since in his letter of appointment he was to work from Monday to Saturday so he was to take one day to rest. However I have considered he must have taken some days off including when he went on leave and so have discounted of those days hence

Kshs.470,270.00

(ii) The contract also provided the Claimant would be given public holidays and the Respondent did not controvert the same. I therefore award him the days claimed for 2014 – 2016 Kshs.270,967.54

### **Conclusion**

49. **The Court finds the Claimant was entitled to reliefs hereby awarded amounting to Kshs.741,237.54.**

50. **I also award him costs.**

51. **Interest at Court rate till full payment.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF OCTOBER 2021**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA NGIBUINI MWAURE**

**JUDGE**