



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1449 OF 2013

JOSEPH MWANZA.....CLAIMANT

v

CHARLESTON TRAVEL LIMITEDRESPONDENT

JUDGMENT

1. Charleston Travel Ltd (Respondent) offered Joseph Mwanza (Claimant) employment as Student Travel Agent General Manager with effect from 1 January 2010.
2. On 8 March 2012, the Claimant gave the Respondent notice of resignation effective immediately.
3. The Respondent acknowledged and accepted the resignation and advised the Claimant that his terminal dues if any would be paid upon clearance. At the same time, the Respondent instructed the Claimant to proceed on pending leave.
4. On 19 March 2012, the Claimant having realised he should have given requisite notice notified the Respondent that the effective date of resignation was 8 April 2012, and that he expected to be paid terminal dues including the accrued leave days.
5. The Respondent, upon receipt of the letter, informed the Claimant through a letter dated 19 March 2012 that he owed it Kshs 333,249/- for failure to fulfil the terms of a bond which formed part of the terms and conditions of service.
6. The Letter also reminded the Claimant to complete the clearance process.
7. On 10 September 2013, the Claimant commenced legal proceedings against the Respondent alleging breach of contract and seeking a total of Kshs 806,544/- being pay in lieu of notice, accrued leave days, mileage for March 2012 and terminal dues.
8. The Respondent filed a *Response and Counterclaim* on 6 November 2013 denying the breach of contract and alleging breach of contract on the part of the Claimant.
9. The Cause was heard on 13 November 2018, 5 February 2019, 15 July 2019 and 28 November 2019 (the Claimant's case was reopened after being closed by the Court).
10. The Claimant and the Respondent's General Manager testified. The witnesses also produced exhibits).
11. The Claimant filed his submissions on 20 December 2019 while the Respondent filed its submissions on 28 January 2020.
12. The Court has considered the pleadings, evidence and the submissions and will examine each head of claim advanced by the parties.

Salary in lieu of notice/earned wages

13. The contract of employment had a clause on termination of the contract. Either party could give 1-month notice or pay an equivalent as salary in lieu of notice.
14. The Claimant gave notice of resignation on 8 March 2012 and indicated that it was effective immediately (the effective date was clarified as 8 April 2012).
15. The Respondent acknowledged the notice and opted to release the Claimant immediately, and also instructed the Claimant to proceed on pending leave.

16. The Respondent was essentially buying off the Claimant's notice period and in the circumstances, it was obligated to pay him remuneration up to 8 April 2012.

17. The Court, therefore, finds that the Claimant was entitled to remuneration up to 8 April 2012 in the sum pleaded of Kshs 221,000/-.

Accrued leave days

18. Annual leave of at least 21 days with full pay is a statutory entitlement for an employee. The contract provided for 25 days of annual leave.

19. The Claimant contended that he had 23 accrued leave days by the time of separation.

20. The Respondent admitted the head of the claim in the submissions and computed the commuted leave as equivalent to Kshs 194,615/-.

21. The Court will find for the Claimant on the basis of the admission by the Respondent as it set out the correct formula for commutation.

Mileage allowance

22. The contract between the Claimant and the Respondent did not provide for a mileage allowance. If there was a custom or practice to pay the mileage allowance, the Claimant failed to prove such custom or practice, to the required standard.

Calculated terminal dues

23. The Claimant sought Kshs 278,000/- on account of what he called calculated terminal dues.

24. The Claimant admitted that he was a contributor to the National Social Security Fund as well as Madison Insurance pension scheme.

25. Without any other contractual foundation to this head of the claim, the Court finds that the Claimant did not prove that the Respondent owed him or was liable to him in the sum of Kshs 278,000/- terminal dues.

Counterclaim

26. The Claimant's contract had a training bond provision under which the Claimant was required to forfeit 60% of the training costs of Kshs 500,000/- if he resigned within 1st year, 40% in the course of the 2nd year and 20% in the course of the 3rd year.

27. The Claimant took up the appointment in January 2010, was taken for training in South Africa from June 2011 to July 2011 which cost Kshs 333,429/-, and he tendered his resignation on 8 March 2012.

28. The clause on training/bonding provided as follows

You will be registered for the company Training program. This is a comprehensive program, with a basic training within the first 6 months, and thereafter on continuous basis both locally and overseas. Consequently, you will be required to sign a 3-year bond/Contract directly linked to training. Should you wish to terminate your contract on the 1st year, you will be liable to pay 60% of the training cost of shs 500,000/=; on the 2nd year – 40%; and 20% on the 3rd year of the contract. Please note that the bond/contract can be extended for a further 3 years at Management discretion and dependent on further investments on training (bonding document itself was not produced).

29. The Respondent's case was that time started running from the date of training but did not produce any bond signed at the time of training. The Court is therefore not able to discern any intention in the contract document that the bond would start running at the time of training.

30. In the view of the Court, the clause set out above refers to the *contract year* and not *training year*.

31. Therefore, if the Claimant had resigned by end of January 2011, he was expected to reimburse 60% of the training costs, but he resigned on 8 March 2012, during the course of the 3rd year, and therefore liable to reimburse the equivalent of 20% of the training costs.

32. In effect, the Court finds that the Claimant should reimburse 20% of Kshs 333,249/- which is Kshs 66,649/80.

Staff loan

33. The Respondent contended at paragraph 10 of the Response that it had advanced the Claimant a loan for the purchase of an enhanced medical cover, and for air tickets paid on behalf of the Claimant, and that there was a balance of Kshs 143,861/-.

34. The Claimant did not deny this head of the counterclaim and the Court will allow the claim.

Conclusion and Orders

35. The Court finds and holds that the Claimant was entitled to salary up to 8 April 2012, and 23 days leave commuted totalling Kshs 415,615/-.
36. The Court also finds and holds that the Claimant is liable to the Respondent in the total sum of Kshs 210,510/80.
37. After reconciling the above, the Court finds and enters judgment for the Claimant Kshs 205,105/-.
38. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 24th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Omondi/Ms. Muigai instructed by Rachier & Amollo Advocates

For Respondent Mr. Kamau instructed by Mwaniki Gachoka & Co. Advocates

Court Assistant Lindsey/Judy Maina