



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 1194 OF 2013

HALIMA MUEKE NGEL.....CLAIMANT

VERSUS

MODERN COAST COURIER (KENYA) LIMITED.....RESPONDENT

Consolidated with

Cause No. 1193 of 2013

HALIMA MUEKE NGEL.....CLAIMANT

VERSUS

MODERN COAST EXPRESS (KENYA) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant seeks to recover from the Respondents for her alleged dismissal from employment. She alleged employment by the Respondent Modern Coast Express (Kenya) Limited and posting to Kampala, Uganda. She asserts she helped set up the office with the active participation of Mr. Shahid Butt and his wife. She sought relief for the expenses she incurred setting up the office at Dewington Road Plot No. 5 Kampala being the commission for acquisition of the office, the registration of the two companies in Uganda, registration for tax purposes and obtaining the requisite operational licences including the courier licences and the one from the Communications Authority in Uganda. She also sought damages for sexual harassment as well as the rent for 3 months for Nairobi and 3 months rent at Kampala. She prayed for costs of the suit too.

2. The Respondent denied the claims made by the Claimant and asserted that the Claimant was not employed by the Respondent. The Respondent denied that the court had jurisdiction to deal with the case as the cause of action accrued in Kampala, Uganda outside the territorial limits of Kenya and therefore the court had no jurisdiction. The Respondent also filed a preliminary objection dated 31st March 2017 in which it asserts that the suit was filed out of time in terms of Section 90 of the Employment Act.

3. The Claimant and the Respondent's witness Doris Njoroge the HR manager of Modern Coast Express. The Claimant reiterated that she worked closely with the director Shahid Butt and his wife and that when she was setting up the Kampala office, the Respondent's owner and his wife took residence at the Serena Hotel while she put up at another hotel and they coordinated the establishment of the Uganda operations of the 2 Respondents. She stated that she helped organize the office, the purchase of furniture and so on and that the director was happy with the work. She stated that she was not paid her commission fees or the money expended for and on behalf of the business including her accommodation expenses. The Respondent's witness stated that the Claimant was not its employee given the records that were held by the Respondents. She stated that she was the HR manager for the establishment including the operations in Uganda and thus knew that the Claimant was not in the roll of employees for the Respondents.

4. Parties were to file submissions and this was done on 20th December 2018 by the Claimant and 16th January 2019 by the Respondent. The Claimant submitted that the Claimant was an employee of the Respondents as shown by the letter of appointment which indicated clearly what role the Claimant was to play. The Claimant submitted that the Respondent had attempted to disparage the letter but did not avail any evidence of the allegations made in regard to authenticity. It was submitted that the signature on the letter was the same as the one in the registration documents the Respondent admitted as being genuine and there was no basis to hold the letter was anything other than genuine. The cases of **Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR** and **Everett Aviation Limited v Kenya Revenue Authority [2013] eKLR** were cited for the arguments on the employment of the Claimant. It was asserted that the control test enunciated in the **Lopeyio** case (*supra*) was in place as the Claimant worked at the direction of the Respondent's director. The Claimant submitted that there was constructive dismissal of the Claimant and cited the case of **Lear Shighadi Siyona v Avtech Systems Limited [2017] eKLR** and the

case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** on what amounts to constructive dismissal. The Claimant submitted that her salary and other dues were not paid from October 2008 which made it impossible for her to continue staying in Uganda thereby constituting constructive dismissal. She submitted that there was no HR manager in Uganda to issue directions and that incorporation was in Kenya and the Uganda operations were just those of a branch. She urged the court to allow her claim.

5. The Respondents submitted that the letter which the Claimant relied on was forged and that even if the letter was genuine it did not create an employee-employer relationship as it was a contract for service and not a contract of service. The Respondent submitted that the court in the case of **Christine Adot Lopeyio v Wycliffe Mwathe Pere [2013] eKLR** distinguished between a contract for service and a contract of service. The Respondents submitted that a contract of employment tainted with illegality was not enforceable. They assert that in Uganda, there must be a work permit issued under the Citizenship and Immigration Control Act for a foreigner to work in Uganda. The Respondent argues that the Claimant did not have a work permit in terms of the law to allow her work in Uganda. The Respondent cited the case of **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** and argued that the court cannot enforce an illegal contract. The Respondent submitted that the Claimant was an unqualified person who was incapable of drawing documents for incorporation under the Advocates Act, cap 16 Laws of Kenya. The Respondent submitted that the suit was filed outside the time limits under the Employment Act, Section 90. The case of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR** which cited with approval the case of **Attorney General & Another v Andrew Maina Githinji & Another [2018] eKLR** arguing that the suit by the Claimant herein should have been filed within 3 years of her departing from Uganda when her salary ceased being paid as averred by her. The Respondent thus submitted that there were no remedies available to the Claimant. On the sexual harassment allegations, the Respondent submitted that no particulars had been made in this serious charge and that the Claimant had failed to provide particulars or report the matter to the Police as it was criminal in nature as well. Reliance was placed on the case of **Mumo Matemu v The Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** for the proposition that a party must provide particulars and proof of the averments for such. The Respondent thus urged the dismissal of the claim with costs.

6. The claim before me is on employment and the Claimant exhibited a letter of appointment which she relied on as proof of her employ. She asserts that the Respondents dismissed her from employment constructively by declining to pay her salary in December 2008 forcing her to leave Uganda and ultimately file the 2 suits against the 2 Respondents. In her claim, she asserts there was non-payment of wages and various allowances as well as commission for acquisition of the Uganda premises for the 2 Respondents. The Claimant thus sought damages including damages for sexual harassment.

7. It is critical for any court to deal with issues of jurisdiction before any other matter. Whereas it is possible that the suit will be determined on a corollary issue which is the limitation period applicable, it is incumbent upon me to determine whether indeed the suit was filed on time or not given the rejection of the court as the appropriate forum and also on account of the limitation period asserted to have been breached. The preliminary objection filed was to the effect that the suit was in contravention of Section 90 of the Employment Act.

8. The issue of jurisdiction is arguable. To the Claimant the court has jurisdiction to hear and determine the case while to the Respondents the court lacks jurisdiction to hear and determine the suit on grounds of limitation and jurisdictional issues relating to the place of accrual of the cause of action. In the case of the **Owners and Masters of the Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2007] eKLR** the learned Judges of Appeal (Omolo, Tunoi and Githinji JJA) on 27th April 2007 held:

...the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. Nyarangi, J.A graphically put it thus:-

"..... I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The learned Judge of Appeal then referred to certain passages in the text "Words & Phrases Legally Defined." – Vol. 3: I – N at pg. 113 and then continued:-

"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

And in concluding his judgment, Masime, J.A, said at pg. 26 of the Report:-"The evidence placed before the court in support of the claim as well as the motion has been analyzed above and I have also, as I said before, had the advantage of reading in draft the comments of my brothers, Nyarangi and Kwach, JJA on it with which I respectfully agree that evidence so far as it was adduced by the respondent fell foul of the requirements of rule 5 of Order 75; it failed to establish that the appellant was "the relevant person." The upshot of that is that the High Court did not have the admiralty jurisdiction and that the respondent was not entitled to invoke that jurisdiction."

9. The Claimant by her own admission was no longer remunerated after December 2008 as she had to abandon her post in Kampala, Uganda. She was therefore constructively dismissed from the employment of the Respondents in December 2008 and had in terms of the new Employment Act 2007 limited to a period of 3 years. The limitation period would set in in December 2011. She filed the suits on 29th July 2013 a period of well over 1½ years from the date limitation set in. the suit was therefore filed outside the time limits prescribed under

Section 90 of the Employment Act. Having so held, I need not consider whether the Claimant should have filed suit in Kenya or Uganda. The suits are dismissed but each party will bear their own costs.

It is so ordered.

Dated at Meru this 4th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 11th day of February 2019

Radido Stephen

JUDGE