



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 945 OF 2014

ANTHONY ALUKHWILI MALECHE.....CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant averred that he was in March 2004 employed by the respondent as a Regional General Manager, Central and worked thereafter in various capacities both in Kenya and Uganda and served until 30th June, 2013 when he left employment due to the respondent's unfair labour practice of failing to pay just dues to him.
2. According to the claimant, while he was in Uganda as the Regional General manger he was issued with a contract dated 12th May, 2010 by G4s International Employment Services Limited Jersey UK and was seconded to G4s Uganda in managerial capacity. The contract indicated that his employment under the agreement would commence on 1st May, 2010. His salary was paid in USD which was 8,905 USD per month net of taxes before inclusion of other benefits.
3. Beginning the month of April 2012 the claimant was transferred back to G4s Kenya under a new contract as the Director, Response Services, a position he held upto June 2013. His salary was Kshs 601,440/= which was a reduction from what he earned while in Uganda. The respondent issued the claimant with a new contract and placing him under probation and consequently denying the claimant his proper earnings. According to the claimant, at no time was his initial contract terminated. The claimant further averred that during his period of service the respondent without any justification refused or neglected to pay his lawful salary, relocation allowance and denied him earnings rightfully due to him.
4. The respondent on its part averred that employees hired by G4S International Employment Services Limited (IEs) are seconded to work under the direction and control of associated companies within the Group of Companies. Such employees according to the respondent enter into a contract with IEs which contract sets out the terms and conditions of service. The employee's contract is therefore with IEs and not with the various companies to which they may be seconded. To the extent that the claimant asserts such rights as may have accrued under his contract with IEs, the respondent asserted that it was not a party to that contract and as such no claim can properly be made against it.
5. The respondent further averred that the claimant was employed as its regional manager-central in March, 2004 at a basic salary of Kshs 1,800,000/= per annum. It was a term of contract that the claimant was to serve with any of the company's divisions or locations within Kenya. The respondent further stated that such service as may have been performed in G4S (Uganda) Ltd in 2009 and prior to his employment by IEs was on terms and conditions of his contract of service dated 16th March, 2004. In April, 2010 when the claimant was offered and did accept employment with IEs and got seconded to Uganda, the offer was made by the Regional Managing Director for East Africa and further that the terms and conditions of the claimant's employment were set out in the offer letter dated 5th May, 2010 which expressly indicated that he would be issued with an expatriate contract of employment with IEs.
6. The claimant having accepted employment with IEs, his contract with the respondent stood terminated as was provided under clause 20 of the contract with IEs. The respondent further pleaded that the payments referred to by the claimant were pursuant to his contract with IEs which the respondent did not deny and further that at the time the claimant left the respondent in April, 2010 he was earning a monthly salary of Kshs 432,800/=.
7. In his oral evidence in court, the claimant further stated he was the Country Manager in Uganda. This was through IEs which was part of the G4S group and that the offer was at expatriate level. According to him, he never received a termination letter by G4S Kenya. He thought he was moving from one station to another. On 1st April, 2012 he started on a new position in G4S Kenya. Was not a termination letter. This offer was made in February, 2012. According to him the offer transferred him to Kenya without undergoing any interview. The claimant further stated that the letter found at page 11 of the respondent's bundle of documents was not a termination letter. This letter in effect transferred him back to Kenya. It signified the end of his secondment in Uganda.

8. It was the claimant's further evidence that the relationship between G4S Kenya, G4S Uganda and G4s, IEs was that they were one organization operationally. The claimant further stated that he worked in Kenya for one year two months as a director response division and resigned due to accumulation of incidents and frustration. It was the claimant's further evidence that while in Uganda his salary was 8,905 USD while back in Kenya he was paid Kshs 600,001 as gross pay. This was a significant reduction in his salary. According to him, other colleagues were not treated this way. One colleague was employed as an expatriate in Malawi and retained his expatriate salary when he was redeployed back to Kenya.

9. Regarding bonus, it was his evidence that this was calculated on lower salary and that bonus was earned when one achieved targets. The clawed back bonus was deducted for 2010 bonus which the respondent had issue with. In cross-examination he stated that his 2004 contract was for G4s Kenya but one could work anywhere.

10. The claimant further stated that he got the G4s IEs contract while in Uganda and that the parties were G4s IEs Kenya and himself and further that G4s Kenya was not a party he however stated that he was informed there would be continuity of service.

11. Concerning the contract he signed in 2012 he stated that he was familiar with the contract and that it was different from the Uganda contract. He raised the issue before he signed it and was told it's not a continuity. He therefore asked to be paid his Uganda dues if the new contract was not a continuity.

12. The claimant further stated that while in Uganda he was not entitled to pension in Kenya. The respondent's witness Mr Stanley Blyth informed the court that he was the respondent's Human Resource Director for Africa and that under the Africa umbrella there were different companies. G4S Kenya was owned by G4S PLC International Employment Service was owned by Risk Management Services. IEs according to the witness employs expatriates for deployment across the world. According to him the respondent uses IEs to create career expatriates. It was his evidence that the claimant went to Uganda as an expatriate on 1st May, 2010 as General Manager. When he took up the IEs contract, the local one became terminated. According to him a new contract is signed with IEs and then seconds the employee to a country as an expatriate. When an employee returns he signs a new local contract and that the pay could be lower than under IEs contract.

13. Concerning his pension, Mr Blyth stated that Uganda had a national pension fund into which the respondent contributed and that the claimant was a member of the pension scheme in Uganda. It was further his evidence that the claimant withdrew his pension when he left Uganda. Regarding bonus, Mr Blyth stated that this was paid based on target. The claimant had been employed for only part of the year hence could not get full bonus. According to him, the targets to be achieved to him, the targets to be achieved were revenue based if the operational cash flow looked better. It was his evidence that the results that were published were incorrect hence the bonus ought not to have been paid. He further stated that it was not the claimant alone who was affected.

14. Regarding discrimination, he said that G4S had about fourteen thousand employees and restructuring was always happening hence there was no discrimination against the claimant.

15. The issues between the parties which need to be resolved in this dispute are first whether the claimants contract with the respondent entered into in March, 2004 became terminated when he got hired as an expatriate IES. Second whether when the claimant's contract with IES ended in Uganda and he relocated to Kenya and issued with another contract he should have continued to work for the respondent on the same terms (expatriate terms) back in Kenya. Thirdly whether the claimant was entitled to bonus claimed.

16. By a letter dated 27th October, 2009 (page 4 of respondents documents) the claimant was appointed as Acting General Manager G4S Uganda. The letter further informed him that he would remain on the payroll of G4S Kenya and be paid in Kenya shillings. The letter further informed the claimant that all other conditions of his employment remained the same.

17. On 5th May, 2010 the claimant became appointed as General Manager Uganda. The letter of appointment was found at page 5 of the respondent's bundle of documents. The final paragraph of the said letter informs the claimant that he would be issued with an expatriate contract of employment with G4S Is to reflect his new terms and conditions of service. This contract dated 12th May, 2010 was eventually issued and was found at page 7 of the claimant's bundle of documents.

18. This contract with IES came to an end on 31st March 2012 through a letter dated 24th April, 2012 (sic). By a letter dated 9th February, 2012 the claimant was offered an appointment as Director, Response Services for the respondent.

19. The appointment was to take effect from 1st April, 2012. That is the next day after the last working day for IES. The claimants annual salary was stated as Kshs 7,217,280 p.a. which translated to Kshs 601,440 per month. The contract was subject to three months probationary period.

20. It was not in dispute that the respondent and IES constitute part of Group of Companies under G4S PLC. It was in evidence that IEs was a body corporate as much as the respondent although the two were a family with possible similar or sharing of directors. When the claimant took up a job with IES the respondent never formally terminated the claimants contract with it. The contract with IES was formally entered into and terminated as per clause 2.2 of that contract. The respondent herein however did not formally terminate the claimant's contract entered into in March, 2004. It wants the court to assume that by virtue of the claimants taking up an appointment with IES the March, 2004 the contract became terminated.

21. Under clause 4 of this contract, the contract save for summary dismissal could be terminated by giving three months written notice by either party or payment in lieu. The respondent did not do so. Where parties have reduced their agreement in writing and made provisions governing their relationship, the court would be reluctant to admit circumstantial or oral evidence to vary or modify what has been agreed in writing. It may be true that the claimant could not practically continue in service of the respondent while at the same time serving IES, it was incumbent on the respondent to formally release the claimant from the March 2004 contract more so considering the fact that IES and the respondent were members of G4S PLC and that IES would hire expatriates and second them to work in any of the national associated

companies across the world like happened in the claimant's case.

22. The court therefore while cannot assume that the claimant's March 2004 contract continued parallel to the IES contract, will find and hold that March, 2004 was not properly brought to an end as per clause 4 thereof and hereby award the claimant 3 months' salary in lieu of notice.

23. Concerning the continuance of the expatriate terms including salary, the court finds this claim without merit for two reasons. First, the respondent was not privy to the contract where the claimant was appointed as an expatriate second, the claimant being a Kenyan national could not earn expatriate status in his own country since the simple meaning of expatriates are individuals who live and work away from their own native countries.

24. Regarding the contract of 9th February, 2012 the court finds and holds that the claimant having executed the contract and served under it for a period of more than a year before he resigned could not turn round and claim he was offered inferior terms under the same contract. At the senior level where the claimant had reached with the respondent it cannot be said that he had a weaker bargaining power. In any event the inferiority of this contract was premised on the assumption by the claimant that he would return to Kenya as an expatriate. The court has found this was not possible.

25. In conclusion the court makes the following orders as against the respondent in favour of the claimant.

- a) Three months' salary in lieu of notice for unfair termination 1,804,320
- b) Costs of the suit
- c) Item (a) shall be subject to taxes and statutory deductions

26. It is so ordered.

Dated at Nairobi this 18th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge