REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 1119 OF 2014

CAPTAIN (RTD) CHARLES K.W. MASINDE.....CLAIMANT

VERSUS

INTERGOVERNMENTAL AUTHORITY

ON DEVELOPMENT.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant filed this Statement of Claim on 4th July 2014 contending that his employment was unfairly and unlawfully terminated by the respondent on 24.2.2011 and prayed for the following reliefs:

a) Salary for 7 months being the short fall in the contract ...US$ 38,500.00

b) Pay in lieu of notice of 1 month ……...….....US$ 5,500.00

c) Refund in respect of travel disbursements…….....…US$ 8,561.00

d) 12 months compensation @ US$ 5,500.00……..…….US$ 66,000.00

e) Pay in lieu of 1-month leave…….…….US$ 5,500.00

TOTAL **US$ 124,061.00**

2. The Respondent in its Memorandum of Response filed on 28th July 2014, raised an objection ***in limine*** that this Court lacks jurisdiction to hear and adjudicate the Claimant's claim because she is based in Djibouti, the Claimant's duty station was Mogadishu and the contract of service was subject to the law of Djibouti. She further averred that the Claimant's contract of service was lawfully terminated in accordance with Clause 10 of the Contract of Service and there was no imperative under the said contract for any hearing and in any event the reasons for termination were disclosed in the letter dated 24th February 2011 and the termination given was in all circumstances justified. She therefore denied liability to pay the Claimant the amounts in Paragraph 9 of the Statement of Claim and prayed that the claim be dismissed with costs.

3. The objection by the respondent on the issue of jurisdiction was argued as a preliminary point before Ndolo J and she pronounced herself vide her Ruling dated 8.7.2016 whereby she declined to dismiss the suit *in limine* and directed the parties to tender evidence to canvass the matter as one the issues for trial. The suit was heard 17.5.2018 and 30.5.2018 when the claimant gave evidence but the respondent closed her case without calling any witness. Thereafter only, the claimant filed written submissions, which I have carefully considered herein alongside the pleadings, and the evidence tendered.

4. I have to state, however, that the failure by the respondent to fully participate in the trial by presenting sufficient material has left the court frustrated and possibly unable to effectively determine the issues raised including jurisdiction of the court over the dispute.

THE CLAIMANT'S CASE

5. During trial, CW1 Charles K. W. Masinde requested to rely on his Claim and 5 documents in the list filed on 4. 7. 2014 which request was not objected to by the Counsel for the Respondent.

6. CW1 testified that he was employed by the respondent on 10.10.2010 as the Senior Liaison Officer based in Mogadishu-Somalia but reporting to the Facilitator, Somali office in Addis Ababa, Ethiopia. The contract was for a period of 12 calendar months ending on 9.10.2011 and his lump sum pay per month was $5000 plus housing allowance of $ 500. The contract of service was signed by both parties at the respondent's office in Nairobi and reported to work immediately.

7. He further stated that he flew to Addis Ababa on 8th November 2010 for briefing by his immediate boss and finally reported to Mogadishu on 21st November 2010 and set up an office after his boss, Hon. Kirwa sent him to seek accommodation in the AMISOM Military base. However the General in charge of the facility refused to accommodate him at the AMISOM base and he reported back to Hon. Kirwa on 23rd November 2011 to notify him of the rejection by General to accommodate him. Thereafter he returned to Mogadishu on 24th November 2010, organized his security, and settled in a private office.

8. CW1 testified that on 26th February 2011, he received a letter from Eng. Mahboub terminating his services and he notified Hon. Kirwa who told him that he was not aware of the termination letter but advised him to comply. The reason cited for the termination was minimal performance, failure to abide by the terms and conditions of service and failure to respect office rules.

9. CW1 testified that he had a 1-year contract and had only worked for 5 months. He therefore prayed for salary for the remainder of the contract term. He further prayed for his accrued leave and refund of travel expenses which had not been paid despite the receipts in support thereof having been presented. He further contended that all his travels and claims were approved by Hon. Kirwa but were never paid. He testified that before filing this suit, he did a lot to seek an amicable settlement through Foreign Affairs Ministry but it failed and hence this suit. He prayed for the reliefs sought in his claim.

10. On cross-examination, CW1 admitted that Clause 11 of the Contract of employment provided that it was subject to the law of Djibouti. He admitted that he saw the clause when he signing the contract but never asked for a copy of the laws of Djibouti. He admitted also that under his contract his work station was Mogadishu and denied ever going to Djibouti. He contended that he was to report to work on 11th October 2010 but instead he reported to Addis Ababa on 8th November 2010 for briefing and was referred back to Kenya for orientation.

11. On further cross-examination, he stated that at first he got accommodation at AMISOM Mogadishu with Authority from the Commander after talking with Ambassador Diara. He contended that he relied on the letter written by Hon. Kirwa to the Ambassador seeking assistance for accommodation at AMISOM Somalia. He however denied knowledge whether the said letter had been responded to. He explained the reason why the said letter had no official stamp is because it was sent via email. Finally, he maintained that the receipts for disbursements were approved by his immediate boss, Hon. Kirwa.

Claimant's Submissions

12. Regarding the objection to the jurisdiction of the court, the claimant appreciated that his contract of service was subject to the law of Djibouti by dint of clause 11 of the said contract. He however submitted that the contract was signed in the respondent's local office at Nairobi where he did most of his functions. He further submitted that by him never setting foot in Djibouti, the law of that country never crystalized and as such it doesn't apply to his contract. In addition he urged that clause 11 of the contract of service never excluded the Kenyan courts from determining any disputes emanating from the contract especially

considering that the contract was prepared and executed here in Kenya. He further submitted that the respondent's objection to the court's jurisdiction was determined by Ndolo J by her Ruling delivered on 8.7.2016. Finally, he urged that ***section 87 of the Employment Act*** allows an employer or employee to enforce their respective rights and remedies for any breach or non-performance of a lawful contract of service outside Kenya.

13. Turning to the merits of the suit, the claimant based his submissions on the Kenyan law. He submitted that he was summarily dismissed by the Respondent by the letter dated 24.2.2011 within the meaning of ***section 44 (1) of the Employment Act 2007*** since he was terminated for absconding work without notice. He however submitted that his evidence that his absence from work station in Mogadishu was permitted by his immediate boss was not controverted. The said evidence included all his Travel Request and authorization form by his employers' authorized representatives.

14. In view of the foregoing, the Claimant submitted that the Respondent failed to discharge her statutory burden of proving the reason or reasons for terminating his contract of employment as required by under ***section 43 of the Employment Act*** and as such the termination was unlawful. He fortified the said submission citing ***ELRC Cause No. 1712 of 2012; Onesmus Mutuku Ndunda vs. Motorways Construction Limited*** and ***ELRC Cause No. 2172 of 2012; George Katana Isanya vs. Aga Khan University Hospital & Another***

15. The Claimant further submitted that the procedure followed by the respondent in dismissing him legally flawed vis a vis A***rticle 47 of the Constitution of Kenya*** which accords him the right to fair administrative action, and ***section 41 of the Employment Act 2007*** which provides that before an employer terminates the employment of an employee on the grounds of poor performance, the employer should explain the reason for termination in the language that the employee understands and thereafter hear and consider any representations which the employee has.

16. The Claimant appreciated that ***section 44 (3) of the Act*** provides that an employer may dismiss an employee summarily if the conduct indicates that he has fundamentally breached his obligations under the contract of service. However he urged that his dismissal was not founded on any valid grounds and the procedure followed was flawed. He therefore prayed for the reliefs sought in the suit to be granted.

Analysis and determination

17. After careful consideration of the pleadings, evidence and submissions, the following issues arose for determination:

i. Whether this Honourable Court has jurisdiction to hear and determine the matter.

ii. Whether the Claimant's employment was wrongfully and unfairly terminated.

iii. Whether the Claimant is entitled to the prayers sought.

Whether the Honourable Court has jurisdiction to hear and determine the matter

18. In its memorandum of response dated 24th July 2014, the Respondent raised the following preliminary objection:

> ***"The Respondent states that under Clause 11 of the Employment Service Contract the relationship between the Claimant and the Respondent was to be subject to the Law of the Republic of Djibouti and the services were to be performed in the Republic of Somalia and consequently an objection in limine shall be raised that the Industrial Court lacks jurisdiction to hear and adjudicate the Claimant's claim."***

19. From the court record, Ndolo J who heard the said preliminary objection ruled that it was not a pure point of law since it required evidence to prove it and directed the parties to canvass it as one of the issues for trial. However, the respondent never tendered any evidence or filed any submissions and for that reason, the claimant contends that his evidence on the said matter is uncontroverted.

20. The jurisdiction of this court to hear and determine employment related disputes in Kenya is out of question. The said jurisdiction flows from Article 162(2)(a) of the constitution, section 12 of the Employment and Labour relations Court Act and the various statutes of labour laws in Kenya. The dispute before the court is founded on a contract of employment signed between the parties herein at the respondent's office in Nairobi to be performed in Mogadishu Somalia. For unspecified reasons the contract was subjected to the law of Djibouti.

21. After careful consideration of the contract of service placed before the court and especially clause 11 that subjected the contract to the law of Djibouti, I did not see any suggestion that the parties intended to oust the jurisdiction of Kenyan courts to determine disputes arising from the contract. All what that clause stated was that the law applicable to the parties thereto was that of Djibouti. In my view the choice of law to apply to an international contract is not synonymous to jurisdiction although they converge. Whereas the former relates to the law to govern a particular dispute, the latter relates to the authority or mandate of a court or tribunal to determine the dispute based on the chosen or applicable law.

22. Flowing from the foregoing, I opine that the choice of the Djibouti law as the one applicable to the contract herein did not mean that a court in Kenya where the contract was signed or Somalia where the contract was performed or violated cannot adjudicate over a dispute emanating from the contract, merely because the applicable law is foreign to the said courts. Consequently, I return that the jurisdiction of this court to determine the dispute herein has not been ousted by dint of clause 11 of the contract of service herein, which subjected the contract to the law of Djibouti.

23. In the case of ***Dorcas Kemunto Wainaina vs. IPAS,(eKLR)*** the court agonized over a more or less similar issue of jurisdiction vis a vis parties choice of foreign law and had the following to say:

> ***"Both parties appeared to mix up and not appreciate the conceptual distinction between jurisdiction and applicable law (choice of proper law) in their submissions. Although a question of jurisdiction is connected to the issue of choice of law, the two are conceptually distinct. In other words, the question of application of foreign law may be irrelevant to the question of jurisdiction in certain instances. For instance, an employment contract may be governed by the law of the United States but the Employment and Labour Relations (sic) 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. It needs no authority therefore to state that a domestic Court may called upon (sic) 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."***

24. The Court further stated that:

> ***"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. In such instance, there are factors which a Court ought to consider before assuming jurisdiction. These connecting or dormant factors equally apply (overlap) when assigning choice of law where there was no express or tacit agreement and they include locus contractus, locus solution is and nationality of the parties (see Forsyth, Private International Law, third Edition, page 288). 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. "***

25. I concur with the foregoing precedent and proceed to hold that this court is clothed with the jurisdiction to determine the dispute herein on basis of the applicable law chosen by the parties, that is to say, law of Djibouti. In any event, I am of the view that Djibouti is too far for the claimant, a retiree to afford the cost of going there to pursue employment benefits claim yet the respondent has a local office within the jurisdiction of this court. Secondly, the presence of the local office almost guarantees the possibility of the decree of this court being executed effectively.

Whether the summary termination of the Claimant's contract was wrongful and unfair.

26. In his letter for termination of employment dated 24th February 2011, the reason given for the termination was:

> ***"…you reported late to your work in November 2010 without any prior consent for your absence. Whenever you showed up in your office you stay only for three or four days. Within the last 5 months you were in Mogadishu office for 3 days in November, 4 days in January and 5 days in February…Your performance was also minimal. You did not respect office rules and regulations and did not abide by the terms and conditions of your service agreement. In the last five months you were expected to deliver but you did not due to your continuous absence from work"***

27. During trial, the Claimant explained the reason why he had been unable to report to work on certain occasions citing briefing by his immediate boss in Addis Ababa, lack of accommodation in the AMISOM camp and permitted assignments in Nairobi office. He produced documents to prove that he was authorized to be away from his work station in Mogadishu. The said explanation was not contested in evidence but I find the same unsatisfactory on a balance of probability. First he took a whole month before reporting to Mogadishu. Second, he was habitually out of Mogadishu for more days than he has tried to justify by the few documents produced as exhibits.

28. Clause 6 of the Claimant's contract provides as follows:

> ***"a. You may not be absent from work without the employer's prior consent.***
>
> ***b. The Secretariat must be informed without delay of your inability to work and, if this exceeds a period of three days, you must provide evidence thereof in the form of medical certificate.***
>
> ***c. Absenteeism from work without prior or subsequent consent, or without proof of inability to work as defined by paragraph 2, results in reduction of pay in accordance with the duration of absence."***

29. In view of the foregoing clause and the claimant's conduct highlighted above, I find and hold that the summary dismissal of the claimant's contract was justified and in accordance with Clause 10 of the Claimant's contract which provided that:

> ***"Either contracting party may terminate this Contract of Employment by providing one months' notice in advance. IGAD however reserves the right for summary termination of this contract with or without a reason."***

30. The claimant has contended that the termination was procedurally unfair based on Kenyan law which requires that a fair hearing be accorded to an employee before termination and prayed for compensatory damages based on the same law. She has also cited Kenyan judicial precedents to fortify the said contention. However as I have held herein above, the jurisdiction of this court over this dispute is only exercisable on the basis of the applicable law chosen by the parties in their contract which is, Djibouti law.

31. Even if I was to determine that the termination was unfair for breach of the Rules of natural justice, which bar condemnation without prior hearing, I will still revert to the law of choice to see whether it allows for any compensatory damages for unfair termination. Consequently, I decline to make any determination on the fairness or lack of it based on the Kenyan law as urged by the claimant and return that the claimant has not proved unfair termination under the Djibouti law. Admittedly he was not give copy of the Djibouti law and he did not set foot in that country. In addition, the effort of my legal researcher to get the relevant law of Djibouti bore no fruit and even the constitution posted online was not in language of the Kenyan courts.

Whether the Claimant is entitled to the prayers sought

32. For the reasons stated above that there was a valid reason to justify summary dismissal and the Kenyan law upon which the suit is founded is not applicable to the dispute herein, I decline to make declaration that the Claimant's dismissal by the Respondent was unlawful and unfair as prayed.

33. Further, for the reason that the termination was justified by the claimant's conduct, I dismiss the claim for $ 38,500.00 being salary for the 7 months he would have served before the expiry of his fixed term contract, and the claim for $5500 being one month salary in lieu of notice. However, I award the prayer for refund of travel expenses proved by receipts ($5698.70) and 10 leave days on pro rata basis($2115.38) equaling to $7814.08. The awards are grounded on clause 14 and 5 of the contract respectively and not the Kenyan law.

Conclusion and disposition

34. I have found that this court has jurisdiction to determine the employment dispute herein based on the contract itself and the Djibouti law and as such the said jurisdiction has not been ousted by clause 11 of the contract of service between the parties to this suit. I have also found that the summary termination of the claimant's contract was justified by dint of clause 10 of the contract. I have further found that the claimant is entitled to some benefits accruing from the said contract of service in terms his annual leave and travel expenses. Consequently, I enter judgment for the claimant in the sum of **$7814.08 plus costs and interest** at the court rate from the date of filing the suit till payment in full.

It is so decreed.

Dated, Signed and Delivered in Open Court at Nairobi this 30th day of November, 2018

ONESMUS N. MAKAU

JUDGE