



**REPUBLIC OF KENYA**

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

**CAUSE. NO. 652 OF 2015**

**TRANSGLOBAL CARGO CENTRE LIMITED.....CLAIMANT**

**-VERSUS-**

**PAUL OTIENO ODUOR.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 21.4.2015 claiming the following reliefs from the respondent:-

- (a) An order for general damages for potential loss of business from Lufthansa;
- (b) Compensation for funds used in training of the respondent amounting to Kshs.363,400.00;
- (c) Costs of the suit;
- (d) Such other or further orders as this Honourable Court may deem fit, just and expedient.

2. The respondent filed defence and counterclaim on 4.7.2016 admitting that he was employed by the claimant from 12.8.2011 until he resigned by the letter dated 20.8.2014. He however denied any wrong doing in the said resignation and contended that it was done in accordance with the contract of employment. He further averred that the claimant's demand that he continues to work for her amounted to breach of his right to fair labour practices and a threat to his freedom from servitude and forced labour. He further averred that as at the time of the resignation he had accumulated 44 leave days. He therefore prayed for the following reliefs against the claimant:-

- (a) An award of Kshs.352,000 being payment for leave days.
- (b) A declaration that the move by claimant to unilaterally revise the terms of the Respondent's employment contract after the fact and to the detriment of the Respondent is a breach of the Respondent's right to fair labour practices under Article 41(1) of the Constitution.
- (c) A declaration that the attempt by the Claimant to restrain the Respondent from resigning from his employment under terms of his employment contract is a threat to the Respondent's freedom from servitude and forced labour under Article 30 of the Constitution.
- (d) An award of Kshs.2,880,000 being damages for the breach and threaten breach of constitutional rights and freedoms.
- (e) Interest on (a) and (d) above at court rates until payment in full.
- (f) Costs.

3. Both parties tendered evidence and thereafter filed written submissions.

**Claimant's Case**

4. Mr. Joseph Mumo Kivai, the respondent's Finance and Administration Director testified as Cw1. He stated that the claimant employed the respondent by a contract dated 12.8.2011 as a Customer Service Trainee and on 29.9.2012 he was confirmed.

5. He further testified that the claimant was provided with extensive training funded by the claimant. He stated that from 23rd to 27th June 2014, the claimant sent the Respondent to ICAP Lufthansa Airline German, which is a client of the Claimant. He further stated that the claimant spent Kshs.363,400 towards the said training in respect of the respondent's return air fare, accommodation of Kshs.130,500, hotel accommodation of Kshs.157,500, visa costs of Kshs.7,300, medical examination of Kshs.3,900, meal allowances of Kshs.60,000, tax charges of Kshs.2,700, yellow fever vaccination of Kshs.1,500 totalling to Kshs.363,400.

6. Cw1 further testified that after the said training the respondent was issued with a certificate of completion of the course. However, the respondent worked for the claimant until 20.8.2014 and resigned but the claimant declined the resignation and ordered the respondent back to work. He contended that the resignation was declined because the claimant had spent a lot of money towards training the claimant for purposes of serving Lufthansa Airline.

7. Cw1 further testified that before the respondent and other trainees left for Germany, the claimant's chairman told them that they were not going to leave the company for a while after the training. Cw1 stated that he was present in the said meeting. He contended the resignation was unreasonable and it was a breach of the agreement to continue working after the training.

8. Cw1 testified that the counter claim lacked merits because the respondent forfeited his leave by his email dated 26.8.2014 which treated the said leave days as his notice. He therefore prayed for the reliefs set out in the statement of claim.

9. Upon cross examination, Cw1 admitted that clause 10 of the contract of employment provided for termination by notice of one month or salary in lieu of notice. He further admitted that the claimant tendered his resignation on 20.8.2014 and by the email dated 26.8.2014, he forfeited his 44 leave days. He also admitted that there were no minutes for meeting before the respondent left for the training in Germany and the agreement to continue working for the claimant was not written down.

10. As regards the training in Germany, Cw1 admitted that Lufthansa Cargo wrote a letter dated 17.4.2014 undertaking to cater for expenses of the trainees after arriving in Germany. On being shown the letter dated 9.5.2014, he admitted that Lufthansa was to meet all the expenses for the training. He contended that the resignation by the respondent led to loss of business to the tune of Kshs.338,650,428. However, he admitted that he had no documentary proof that such loss occurred and that it was a direct consequence of the respondent's resignation. He further admitted that the respondent offered to assist the claimant if the need arose during the transition period.

11. Cw1 further admitted that he threatened the respondent with severance consequences if he failed to report back to work. He maintained that by the respondent getting specialized training to serve Lufthansa at the claimant's business meant that he was to continue working for the claimant.

#### **Defence Case**

12. The respondent testified as Rw1. He admitted that he was employed by the claimant as a customer service Officer (Trainee) by letter dated 12.8.2011 and confirmed as permanent employee on 29.9.2012. He further admitted that he resigned by his letter dated 20.8.2014 but the claimant declined the resignation by the letter dated 22.8.2014 and threatening severance consequences if he insisted on the resignation. He denied ever holding a meeting with the claimant in May 2014 in which he and other employees were restrained from leaving the claimant's employment after attending training in Germany. He contended that the expenses for the training in Germany were met by Lufthansa Cargo, a client of the claimant.

13. Rw1 further testified that if the cost of the training was recoverable from him then it is Lufthansa and not the claimant who should claim the same from him. He further contended that clause 10(a) of his contract of employment provided for termination of the contract by one month notice or payment in lieu of notice. He contended that he acted in good faith by offering to forfeit his 44 leave days, which were in excess of the required one-month notice under the contract. He further contended that there was no loss to be occasioned by his exit because he offered to voluntarily assist the claimant during the transition but the claimant declined the said offer.

14. He further testified that the restriction from exiting the respondent's employment and the threat to face severe consequences for resigning after the training in Germany was unconstitutional unreasonable and unenforceable as it amounted to servitude and forced labour contrary to Article 30 of the Constitution. Finally, he prayed for payment in respect of his accumulated leave of 44 days.

15. Upon cross examination Rw1 admitted that Lufthansa Cargo was one of the claimant's clients. He further admitted that he went for training in Germany between 23rd and 27th June 2014 about the new software for Lufthansa Airline. He confirmed that the training was specialized for the said Airline and the Airline was to deal only with the employees of the claimant who underwent the said training.

16. He admitted that he was to utilize the skills received from the training at the claimant's but he resigned on 20.8.2014. He however denied that there was a meeting between him and the claimant's management in which he was told that he would continue working for the claimant for 2 years after the training in Germany. Finally, he admitted that by his email to the claimant's Finance Director he forfeited his 44 leave days to cover the notice period.

#### **Analysis and determination**

17. After careful consideration of the pleadings evidence and submission by both parties, there is no dispute that the respondent was employed by the claimant until 20.8.2014 when he resigned voluntarily. The issues for determination are:-

(a) Whether the respondent executed any bond to work for the claimant for 2 years after training by Lufthansa Cargo.

(b) Whether the resignation by the respondent on 20.8.2014 amounted to breach of his contract of employment and bond to continue

working for the claimant after training by Lufthansa Cargo.

(c) Whether the claimant is entitled to the reliefs sought in the claim.

(d) Whether the respondent is entitled to the reliefs sought in his counter claim.

### **Bond to continue working**

18. Cw1 admitted in evidence that there was no written agreement binding the respondent to continue working for the claimant after training by Lufthansa Cargo. The respondent also confirmed that there was never any meeting with the claimant's management before his departure to Germany in which he was bonded to work for her for 2 years after training by the Airlines.

19. After careful consideration of the evidence tendered, I find that there was no written agreement between the claimant and the respondent binding the latter to continue working for the former for 2 years after the training in Germany from 23rd to 27th June 2014. Although the respondent admitted during cross examination that he was given the specialized training in Germany in order to serve Lufthansa Cargo in the claimant Company, I still do not think that there was any binding undertaking made by the respondent to the claimant that he would not exist the company until expiry of 2 years.

### **Breach of contract and Bond to continue serving**

20. I have already made a finding of the fact that there was no bond executed by the respondent to serve the claimant for at least 2 years after the Lufthansa Cargo training. Consequently, it was not possible to breach a non-existent bond by exiting the claimant company on 20.8.2014, one month after the said training.

21. As regards breach of the contract of employment, the respondent contended that he fully complied with clause 10(a) of the contract of service by serving a termination notice and forfeiting his 44 leave days. Cw1 admitted in evidence that the contract of employment allowed termination of the contract by notice of one month or payment of one month's salary in lieu of notice.

22. I have perused clause 10(a) of the contract of employment contained in the letter of appointment dated 12.8.2011. It clearly states that after confirmation of the contract, either party could terminate the contract by serving one month's written notice or paying the other one month gross salary in lieu of such notice.

23. In this case the respondent resigned by the letter dated 20.8.2014 with immediate effect. That amounted to breach of the contract. However the same was remedied by the respondent by forfeiting his 44 leave days by the email dated 25.8.2014. The said matter rested at that and in this case, the claimant is not seeking salary in lieu of notice.

### **Reliefs sought by the claimant**

24. The respondent contended that all the expenses for his training in Germany were met by the claimant's client, Lufthansa Cargo and denied the claim for refund of Kshs.363,400. Cw1 admitted that the letter by Lufthansa dated 17.4.2014 and another one by the claimant dated 9.5.2014 indicated that all the expenses of the respondent's training in Germany were to be paid by Lufthansa Cargo.

25. The letter dated 17/4/2014 stated:-

***“To whom it my concern***

***Re: Invitation letter to attend a course in Germany for Paul Otieno***

*Dear Sirs*

*Paul Otieno is planned to participate in the following training course:*

*...*

*Our company will provide free transportation, medical insurance and all other related expenses to his duty travel in Germany.*

*The accommodation, including all meals, will be served and paid by L. H. Cargo AG...”*

26. The claimant wrote the letter dated 9.5.2014 to the German Embassy in Nairobi seeking for a visa for the respondent to attend the said course and stated in part that :-

***“As indicated the invitation letter, Lufthansa Cargo will met all the expenses of the training...”***

27. Cw1 contended that she spent Kshs.363,400 on the respondent to facilitate his return ticket among other items set out in the claim. He however did not produce any supporting receipts or other claim supporting documents. I therefore return that the claimant has not proved on a balance of probability that she spent Kshs.363,400 towards the training of the respondent in Germany as claimed. Consequently, that claim

is dismissed.

28. Likewise the claim for loss of business estimated at Kshs.338,650,428 is dismissed for lack of merits. The claimant has not proved that the said was incurred or likely to be suffered due to the claimant's exit from the company. She also did not demonstrate how the said loss was to occur as a result of the respondent's exit from the company.

#### **Counter claim**

29. The respondent admitted that he wrote the email dated 25.8.2014 forfeiting his 44 leave days for terminating his contract of service without prior notice. He cannot therefore turn round to demand the same. That claim for accrued leave is therefore dismissed.

30. Likewise the claim for damages for constitutional violation is not merited and it is also not pleaded with the precision required for such claims as it was set out in **Anarita Karimi Njeru v Republic [1979]eKLR**. In the said case, court held that:-

*“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”*

31. I have found that both the claimant the respondents counter claim lack merits and are dismissed. Each party to bear his/her own costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of November, 2019**

**ONESMUS N. MAKAU**

**JUDGE**