



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 299 OF 2015
BETWEEN
ARFAAN KASU.....CLAIMANT
VERSUS
EXPRESS TRAVEL GROUP LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Stephen Oddiaga & Company Advocates for the Claimant

P.M. Ndung'u & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 7th May 2015. He states he was employed by the Respondent Company as its General Manager, Mombasa Office, on 4th October 2010. The Parties executed a contract of employment, granting the Claimant a total salary of Kshs. 130,000 a month. He suffered as stroke on 17th January 2014. He was treated at Aga Khan Hospital Mombasa, and P.D. Hinduja Hospital in India up to 24th April 2014, when he travelled back to Mombasa. The Respondent was aware about the Claimant's illness and hospitalization, and paid his and his caretaking Sister's air tickets to India. He went back to work on 2nd May 2014. He received a letter from the Respondent on 9th May 2014, instructing him, he had been transferred from Mombasa, to Respondent's Office at Nairobi with effect from 15th May 2014. He replied on 12th May 2014 expressing his inability to travel to Nairobi, due to his medical condition and short notice. The Respondent wrote back to the Claimant on 15th May 2014, advising him that he had exhausted his sick leave, and his last working day would be 15th May 2014. The Claimant considered his contract to have been terminated unfairly and unlawfully. He prays for Judgment against the Respondent as follows:-

- a) Salary for 15 days worked in May 2014 at Kshs. 56,500.
- b) Annual leave for 2011 -2014 at Kshs. 376,608.

c) 3 months' salary in lieu of notice at Kshs, 339,000.

d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,356,000.

e) Pension at Kshs. 637,858

Total... Kshs. 2,765,966

f) The Respondent to supply the Claimant with details of his pension dues to-date.

g) Costs.

2. The Respondent filed its Statement of Response on 17th June 2015. It discloses that the Claimant was first employed by the Respondent on 2nd September 2004. He resigned on 12th November 2004. He was reemployed on 28th September 2010 as the Branch Manager Mombasa. He fell sick and was unable to continue working. His whereabouts was unknown. The Respondent continued to pay his salary until 31st March 2014. The business suffered loss in his absence. He returned in May 2014 after 4 months being out of Office. He had not supplied the Respondent with any Doctor's report, or notification. He was advised he had been transferred to Nairobi effective 15th May 2015. He wrote to the Respondent on 12th May 2014 declining transfer. He was consequently informed his last day of work, would be 15th May 2014. He issued on credit, to Respondent's Customers, air tickets worth Kshs 973,120. He did not recover the price of the air tickets. The Respondent counter-claims the sum of USD 10,832. The Court is urged to dismiss the Claim with costs to the Respondent.

3. The Claimant gave evidence on 31st October 2016. He closed his case on 17th February 2017. Respondent's Finance Group Director Joseph Wambua Kithitu gave evidence on 17th February 2017, when proceedings closed. The matter was last mentioned in Court on 23rd March 2017, when Parties confirmed the filing of the Closing Submissions and Judgment scheduled for delivery.

Claimant's position

4. The Claimant restated in his evidence, his employment history as pleaded; the terms and conditions of employment; and the circumstances of illness leading to hospitalization, and loss of employment.

5. He is not able to travel for long due to the illness. He is compelled to work from home. He conceded he would issue air tickets to Customers and make a follow-up of payment for the tickets. He could not follow up after hospitalization. The amount counterclaimed is debt owed to the Respondent by its Customers. It is not a debt owed by the Claimant to the Respondent. It is not recoverable from the Claimant.

6. The Claimant informed the Respondent he could not take up the transfer, as he had not healed. The Respondent terminated his contract. His attempts to consult the Managing Director for review of the decision, failed.

7. He agreed on cross-examination, that his contract provided he could be transferred to various outlets of the Respondent. The Respondent knew he was sick and its Officers visited him while he was in hospital. There were e-mails exchanged between the Parties when the Claimant was hospitalized in India. He was employed after termination, by Fourways Limited at Mtwapa in Kilifi, but was unable to continue working due to his condition. He worked for 3 months there. There was no particular medical report saying he could not work. There was medical evidence to show he could not travel for long. The medical report of Dr. Onguti was prepared after termination. The letter of transfer informed the Claimant 15th May 2014 would be his last day in Mombasa, not his last day at work. He had at one time worked for the Respondent in Nairobi.

8. He was hospitalized in India for 3 days. At Aga Khan Mombasa he was in-patient for about 10 days. He was out of work for a total of 4 months. He would be held accountable in case Customers he had issued air tickets failed to pay.

9. He emphasized on redirection that the Respondent was always aware the Claimant was unwell and paid for his, and his caretaker's air travel. Paragraph 5 of the Statement of Response discloses the Respondent was aware about the Claimant's illness. He received the letter of transfer barely a week after he had arrived from India. He did not receive any letter from the Respondent charging that he had been absent without leave. The letter of transfer is dated 7th May 2014. The Claimant was required to be at Nairobi on 15th May 2014. He has a Family in Mombasa. The letter advising his last day in Mombasa would be 15th May 2014 was received by him on 15th May 2014. He was Manager at Mombasa. He was not told what he was going to be at Nairobi.

Respondent's position

10. Dr. Kithitu told the Court he was not aware the Claimant was taken ill while in employment. He did not know the Claimant was treated in India. His letter of employment states his area of duty could be within any of the 6 Branches of the Respondent. He wrote to the Respondent that he could not transfer because he was unwell. He did not support his letter with medical evidence. Kithitu was not aware the Respondent arranged for the Claimant's travel to, and treatment in, India.

11. The time given to transfer was reasonable and adequate. The Respondent did not write to him asking him, to prove his illness. The Claimant disappeared. His letter was deemed a resignation. He was at work on 7th May 2014. He was on duty on 12th May 2014. It is not true he absconded.

12. He issued air tickets and was expected to pursue payments. The amount had not been paid when he left. He was under a Pension Scheme. The Respondent has not assisted him in payment of pension. Kithitu reiterated the Respondent did not know the Claimant was unwell and did not know of his whereabouts.

13. Dr. Kithitu stated that the Claimant absconded. He then stated the Claimant did not abscond; he terminated his own contract of employment. Unable to explain exactly what he meant by this confusing evidence, Dr. Kithitu told the Court it is all about terminologies. Redirected, Kithitu stuck to his position that the Respondent did not know the Claimant was unwell.

The Court Finds:-

14. The Claimant was employed by the Respondent as its General Manager Mombasa, in a contract dated 28th September 2010. He earned a monthly basic salary of Kshs. 100,000, and house allowance of Kshs. 30,000- total Kshs. 130,000 as shown under the contract.

15. There is adequate evidence that the Claimant fell ill and was treated at the Aga Khan Hospital in Mombasa, and P.D. Hinduja National Hospital and Medical Research Centre in India. There are medical reports from the 2 Hospitals. There is a Passenger Medical Clearance Form issued to the Claimant by Kenya Airways, showing he travelled from Mumbai India, to Mombasa Kenya on 24th April 2014. He told the Court, and the Court has no reason not to believe him, that the Respondent catered for the Claimant's and his Caretaker's air ticket to India.

16. It is difficult to understand the false testimony of Dr. Kithitu, that the Respondent did not know the Claimant was ill, or that he was treated in Kenya and India for a period of 4 months. The Claimant was not an ordinary Employee of the Respondent. He was the General Manager, Mombasa. It is unbelievable that an Employer would not know its General Manager is ill and hospitalized in Kenya and abroad. The Respondent would not continue to pay his monthly salary without knowing where the Claimant was, and why he was away. The evidence by Kithitu was shockingly untruthful. More so because at paragraph 5 of the Statement of Response, the Respondent states the Claimant fell sick and was unable to work. So why

would the Respondent send its Officer Kithitu to come to Court and give falsehoods?

17. The Claimant as shown in the document from Kenya Airways arrived in Mombasa around 24th April 2014. He reported to work at Mombasa on 2nd May 2014, barely a week after he returned. On 9th May 2014, the Respondent issued upon the recuperating Employee a letter to transfer to Nairobi by 15th May 2014. The Respondent is not shown to have as much enquired into the Claimant's condition, knowing he had suffered a serious illness, and been out of work on medical ground for 4 months. A reasonable, fair-minded and conscientious Employer would have asked the Employee, if the Employee, was in a position for immediate relocation away from Family, to the chaotic City of Nairobi. The Claimant quite expectedly declined transfer and was dismissed through the letter of the Respondent dated 15th May 2014.

18. Reading between the lines, the Court formed the view that the Respondent merely devised a way of getting rid of the Claimant quickly from Mombasa, because it was felt, as stated at paragraph 6 of the Statement of Response, Mombasa Office suffered lack of overall trading as a result of Claimant's situation. Transfer was ill-motivated, and the Respondent cannot rely on the transfer clause in the contract of employment, to justify what was obviously very inhuman treatment of the Claimant.

19. ***Termination was unfair.***

20. ***The Respondent shall pay to the Claimant the equivalent of 12 months' gross salary, based on the consolidated rate of Kshs. 130,000 under the contract, amounting to Kshs. 1,560,000 as compensation for unfair termination.***

21. ***Notice pay of 3 months is granted under the termination clause in the contract, at Kshs. 390,000.***

22. He was, as conceded by Kithitu on duty up the date he was advised would be his last day at work, 15th May 2014. ***He is entitled to, and is granted salary for 15 days worked in May 2014, which is as shown here: Kshs. 130,000 divide by 26 working days= Kshs. 5,000 x 15 days = Kshs. 75,000.***

23. He prays for annual leave pay for the period 2011 to 2014. The Court has considered the Respondent accommodated him for a period of 4 months during which he was unwell. He was paid his salary in full, even through the period he was away exceeded the statutory allowable period of paid sick leave. The Respondent reasonably accommodated him during the period of treatment and continued to pay his salary. It is not reasonable to pursue annual leave pay, in view of the prolonged period the Claimant was out sick and on full pay. The prayer for annual leave pay is rejected.

24. The Claimant did not supply details of his Pension Scheme, and the sum of Kshs. 637,858 claimed as pension was not understood by the Court. Kithitu however testified he is ready to assist the Claimant in accessing his Pension. The Claimant should consult Kithitu on his word. The Court does think this requires to be done through an order of the Court. There is no evidence supplied to the Court as to enable the Court issue any order on pension.

25. The prayer for damages and an order compelling the Respondent to pay the Claimant all statutory dues are too general, without legal and factual support, and duplicitous. They are rejected.

26. There was no support in evidence, for the Respondent's counterclaim of USD 10,832/74. The Claimant did not irregularly give out air tickets to Respondent's Customers. He did not pocket the proceeds of sale. His contract did not state that only he could recover the price of the air tickets, from Respondent's Customers. It was preposterous to expect him to pursue debtors, from his hospital bed. This was a debt owed to the Respondent by its Customers, recoverable with, or without the intervention of the Claimant. The Respondent did not show the Court that it was unable to recover its money from its Customers, after the Claimant was taken ill, or after the Respondent terminated his contract of employment. Dr. Kithitu said nothing in Court which would justify the upholding of the counterclaim. The counterclaim is declined.

27. Costs to the Claimant.

28. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,560,000; notice pay of 3 months at Kshs. 390,000; and salary for 15 days worked in May 2014 at Kshs. 75,000 –total Kshs. 2,025,000.

c) Costs to the Claimant.

d) Interest granted at 14% per annum.

Dated and delivered at Mombasa this 29th day of June 2017

James Rika

Judge