



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1033 OF 2014**

**(Formerly HCCC No. 132 of 2007 at Nairobi)**

**GEOFFREY GITAU WAINOGA.....CLAIMANT**

**VERSUS**

**GOAL SOUTH SUDAN.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> June, 2019)

**JUDGMENT**

The claimant filed a plaint on 09.02.2007 through O.N.Ojwang & Company Advocates. The claimant filed the amended plaint on 27.10.2009. As at the hearing of the suit the claimant had changed his advocates to Kinoti & Kibe Advocates and who filed the statement of claim on 11.11.2015.

The claimant claimed that he was owed remuneration as an expatriate because he was not paid like other expatriates. He claimed and prayed that he is paid a sum of Kshs. 8, 885, 972.00 being underpayment or withheld pay (for the period worked from January 2002 to February 2005 – 38 months) as against the lowest paid expatriate being a Field Supervisor and the claimant having served as a Medical Supervisor. The claimant further prayed for payment of Kshs.3, 420, 000.00 at Kshs.285, 000.00 for compensation on account of unfair loss of employment because the respondent refused, neglected or failed to redress the brazen underpayment and discrimination he was being subjected to thereby exposing the claimant to economic hardship and compelling the claimant to quit the employment. The claimant further pleaded that the respondent induced him to leave employment. The particulars of inducement were as follows:

- a) Misrepresenting to the claimant the terms of the contract and or international contract of employment between them.
- b) Causing and treating the plaintiff as a local rather than as an expatriate employee.
- c) Failing and neglecting to regard the contract of employment with the claimant as an international or expatriate contract.
- d) Withholding the claimant's benefits under an international or expatriate contract.
- e) Failing to rectify the contract to embody the provisions of the law, practice and usage that guide international contracts and to reflect the true intentions of the parties.
- f) Failing and neglecting to provide work to be done or performed by the claimant.
- g) Making it impossible for the plaintiff to continue working under the terms of contract of employment.
- h) Causing the claimant to leave employment.

The claimant's further case was that his constitutional rights under the former Constitution of Kenya were breached namely, under section 74(1) which stated that no person shall be subjected to torture or inhuman or degrading punishment or other treatment; and, section 82 on discrimination on account of race since the respondent subjected him to different and disadvantageous remuneration as though he was a national whereas he was actually an expatriate. The claimant claimed for compensation for breach of his constitutional rights.

The claimant's case was that he was a Kenyan citizen employed by the respondent to work in Sudan and he was entitled to be remunerated as an expatriate in the defendant's employment. The claimant's case is that the parties concluded a local contract of service instead of a foreign contract of service and in signing the contract the claimant believed that it embodied the relevant provisions of the Employment Act (Cap

226 Laws of Kenya but presently repealed by the Employment Act, 2007) but the contract did not in fact embody or comply with the provisions of the Act. The claimant's further case was that he signed the contract believing that the contract complied with the provisions of the Act, Kenyan Constitution, the International Labour Laws and Policy and the International Charter on Human Rights.

The claimant's further case was that immediately he discovered the contract did not embody the parties' actual, mutual or true intentions, he notified the respondent to rectify the same but the respondent fraudulently and wrongfully declined to rectify the contract. Thus, the claimant pleaded that the respondent induced him to leave the employment. He further pleaded that he was racially discriminated against and exploited by the respondent because he was remunerated as a Sudan national and not as an expatriate on racial grounds. Further, upon resigning and despite demand, the respondent refused to give the claimant a certificate of service.

The claimant prayed for judgment against the respondent for:

- a) A declaration be issued to declare that the said contract of employment between the Claimant and the Respondent is in breach of the Kenya Employment Act, Cap 226, the Constitution, , the International Labour Laws and International Charter on Human Rights.
- b) The Honourable Court be pleased to declare that between 14.01.2002 and February 2005 the claimant was employed by the respondent as an expatriate employee.
- c) A declaration be issued to declare that the contracts of employment dated 14.01.2002, and subsequent extension of contract are fraudulent and illegal to the extent that they purport that the claimant was employed in South Sudan as a national of that Country.
- d) A declaration be issued to declare that the respondent subjected the claimant to cruel and unfair treatment in the course of his employment in South Sudan in violation of section 74 of the Constitution of Kenya.
- e) A declaration be issued to declare that the respondent subjected the claimant to discrimination in the course of his employment in South Sudan in violation of section 82 of the Constitution of Kenya.
- f) An order for payment of salary underpayment in the sum of Kshs. 8, 885, 972.00 to the claimant by the respondent.
- g) An order for the respondent to pay compensation to the claimant in the sum of Kshs.3, 420, 000.00 for unlawful termination of employment.
- h) An account of the monies and emoluments found to be due to the claimant on the basis of the said agreement as so rectified and an order for the payment of such amount to the claimant.
- i) Compensation for violation of the claimant's rights under sections 74 and 82 of the Constitution.
- j) General damages for inducing breach of contract, fraud and illegality on the part of the respondent.

The respondent's case was based on the amended defence (conditional) filed on 13.11.2009 filed through Nyachoti & Company Advocates. The respondent further filed the memorandum of reply to the memorandum of claim dated 28.11.2016. The respondent changed its advocates to Anjarwalla & Khanna Advocates. The respondent prayed that the claimant's suit is dismissed with costs.

The respondent pleaded that if any contract of service was signed between the parties, the same was concluded voluntarily with the full knowledge of the parties thereto and all legal provisions applicable thereto were fully complied with and the claimant was put to strict proof of any contrary allegation. Further the claimant signed the contract voluntarily and the contract embodied all the applicable terms and conditions of service. The respondent denied that it offered the contract of service to the claimant fraudulently and denied the inducement as was pleaded for the claimant. The respondent pleaded that it received no requests of whatever nature from the claimant about his terms and conditions of service.

The respondent pleaded that it employed the claimant upon fixed term contracts as follows:

- a) By letter dated 14.01.2002 he was employed as a Medical Officer for 12 months from 10.01.2002 to 10.01.2003 at Kshs.60, 000.00 per month and contract discharged by performance.
- b) On 18.01.2003 the claimant accepted the 2<sup>nd</sup> contract of 12 months from 11.01.2003 to 10.01.2004 at enhanced monthly salary of Kshs.75, 000.00.
- c) By letter dated 04.01.2004 the 3<sup>rd</sup> contract was concluded employing the claimant as a Field Medic for 13 months from 01.01.2004 to 28.02.2005 at Kshs. 75, 000.00 per month.
- d) By the letter dated 07.04.2004 the claimant was promoted to Medical Supervisor in the Southern Blue Nile Region of South Sudan effective 01.04.2004 at enhanced monthly pay of Kshs.80, 000.00. The contract was to run from 01.04.2004 to 28.02.2005. The claimant fully performed the contract.
- e) On 14.02.2005 the claimant contacted the respondent's Human Resources Manager and indicated that he did not wish his contract to be renewed any further.

f) It was a term of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> contracts that the claimant would work in South Sudan for 8 week period and then take 12 days off for rest and relax in Nairobi.

The claimant testified to support his case and the respondent's witness (RW) was Louise Foster, the respondent's Assistant Country Director of Systems for Goal South Sudan and residing at Juba within the Republic of South Sudan.

The Court has considered the pleadings, the evidence and the submissions filed for the parties.

To answer the 1<sup>st</sup> issue for determination, the Court returns that there was no dispute that parties signed the contracts of service in issue and the law applicable to the contracts was the Kenyan law.

The 2<sup>nd</sup> issue for determination is whether the respondent fraudulently induced and misrepresented the claimant into the various contracts as were signed by the parties believing that he is a national rather than an expatriate working in Southern Sudan. The respondent's case is that such allegations are untrue and that the claimant voluntarily signed and accepted the contracts. The respondent's further case is that the contracts embodied the intention of parties including standard terms and conditions, the duties of each party, the place of work, remuneration, benefits, procedure for termination and other provisions as was agreed.

The Court has considered the evidence on record. The claimant testified that he understood the contents of the contracts and he voluntarily signed them. However, the claimant's case is that the respondent by failing to comply with the statutory provisions on conclusion of foreign contracts of service thereby induced him, by misrepresentation to proceed on the foreign contract of service.

The Court finds that the allegations of fraudulent coercion and mistake have not been established at all as there was no evidence of fraud or mistake as at the time the contract was entered into. The parties appear to have been aware of the terms and conditions, the obligations of each party were clear, and the performance expected was defined.

However, the Court holds that the statutory provisions were clear and as will be shown later in this judgment, the provisions placed upon the respondent as an employer the duty or obligation to ensure that the foreign contract of service was concluded in compliance with the statutory provisions. The respondent does not deny that it failed to comply with the statutory provisions and the Court returns that by that failure the respondent was therefore strictly liable of inducement and misrepresentation and must be deemed to have unfairly misled the claimant into concluding the contracts of service in issue. The Court finds accordingly.

The 3<sup>rd</sup> issue for determination is whether the contracts of service in issue are not enforceable for violation of statutory formality on attestation and related conditions.

The claimant's case was that his was a foreign contract of service within the meaning in section 2 and 19 of the Employment Act, Cap. 226 (Repealed but applicable at the time of the Contract) so that sections 19-23 of the Act applied. Section 19 of the Act defined "a foreign contract of service" as a contract for service made within Kenya and to be performed in all or in part outside Kenya, and every contract for service with a foreign state, except a contract for service entered into with or by or on behalf of the Government.

Section 20 of the Act provided that every contract of service shall be in the prescribed form, signed by the parties thereto and shall be attested by a labour officer. Under section 21 of the Act a foreign contract of service shall not be attested unless the labour officer is satisfied that the employee's consent to the contract has been obtained; the absence of any fraud, coercion or undue influence, and any mistake of fact or misrepresentation which might have induced the employee to enter into the contract; the contract is in the prescribed form; the terms and conditions of employment contained in the contract comply with the provisions of the Act and have been understood by the employee; the employee is medically fit for the performance of the contract; and the employee is not bound to serve under any other contract of service during the period provided in the foreign contract. Section 22 provides that the attesting officer may require reasonable security by bond if the employer in a foreign contract of service does not reside or carry on business in Kenya. Section 23 of the Act makes it an offence to induce a person to proceed abroad under an informal contract of service that has not been concluded as per the provisions of the Act on foreign contracts.

There was no dispute that the contracts of service required the claimant to work and reside in Sudan and the contract was therefore within the definition of a foreign contract of service. The claimant worked outside Kenya and the contract was clearly a foreign contract of service. As submitted for the claimant it required to be attested by a labour officer and there was no dispute that it was not attested as required. Further the Court finds that section 23 of the Act created an offence as against the employer if the provisions on the conclusion or formation of the contract were not complied with. By reason of that envisaged offence, the Court comes back to the issue as highlighted earlier in this judgment and returns that the statutory provisions creating the offence against the employer clearly placed upon the respondent as an employer the duty or obligation to ensure that the foreign contract of service was concluded in compliance with the statutory provisions. Thus the Court has already found that by reason of breach of mandatory statutory provisions the respondent is strictly liable of inducing and misrepresenting to the claimant that he had entered a valid foreign contract of service but which was not the case.

The evidence is that the claimant served and the parties fully performed the contracts. Thereafter, in the present suit, the claimant says the contract lacked the statutory formality. It is submitted for the claimant that the respondent engaged him to work outside Kenya by deliberately refusing or failing to comply with that formality of attestation by the labour officer and complying with the other statutory formalities for concluding foreign contracts of service. It is further submitted for the claimant that as a result it can only be concluded that the respondent induced the claimant to enter the contract through fraud, coercion and undue influence. The Court has found that fraud, coercion and mistake were not established but for failure to carry out the statutory obligation the respondent as the employer is strictly liable of inducement and misrepresentation.

For the respondent it is submitted that the contracts were made in Kenya and were to be performed outside Kenya. Being foreign contracts of service, they had to comply with the statutory provisions. It was not in dispute that the statutory form and attestation was not complied with

and therefore, the contracts are not enforceable as they were illegal or unlawful. The respondent relied upon the holding by Cockar J in **Fredrick Karani M'Imathiu –Versus- Stirling Atsandi (A) Ltd [1986]eKLR**, thus, **“It is clear that the requirements thereof have to be strictly complied with in order to render the contract enforceable. The relevant portion of the rules enacted under the Act and cited as the Employment (Foreign Contracts of Service) Rules, 1977, reads as follows: All foreign contracts of service under section 20 of the Act shall be in the form set out in the First Schedule to these Rules and any security bond....”** It was therefore submitted for the respondent that the use of the word **“shall”** made compliance with the provisions as mandatory.

The Court returns that as submitted for the respondent, under section 20 of the repealed Act and which was applicable, it was mandatory that the foreign contract of service is in the prescribed form and attested by the labour officer. The undisputed evidence was that the mandatory statutory provisions on the formalities of a foreign contract of service were not complied with.

What was the consequence of the failure to comply with the provisions? The Court has found that the statute imposed upon the respondent as the employer to ensure that the provisions were complied with and failing, the employer may be liable of the offence under section 23 of the Act. In so far as the respondent failed to comply with the statutory provisions in discharging the statutory obligation, the Court returns that the foreign contracts of service would be null and void and unenforceable at the instance of the respondent. However, the statutory provisions having been enacted for the safeguard and protection of the claimant as an employee, the foreign contracts of service would not be null and void and therefore are enforceable at the claimant's instance as the employee and are therefore liable to rectification or other reconsideration in balancing justice for the parties and as partly urged for the claimant.

The general rule is that illegal or unlawful contracts (those with a subject matter or purpose that is unlawful or made in violation of statutory provisions) are null and void and therefore unenforceable. The maxim was simply *ex turpi causa* (meaning immoral consideration) and rendered in full *ex turpi causa non oritur actio* (from an immoral consideration an action does not arise) and expressing the principle that a party does not have a right to enforce performance of an agreement founded on a consideration that is contrary to the public interest. (See **Black's Law Dictionary 9<sup>th</sup> Edition**). That was and is the general principle as was applied by Cockar J in **Fredrick Karani M'Imathiu – Versus- Stirling Atsandi (A) Ltd [1986]eKLR** but it is the Court's opinion that the duty bearer, in an appropriate case like the present one, should not be allowed to benefit out of the illegal or unlawful contract if the right holder is seeking to enforce a benefit out of the contract and in which case the Court returns that the contract is voidable as against the right holder.

While making that finding the Court follows the **Quinn and Others –Versus-Irish Bank Resolution Corporation Limited and Others [2015]**(see as discussed by Eugene F. Collins at [http://www.efc.ie/images/uploads/Decision\\_on\\_Illegality\\_and\\_the\\_enforcement\\_of\\_contracts.pdf](http://www.efc.ie/images/uploads/Decision_on_Illegality_and_the_enforcement_of_contracts.pdf)) where the Supreme Court of Ireland set the criteria to mitigate against the harsh rule of un-enforceability of the illegal or unlawful contracts on account of failure to comply with statutory formalities in concluding the contracts. Collins sets the criteria as decided by the Court as follows:

**“The court laid out the following criteria to be addressed:**

**1. Whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or enforceable. If the legislation does so provide, then nothing further needs to be done other than to determine whether the contract in question comes within the category of contracts which are expressly void or unenforceable.**

**2. Where the relevant legislation is silent as to whether a contract is to be regarded as void or unenforceable, the court must consider whether:-**

**(a) the requirement of public policy (which suggest that a court refrain from enforcing a contract tainted with illegality); and**

**(b) the policy of the legislation concerned are such that in addition to whatever sanction might be provided for in the legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed.**

**3. In considering 2 above, the court should assess:-**

**(a) whether the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent; and**

**(b) whether the wording of the statute itself might be taken to strongly imply that the remedies or consequences specified in the statute are sufficient to meet the statutory end;**

**(c) whether the policy of the legislation is designed to apply equally or substantially to both parties to a relevant contract or whether the policy is exclusively or principally directed towards only one party ;**

**(d) whether the imposition of voidness or unenforceability of a contract might be counterproductive to the statutory aim as found in the statute,**

**4. The Supreme Court indicated that further factors which might properly be taken into account in an appropriate case are:-**

**(a) whether having regard to the purpose of the statute, adverse consequences for breach set out in the statute should be considered to be adequate to secure the statutory purpose without having to treat the relevant contract;**

**(b) whether the imposition of voidness or unenforceability of the contract might be disproportionate to the seriousness of the unlawful conduct in question, in the context of the relevant statutory regime in general.”**

In the present case, the Court returns that the statute did not provide that the foreign contracts of service concluded in violation of the statutory provisions are null and void and therefore unenforceable. The Court has considered and found that by reason of the offence imposed on the employer under section 23 of the Act, the employer was obligated to comply and ensure that the statutory provisions are complied with. The Court has considered that the general policy of the Employment Act (Repealed) and even as currently enacted was to protect the employees by setting out minimum terms and conditions of employment to be upheld by employees as a matter of statutory duty. The Court finds that if the foreign contracts of service were to be declared null, void and unenforceable in every instance or case then the employees will be left exposed in a disproportionate manner. The Court therefore holds that the contracts would be voidable at the instance of the employee and liable to rectification towards ends of justice. The Court finds accordingly.

The claimant urged that the respondent may have committed an offence in the process and the Court returns that such may fall for determination in appropriate criminal proceedings as may be initiated in a court with appropriate jurisdiction as the same is clearly outside the scope of the present civil suit. For purposes of the present civil proceeding, it is sufficient to find that the contract is enforceable at the instance of the employee, the claimant.

While making the findings the Court has informed itself that the statutory provisions on concluding foreign contracts of service are carefully designed to protect the innocent citizens who may prefer to seek employment in foreign lands. It cannot be that they are exposed, without a remedy, to failures by their employers to comply with the clear statutory provisions on formalities of such contracts. The Court holds that in appropriate cases like the present one, it should be possible to enforce such contracts at the instance of the disadvantaged employee. The Court further holds that in appropriate cases like the present one, the offensive foreign contracts of service that otherwise fail to meet the statutory formalities will be liable to rectification to prevent defeating of the statutory safeguards and protection that is conferred to the employees. The Court holds that it is contrary to the universally accepted principles of statutory minimum terms and conditions of service and protection of employees that the employers fail on their statutory duty to conclude foreign contracts of service with all the prescribed formalities and the same employers benefit out of their failure by invoking illegality of the contract and therefore void and un-enforceable. The Court finds accordingly.

The **3rd issue** for determination is whether the contract should be rectified. The Court has already found that the claimant has established that the contract is enforceable and therefore is liable to rectification. The claimant urges for rectification within conferring him the terms and conditions of service as would apply to expatriates. The evidence is that the claimant was indeed placed on national terms as opposed to expatriate terms yet he was not a national of Sudan. He has shown that he was a Kenyan national and therefore entitled to the foreign contract of service with terms and conditions of service attached to expatriates. The claimant has established that the salary difference between himself and the least paid expatriate was **Kshs.8, 885, 972.00**. The respondent has not disputed the computation but urged that the comparator being a Supervisor (Field Services) was not tenable. There was no dispute that the claimant was deployed in the field as a Medical Supervisor and the Court returns that the comparator was reasonable towards rectification of the contract. He had served in South Blue Nile and the Court returns that he was well comparable to the expatriate Field Supervisor.

The **4th issue** for determination is whether the claimant was discriminated against in pay on account of race and in violation of section 82 and treated unfairly with cruelty contrary to section 74 of the former constitution of Kenya. The Court considers that the claimant's main complaint was that he had not been paid like the other expatriates and there was no evidence that the failure to be so paid was on account of his race. There was no evidence of the other racial diversities and that he was lowly paid on account of his being an African or of Kenyan extraction. Further the Court returns that there was no evidence of cruelty or any other unfair treatment. Accordingly, the Court returns that the claimant's rights were not violated as alleged.

For avoidance of doubt the evidence was that the claimant fully performed the last contract and opted not to go for another contract so that allegations of constructive unfair termination were misconceived and unfounded.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the foreign contracts of service between the parties violated the provisions of the Employment Act (Repealed) on conclusion of foreign contracts of service.
- b) The declaration that between 14.01.2002 and February 2005 the claimant was employed by the respondent as an expatriate employee and the contracts between the parties are liable to rectification from service as a national to service as an expatriate.
- c) The respondent to pay the claimant a sum of **Kshs.8, 885, 972.00** by 01.09.2019 failing interest to be payable thereon from the date of filing the suit till full payment.
- d) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 21<sup>st</sup> June, 2019.**

**BYRAM ONGAYA**

**JUDGE**