



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 165 OF 2015

DORCAS KEMUNTO WAINAINA CLAIMANT

v

IPAS RESPONDENT

JUDGMENT

1. The dispute presented herein involves an employment contract entered into by a Kenya national with a North Carolina (United States of America) based employer, IPAS,(Respondent). In the contract documents, the parties did not expressly make provision for choice of law (proper law) or jurisdiction in case of dispute.
2. The Kenyan national, Dorcas Kemunto Wainaina (Claimant) operated mostly from Nairobi with work visits to countries in the region.
3. The contract can therefore be categorised as an international employment contract. The Claimant now alleges breach of contract/unfair termination of contract.
4. Conflict of laws questions with the attendant issues of jurisdiction and choice of law (or proper law of contract) governing the contract are therefore implicated.
5. The parties have naturally contested the twin questions of *jurisdiction* and *choice of law* (proper law of contract) and the Court will in due course address its mind to the same as they are decisive of the cause of action advanced and the remedies, but first some background would be in order.
6. But just to mention that domestic case law in the area of conflict of laws within the labour/employment framework in Kenya under the current constitutional and statutory dispensation is scarce.

Background

7. The Respondent advertised for the position of Senior International Human Resource Associate and included a job description in the advertisement. The advertisement indicated that the location was *Chapel Hill, NC, USA and Nairobi, Kenya, Africa*.
8. The Claimant applied for the position and after interview, the Respondent wrote to her on 9 October 2012 to offer/confirm to her *full-time regular employment* as a Senior International Human Resource Associate.
9. The letter advised the Claimant that the employment would be governed by the Respondent's Personnel Policies and further that the *employment was at will* and was not for a fixed period. Termination would be at the option of either party at any time.
10. On 19 November 2014, the Respondent wrote to the Claimant to inform her that the position of *Senior Human Resources Advisor* was being eliminated due to restructuring and therefore her services would no longer be required.
11. The termination notice also advised the Claimant that her last day of work would be 19 November 2014 and that her health insurance would be effective through 30 November 2015 and that under the terms of *Severance Agreement and Release*, the equivalent of 3 months of premium would be paid.
12. The Claimant felt the separation was not legally justified under Kenyan law and on 3 December 2014, her legal advisors wrote a demand before action to the Respondent seeking admission of liability and dues amounting to Kshs 18,923,019/- (pleaded amount was Kshs 17,123,019/- which was amended to Kshs 17,408,642/-).
13. On 9 January 2015, the Claimant's legal advisors wrote another letter to the Respondent decrying the stopping of her health insurance

cover before the effective date of 30 November 2015.

14. Seeing no resolution in sight, the Claimant moved Court on 11 February 2015 and the Issues in Dispute were stated as

Wrongful, unlawful, and unfair termination on allegation of redundancy, unconscionable withholding, denial and/or retention of terminal benefits, and breach of trust and confidentiality by the employer, non-payment of overtime, house allowance, accrued annual leave, refund of monies unlawfully deducted by the Respondent, non-payment of notice pay and damages and non-payment of terminal benefits generally.

15. On 24 March 2015, the Claimant moved Court under certificate of urgency seeking an order restoring her health insurance cover but the application was withdrawn on 9 November 2015.

16. On the same day, the Claimant secured leave of Court to file an amended Memorandum of Claim, which was filed on 1 December 2015 paving way for the Respondent to file a Statement of Response, Counterclaim and Setoff on 29 January 2016.

17. The Claimant filed a Reply to the Response, Counterclaim and Setoff on 9 February 2016, and the Cause was heard on 13 February 2018 when the Claimant testified and on 21 February 2018 when the Respondent's IPAS Africa former acting Country Director testified.

18. The Claimant filed submissions on 8 March 2018, while the Respondent filed its submissions on 26 March 2018.

19. The Claimant raised some 9 questions to be determined in her submissions being

(i) Does the Employment and Labour Relations Court of Kenya have jurisdiction to determine the dispute herein and if so which labour laws apply in the case at hand, the American labour laws or Kenyan labour laws.

(ii) Whether the Claimant was paid house allowance for the period she worked for the Respondent?

(iii) Who can enforce the law at the work place when it is not being complied by in an organisation?

(iv) Whether in deed there was redundancy at the Respondent organisation.

(v) Whether due process was followed in declaring the Claimant redundant.

(vi) Whether the Claimant could be terminated at will without reasons being given.

(vii) Whether the law of estoppel can apply in the case herein as regards to the cancelled medical cover.

(viii) What are the remedies available to the Claimant/Is the Claimant entitled to the remedies sought?

(ix) Who bears the costs of the suit herein?

20. The Respondent on its part identified in its submissions, the Issues arising as

(i) Jurisdiction and applicable law.

(ii) Whether Claimant was entitled to the equivalent of 1 year premiums on medical cover.

(iii) Whether Claimant is entitled to 3 months' pay in lieu of notice.

(iv) Whether the Claimant is entitled to basic salary for 19 days in November.

(v) Whether the claim for house allowance is warranted.

(vi) Whether the Claimant is entitled to a claim for severance pay at 3 months' pay.

(vii) Claim for leave and 13th month bonus.

(viii) Counterclaim.

21. The Court has considered the pleadings, evidence and submissions and identified the Issues arising for determination as, *whether the Court has jurisdiction over the dispute, which law (Kenyan or United States of America law) governed and applied to the contract, (If jurisdiction is assumed), whether the termination of the Claimant's contract was unfair/lawful, whether the cancellation of health cover was unlawful, whether Claimant breached her duties under the contract and appropriate remedies/orders.*

Jurisdiction

22. Both parties appeared to mix up and not appreciate the conceptual distinction between *jurisdiction* and *applicable law* (choice of law/proper law) in their submissions.
23. Although the question of *jurisdiction* is connected to the issue of *choice of law*, the two are conceptually distinct.
24. In other words, the question of application of foreign law may be irrelevant to the question of jurisdiction in certain instances.
25. For instance, an employment contract may be governed by the law of the United States but the Employment and Labour Relations of Kenya would have jurisdiction to arbitrate in disputes alleging breach of contract, but applying the law of the United States where the parties have expressly agreed so, or where the Court after assessment of the connecting or dominant features and the law assumes jurisdiction.
26. It needs no authority therefore to state that a domestic Court may be called upon to apply foreign law in a contractual situation as obtains here. The distinction in simple terms is on *choice of jurisdiction* and *choice of law*.
27. Although admitting that this Court had jurisdiction to hear and determine the dispute herein, the Respondent in the same breath disputed the jurisdiction of the Court on the ground that the dispute/contract in contention was concluded and governed by United States laws.
28. Case law is now clear that a Court of law cannot assume jurisdiction not granted by law (the Constitution or some statutory law). In that respect, parties cannot consent to clothe a Court with jurisdiction.
29. The jurisdiction of this Court is anchored primarily in Article 162 of the Constitution, the Employment and Labour Relations Court Act, the Employment Act, 2007 and the Labour Relations Court Act, 2007, among many other statutes.
30. In determining the question of jurisdiction, the Court must categorise the dispute presented to it for adjudication.
31. It cannot be disputed that the dispute before Court arises out of a *contract of service* (appropriate term in modern employment law is *contract of employment*), albeit an international contract of employment.
32. The parties entered into a contract of employment which it is alleged to have been breached, and the Claimant partly operated out of Nairobi and therefore in terms of sections 3 and 87 of the Employment Act, 2007 and 12 of the Employment and Labour Relations Court Act, the jurisdiction of the Court is provided for.
33. The parties herein though entering into an international contract of employment did not expressly provide for the Court which would have *jurisdiction* in case of conflict **or** on allegations of breach of contract.
34. In such an instant, there are factors a Court ought to consider before assuming jurisdiction. These connecting or dominant factors equally apply (overlap) when assigning choice of law where there was no express or tacit agreement and they include *locus contractus*, *locus solutionis*, *domicile* and *nationality* of the parties (see Forsyth, Private International Law, third edition, page 288).
35. The Court is expected to weigh up these features in a qualitative rather than quantitative basis. The Court should also have regard to whether any judgment it renders would be effective and capable of being enforced.
36. Considering the Respondent's admission on the question of jurisdiction, that the contract provided that the Claimant would be based in both Chapel Hill, North Carolina and Nairobi, that the remuneration was subject to Kenyan tax laws and that the dispute concerns breach of contract and unfair termination of employment, the Court will not belabour the point but find that it has jurisdiction over the dispute presented before it.

Choice of law/Proper law governing the contract

37. The primary documents on the construction, interpretation and application of the choice of law/proper law governing an international contract of employment are the contract documents, applicable municipal law as well as international law.

Contractual documents

38. In the instant case, apart from subjecting the Claimant's employment to the Respondent's (IPAS Personnel Policies, August 2005), the contract documents did not expressly indicate the applicable law.
39. However, the Respondent posited that the application of United States laws could be implied into the contract by reference to where contract was concluded.
40. The Respondent thus urged because the Claimant was hired for an international role and the Personnel Policies applicable were framed within the context of the laws of the United States that was the appropriate law to apply to the dispute.
41. It was also urged that the application of the United States laws could be implied from the use/choice of the terminology of *employment at will* which is peculiar to that jurisdiction. Because *employment at will* was contrary to Kenyan law, it was submitted that Kenyan law did not apply.

Offer letter

42. In terms of contractual agreement, the Court has looked at the offer/confirmation letter dated 9 October 2012 and the Personnel Policies.
43. Although providing that the contract was governed by the Respondent's Personnel Policies (IPAS Personnel Policies August 2005), the letter of offer did not expressly subject the contract to the laws of the United States or North Carolina, or the laws of Kenya.
44. The letter equally did not oust the application of the laws of the United States or North Carolina, or the laws of Kenya.

Personnel Policies

45. The Court therefore turns its focus to the Personnel Policies.
46. Material to the discourse is clause 1 Employment Policy and the Court will set it out in *extenso*

1.1 Hiring

Directors, Managers and Country Directors recommend filling vacant positions by completing a New Hire Approval Form prior to posting or advertising a position. New positions are requested during the bi-annual budget building process and are approved by the Executive Team and the President. Once a position has been approved, the hiring manager has authority to hire following the primary decision making guidelines grid found in Shares/Step-by-Step/Decision Making Grid.

For positions within the US:

Employment with IPAS shall be by a letter of appointment issued from Human Resources and signed by the Executive Vice President of Finance and Administration. That letter shall set out the date of commencement and the bi-weekly/monthly salary rate or hourly wage agreed upon. All positions within Ipas are at will- that is, they are for no definite duration, and can be affected by a variety of factors, including changes in funding. If a position is hired.....

For positions of Country Directors:

Procedures shall follow those stated above for US positions. A Country Director is considered an employee of his/her respective country office. Local labour laws will apply with regards to contract periods and end dates.

For positions within country offices:

A letter of appointment will be issued from Human Resources and signed by the Country Director. That letter shall set out the date of commencement and the agreed upon salary. Positions in the country offices are considered employees of the respective country office. Local labor laws will apply with regards to contract periods and end dates.

47. The Policies do not seem to have contemplated the position such as that held by the Claimant.
48. An illustration is the fact that the contract was not under the hand of an Executive Vice President to qualify it as a *US hire*.
49. Unlike the provision in regard to positions within country offices that are subject to local laws, the Respondent's Personnel Policies were not express on the applicable law especially in a position such as was held by the Claimant, considering that the location was given primarily as North Carolina and Kenya (place of performance of contract was primarily out of Nairobi).
50. Actually the last page of the Policies had a provision in bold to the effect that

I understand and acknowledge that this handbook does not constitute a contract of employment or establish a just cause termination standard. I understand that, just as I may terminate my employment at any time, Ipas may terminate my employment at any time, with or without notice or cause. I understand that no employee or representative of Ipas, other than the President, has the authority to create a contract of employment with me and that such contract must be in writing signed by both parties.

51. The Policies therefore is not of a decisive nature in the instant dispute as to choice of law/jurisdiction.
52. Evidently, there was a lacuna in the contractual documents presented in Court as to the *choice of law* in cases of conflict, and therefore it is doubtful whether the Policies should be decisive in determining the applicable law.
53. The Court will therefore the Court turn to comparative case laws, considering that the Claimant operated out of Kenya and she signed the contract in Kenya.

Comparative case law

54. The Kenyan employment and labour law framework is heavily borrowed from the South African framework and the Court will look at

case law from that jurisdiction.

55. In *Kleinhans v Parmalat SA (Pty) Ltd* (2002) ILJ 1418, (the Court is aware of the criticism of the decision by Christa Roodt in *Jurisdiction of the South African Labour Court: Employer Identity and Party Autonomy*) the Labour Court found that as regards international employment contracts, consistent with the common law principle of party autonomy, parties to an international contract are free to agree, expressly or tacitly, on the specific legal system to govern their contract, and as to which country law would govern the relationship and where there is no provision, it is for the court to assign the proper law of contract and jurisdiction.

56. In terms of the test to apply in determining the proper law of contract and jurisdiction the court in *Kleinhans* noted that the subjective test which was applied in *Standard Bank of SA v Efroiken & Newman* 1924 AD 171 at 185 had not been rejected.

57. However, the court preferred the objective test which was enunciated in *Ex parte Spinazze & Another* NNO 1985 (3) SA 650 (A).

58. According to the Court, the enquiry in terms of the objective test entails an investigation into which law and jurisdiction does the contract have the most real connection?

59. Some of the factors noted in the case to be considered in determining the proper law of contract included *locus contractus*, *locus solutionis*, *nationality and domicilium* of the parties (dominant/connecting features). The same factors were identified in *Parry v Astral Operations Ltd* 10 BLLR 989.

60. The same approach was also taken in *Sertfontein v Balmoral Control Contracts SA (Pty) Ltd* (2002) 21 ILJ 1091 (CCMA).

61. In the present instance and in as far as the issue of who the true employer was, there is no dispute that the Respondent was the employer, and it is based in North Carolina.

62. There is also no dispute that the Claimant was domiciled in Kenya and mostly operated from Nairobi and that was recognised in the offer letter.

63. As to the performance of the contract, despite the fact that recruitment process was conducted from North Carolina, there was no evidence that the Claimant ever performed her contract in the United States or North Carolina. She was based in Nairobi with work trips to countries in the region.

64. The Respondent also paid the Claimant her salary in Kenya and effected deductions for the purpose of the Income Tax, Kenya.

65. In as far as the choice of law is concerned, the dominant features connect the contract to Kenya rather than to the United States, and the Court so finds.

International standards

66. The special features of international employment contracts are recognised in international law.

67. For instance, Article 6 of the Convention on the Law Applicable to Contractual Obligations, [11](#)(105) (the Rome Convention) firstly recognises party autonomy by permitting a contract of employment to stand, provided a choice of law made by the parties does not have the result of depriving the employee of the protection afforded to her by the mandatory rules of the law which would be applicable in the absence of choice.

68. Secondly, in the absence of choice, a contract of employment is to be governed:

(a) by the law of the country in which the employee habitually works;

or (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

69. Kenya may not be bound by the Convention. Perhaps the time is ripe to consider it.

70. In the meantime, having considered all the above, the Court considers the Convention to be of persuasive value as it protects employees and nothing in it conflicts with the Constitution or our labour laws.

Kenya law

71. The primary statute providing for laws of general application in regard to employment contracts in Kenya is the Employment Act, 2007.

72. On the assumption that the Respondent is United States based and was entering into a contract with a Kenyan, the provisions of Part XI became implicated.

73. No evidence was led either by the Claimant or the Respondent that the requirements of the Part and more so sections 83, 84 and 86 of the

Act were satisfied to bring the contract within the ambit of a foreign contract of service.

74. And that deficiency cannot be attributed to the Claimant, for at the time of her recruitment and preparation of the offer letter, she was under no obligation or duty to advise the Respondent's on the terms of contract.

75. Considering the deficiencies in the contractual documents governing the relationship between the Claimant and the Respondent and that the causes of action presented are statutory and common law breaches of the contract of employment and that the Constitution guarantees every worker the right to fair labour practices, the Court finds that it has jurisdiction and the laws of Kenya are applicable.

76. Just for clarity, it is the opinion of this Court that in cases of international contracts where there is no express provision of choice of law and which contract is performed majorly from Kenya by a Kenya citizen and where the employer has a presence within the country, the Court will have jurisdiction.

77. Further, the Court notes that although the registration status of the Respondent in Kenya was not disclosed, it is doubtful whether it would have legally operated without such registration or licensing.

Whether termination was unfair/unlawful

78. The contract in contention expressly provided that it was at will and any of the parties could terminate it at any time.

79. However, such a contractual provision would not pass legal muster under the statutory regime in Kenya in light of the clear and mandatory provisions of sections 35, 40, 41, 43, 45 and 47 of the Employment Act, 2007.

80. The said provisions are an expression of public policy in Kenya.

81. The separation in issue here was on account of redundancy and the provisions of sections 40, 43 and 45(2)(a),(b)(ii) become directly implicated.

82. The question of performance or negligence on the part of the Claimant would therefore not be material.

83. The Claimant and the labour officer were not given advance written notice of a month and on that singular ground, the Court finds that the termination on account of redundancy was tainted with procedural unfairness.

Health cover

84. In terms of the separation letter, the Respondent represented to the Claimant that the health cover in place would run through to 30 November 2015.

85. The Respondent did not dispute that the cover was stopped mid-way.

86. It instead submitted that because the Claimant did not sign the *Severance Agreement and Release*, there was no valid agreement creating an obligation to meet the health cover bargain.

87. Considering that the representation was made by the Respondent, it was incumbent upon it to ensure that it paid premiums such as would ensure that the cover run up to 30 November 2015.

88. If at all, the 3 months premium was inadequate to cover the health scheme up to 30 November 2015, that was a breach of a promise by the Respondent and it would be liable for any medical expenses incurred by the Claimant during the period.

Breach of duties under the contract

89. In its Counterclaim and Setoff, the Respondent contended that due to the Claimant's negligence in her advisory role, an employee Francis Kooli sued the Respondent (Cause No. 267 of 2015) and had to be paid.

90. The Court finds this allegation most spurious, for according to the letter terminating the said employee's contract, the reason given was *anticipated changes in the financial unit*.

91. The said employee's position was declared redundant according to the letter signed by a Director, Dr. Aziz Abdallah and it was due to financial reasons.

92. On the other allegations of negligence with respect to local labor laws in Kenya and the various countries within the region, the Respondent did not provide any particulars and the allegations remained just general and vague allegations.

93. As to the contract of the witness presented by the Respondent, the contract in question was drawn in 2011 when the Claimant was not in the employment of the Respondent.

94. When it was rectified in November 2012 to conform to the local laws, the Claimant had come on board and she may not be blamed.

95. In the Court's view, if indeed, the allegations had any substance, the Respondent should have at the minimum produced copies of documentary proof of the negligence in terms of advice or show cause to the Claimant to explain her performance/negligence/misadvice.

Appropriate remedies

Pay in lieu of notice

96. The Claimant was paid by the month and pursuant to section 35(1)(c) of the Employment Act, 2007 and to the fact that no notice was given would be entitled to the equivalent of 1 month salary as pay in lieu of notice.

97. The Claimant was paid the equivalent of 2 weeks' pay in lieu of notice and is entitled to the balance.

Damages for wrongful dismissal

98. The Claimant served the Respondent for about 2 years and considering the length of service, the Court is of the view that the equivalent of 3 months gross salary would be appropriate and fair.

Salary for November 2014

99. The Claimant anchored this head of claim on calendar days worked while the Respondent maintained that the Claimant was paid for actual days worked (excluding weekends).

100. None of the parties provided a contractual, legal or evidential foundation for the formulas used and the Court will decline the relief.

House allowance

101. The Claimant sought Kshs 1,019,998/- under this head.

102. In resisting the claim for house allowance, the Respondent argued that because the Claimant was not earning a basic wage as contemplated by the Regulation of Wages (General) Order, she was not entitled to house allowance.

103. Purely as a matter of law, that submission is not only misplaced but mischievous in light of the express provisions of section 31 of the Employment Act, 2007 (the substantive right creating law).

104. The Claimant was a highly experienced human resource practitioner and during the currency of her employment never raised the issue of house allowance with her employer.

105. Although technically entitled to her allowance, the Court would decline to award house allowance.

Annual leave

106. The Claimant was paid Kshs 699,337/13 on account of leave and nothing turns on this head of relief.

Severance pay

107. The Claimant sought Kshs 4,289,265/- on account of severance pay based on the equivalent of 3 months' pay for each completed year of service (she served for about 2 years). The Respondent paid her Kshs 621,632/- at the rate of 15 days for each year worked.

108. However, she did not provide any contractual basis for the formula.

109. The formula used by the Respondent has statutory anchor in section 40(1)(g) of the Employment Act, 2007 and the Court that was in accordance with the law.

13th month bonus

110. The Claimant was paid Kshs 549,187/- under this head and the Court finds it would be unconscionable and against the contract to pay her twice.

Premium for medical cover

111. In the view of the Court, the Claimant would only be entitled to the actual medical expenses and not the premium the Respondent ought to have paid.

112. The Claimant produced receipts totalling Kshs 24,077/-

Pension scheme

113. No evidence was led in respect of this head of claim and it is dismissed.

General damages for embarrassment and psychological torture

114. Nearly all unfair terminations of employment would lead to some embarrassment and or torture to an employee, but the statute has provided the primary remedies which do not include general damages.

115. This would not be an appropriate case to consider this head of claim and relief.

Conclusion and Orders

116. The Court finds and holds that the termination of the Claimant's contract was unfair and awards her and orders the Respondent to pay her

(a) Balance (pay in lieu of notice)	Kshs 310,816/-
(b) Compensation	Kshs 1,243,264/-
(c) Medical expenses	Kshs 24,077/-
TOTAL	Kshs 1,578,157/-

117. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 13th day of April 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyasimi instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Ms. Kirimi instructed by Hamilton Harrison & Mathews Advocates

Court Assistant Lindsey

(105) opened for signature in Rome on 19 June 1980 (80/934/EEC)