



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1982 OF 2011

MARK MBAU MUTHEE..... CLAIMANT

VERSUS

CAMERA PIX 1ST RESPONDENT

A24 MEDIA LIMITED 2ND RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 22nd November, 2011. A Supplementary Statement of Claim was filed on 28th February, 2012. On 25th February, 2016 the claimant filed an Amended Memorandum of Claim.

2. On 16th December, 2011 the 1st respondent filed a Defence. On 17th March, 2016 the respondents filed an Amended Memorandum of Response.

Claim

3. The claimant is an adult male and the respondents are companies working jointly in media and publishing and where the claimant was working as a fixer/producer, cameraman and Chief Operating Officer. The claimant was paid a salary of Kshs.113, 616.00 per month.

4. The claimant was first employed by the 1st respondent on 25th October, 1994 as a production and library assistant. He also worked with Reuters for the production of a current affairs programme called *Africa Journal*.

5. The claim is also that at all material time the operations of the 1st respondent and operations of Reuters and Camerapix Publishers International shared the same management, staff and address. There was no difference in the companies rather, there were departments all run by the then managing director and bureau chief, the late Mohamed Amin.

6. In 1995 the relationship between the 1st respondent and Reuters was not working and thus Reuters took over the running of *Africa Journal* and some employees moved offices to a different location while the claimant was left with the 1st respondent.

7. The claimant started working for the 1st respondent on 20th May, 2008 as the chief operating officer and the appointment was communicated to him by letter signed by the chairman, Salim Amin and the president and Chief Officer Asif Sheikh. The running of operations remained the same. The running of

operations was not differentiated.

8. On 27th April, 2009 the claimant was granted one week leave by the 1st respondent. He was to report back on 4th May, 2009.

9. The claimant's salary was due on 1st May, 2009 while he was on leave. He had requested the accountant to leave the pay cheque at his desk. When the claimant collected the same, inside the envelope was a note from the CEO that his salary would be reduced by half. Upon asking the chairman, he was told there would be a meeting to discuss the matter on 11th May, 2009. On the due date the claimant was called by the 2nd respondent and informed that his services were no longer required as his office and duties had already been handed over to the then head of marketing.

10. The claimant was then directed to leave his desk and hand over any property of the company. He was also given three different computations of his salaries to pick from as he found suitable. The claimants did his own computations. When the claimants made effort to get his dues, the respondent alleged that the claimant had resigned. As a result the claimant's employment was terminated unfairly and without payment of terminal dues. There unfairness arose in that;

There was no written notice of termination;

There was no notice;

There was no reasonable justification; and

The claimant was not issued with a certificate of service.

11. The termination of employment was contrary to article 41(1) and 47(1) and (2) of the constitution, 2010, contrary to section 43(1), 44(2), 45 and 51 of the Employment Act, 2007. The claimant was entitled to severance pay for 14 years and 8 months for his service; 63 leave days as his terminal dues.

12. The claim is for a declaration that termination was unfair, compensation thereof and payment of terminal dues amounting to Kshs.1, 672,392.00 and notice pay of Kshs.113, 616.00 with costs of the suit.

13. The claimant filed his written statement and testified in support of his claim.

14. The claimant testified that he has filed suit for the reasons that his terminal dues were not paid and he was not given a reason for his termination of employment. His last position held with the respondents is that of Senior Project Manager. The 2nd respondent was the employer and the 1st respondent was the subsidiary and the claimant its CEO. The functions of the two respondents were merged. His salary was improved by \$500 and each month he was paid a salary by both respondents.

15. The 2nd respondent developed content for the 1st respondent to post on the website and as a channel for sales. Once a story was done, the IT department processed the same via the 2nd respondent to post and sell.

16. The claimant was paid for April, 2009 and when he went on leave the May, 2009 salary was not paid in full. The defence that the claimant was paid his dues is not true and the document that he signed for it the signatures thereto not correct. On 11th May, 2009 when the claimant was directed to pick his salary, the 2nd respondent told him he was not an employee. His dues were paid to him. There was no letter terminating his employment. By the conduct of the respondent, it was apparent he had been terminated from his employment.

17. On 31st December, 1996 the claimant received letter by Stephen Jill on restructuring following the death of the founder and owner of the respondent companies Mo Amin. The claimant chose to remain

with the respondents as this was a group of companies. Following Mo's death, the claimant's duties did not change. Camerapix Publishers Internal Limited was registered after the death. The claimant continued to work with the Camerapix Group and not true the company was incorporated in 2003 and new contract issued. He has been with the respondents since 1994. The contract attached to the defence is forged.

18. The main contest is the computation of the terminal dues. Severance pay for 14 years of service.

19. The claimant also called a witness, Martin Papa a forensic investigator and who filed a document examination report with regard to the various signatures of the claimant from various documents.

Defence

20. In response, the respondents have denied all allegations made by the claimants. Prior to 1996 the 1st respondent existed as a sole proprietorship by the name of Camerapix and owned by Mohammed Amin who died on 23rd November, 1996 leading to the company dissolution. Upon the dissolution of the 1st respondent two different companies were registered on 13th June, 1997 being Camerapix Limited and Camerapix Publishers Limited International.

21. In October, 2003 the claimant was moved from Camerapix Publishers International to Camerapix Pix Media Limited and such employment was concluded upon payment of his terminal dues. These dues included;

Leave pay for 33.75 days at Kshs.24, 144.00 and

Severance pay for 6 years at Kshs.55, 800.00

Vide cheques No.100935 and No.100936 and both dated 31st October, 2003.

22. The defence is also that the alleged salary of Kshs.113, 616.00 is not correct and is without proof.

23. The claimant worked for the 1st respondent from October, 2003 to May, 2009 when he voluntarily resigned. Any engagement between the claimant and the 2nd respondent were from 1st June, 2008 and by the time of resignation the claimant had not completed a year therein so as to make the claims herein set out.

24. By letter dated 15th March, 2004 the claimant was appointed Project manager at a salary of Kshs.65, 000.00. Upon his resignation, the respondents directed the finance officer to compute dues owing to the claimant but he disappeared only to appear a year later with this suit.

25. The defence is also that the companies Camerapix Limited and Camerapix Publishers International are two different entities. The ownership and directors are different. Due to financial difficulties there was reduction of staff and salaries and this affected the claimant's salary as well which was Kshs.52, 581.00 net pay. The claimant then terminated his employment with the 2nd respondent by resignation.

26. Despite his action of resignation, the respondent offered to pay the claimant to put his claims to rest as follows;

a) 1st October, 2003 to 31st May, 2009

b) Service fee for 5 years severance pay Kshs.375, 580.00

c) Accrued leave of 42 days for 2007 and 2008 Kshs.150, 232.00

d) Net pay Kshs.374, 136.00

27. These payments were offered in acknowledgement that the claimant had resigned and at the time he was a member of the NSSF but as a gesture of goodwill the same was offered. The claimant has rejected the offer.
28. The respondents have always been willing to pay the claimant for his earned leave days but the claimant has declined the same.
29. The claims made for allowances amounting to Kshs.1, 672,392.00 have no justification and there is no proof of legal basis. The release of the claimant from his employment with the respondent was lawful and claims made are not justified. The claim should be dismissed with costs.
30. In evidence, the respondent witness was Salim Mohamed Amin, the director of Camerapix Limited since November, 1996. Mr Amin testified that the claimant joined his late father Mohamed Amin in his business at Camerapix in 1994. The late Mohamed Amin died in a plane crash in November, 1996 and the company could not trade as he was the sole owner. Two companies were registered being Camerapix Limited and Camerapix Publishers International with different shareholders and all the willing employees were employed afresh.
31. With the claimant being given new employment by the respondents, new contracts were drawn. The claimant was paid his final dues when a new contract was drawn with the respondents. On the strength of his new employment, the claimant remained with the respondent companies until he resigned. He was paid via various cheques which he banked in his account.
32. The 2nd respondent was incorporated in 2008, a different company with different shareholders. The claimant undertook his work under the employment of the Camerapix Limited and when he did work for the 2nd respondent, the employer paid.
33. The claimant was not terminated from his employment by the respondents as alleged. On 11th May, 2009 when the claimant avers that he was directed to leave the workplace, the witness was available for consultations but he did not follow this with the employer but opted to be away from work.
34. Mr Amin also testified that the claims made relate to computations of terminal dues which the claimant has rejected the offer made by the respondents. There is no claim for unfair termination of employment in acknowledgement that the claimant resigned from his employment. The computations made are erroneous and based on non-existent facts and outside the claimant's employment with the respondents.
35. The respondents were generous with the claimant in the offer for payment of terminal dues. The claimant had a loan of Kshs.300, 000.00 and this was given up as a sign of good faith and has the matter resolved amicably. The claimant had been a good employee, he had previously resigned from his employment agreed to resume upon discussions with the witness.
36. At the close of hearing, both parties filed written submissions.
37. The claimant submits that upon employment by the respondents in 1994 they operated under different company's names and under the common name *Camerapix*. The 1st respondent was the initial employer then the 2nd respondent but the management remained the same. The claimant took leave in April, 2009 and when he resumed he had reduced salary and was then terminated from his employment.
38. The respondent did not announce any changes to their business entities or made any changes to the claimant's employment. It was not possible for the claimant to be privy to the differences made in the registrations of the various companies. The claimant continued to receive his salary over the years until his unfair termination in May, 2009.
39. The claimant has relied on the cases of **Charles Mutua Mwanzi versus Invesco Assurance Limited**

[2016] EKLR; Royal British Bank versus Turquand [1856] 6 E & B; Kennet Kimani Mburu & another versus Kibe Muigai Holdings Ltd [2014] eKLR.

40. The respondent submits that in the various amendments made to the claim, the claimant has replaced the 1st respondent Camerapix Media Limited with Camerapix.

41. The respondents agree that at the time the claimant left their employment he was working under them Camerapix Limited was incorporated on 13th June, 1997 and the 2nd respondent registered on 16th May, 2008. This is confirmed by documents submitted by the claimant.

42. The 1st respondent was a sole owned business and dissolved with the death of the shareholder the late Mohamed Amin. No claims can lie herein against such company.

43. The respondents also submit that there was no case for unfair termination of the claimant. The evidence that the claimant was asked b Assif not to report to work whereas his employer was Camerapix Limited contracts such averments. There is no written notice of termination and the claim is made a year after the alleged directions. The claimant proceeded to demand for his terminal dues which confirm that he had resigned from his employment with the respondents. The claims made are not justified.

44. The respondents have relied on the cases of **Caleb Oketch Otvoli & Another versus Yadav Construction Limited [2014] eKLR; Kenya Bridge Africa Limited versus Raj Thakker & 12 others [2008] eKLR; Ndiwa Tea Factory Company Limited versus Kenya Tea Development Agency Limited [2008] eKLR.**

On the matters set out in the claim and response, the issues which emerge are;

Who was the employer?

Whether there was termination of employment;

Whether the remedies sought are due.

45. The claimant admits that he was employed by the respondent group of companies. His employment was by the late Mohammed Amin with whom he closely worked with. It is common ground that Mohammed Amin died on 23rd November, 1996 and where he was the sole owner of Camerapix, in law, such company became dissolved.

46. The claimant also testified that he got letter dated 31st December, 1996 By Stephen Jill acknowledging the death of the respondent company and the need for reorganisation. As such, where Camerapix was fully owned under sole ownership, and with it dissolution with the death of the sole owner, any claims thereto in the context of employment and labour relations ought to have been filed within the existing law and Employment Act, Cap 226 as repealed.

47. The applicable law in November, 1996 allowed filing of any claims within 6 years. The claim herein commenced on the 22nd November, 2011. Such is a period of over 15 years since any claims against Camerapix arose.

48. The initial claim of 22nd November, 2011 was against *Camera Pix Media Limited* and *A24 Media Ltd*. The claims made against the respondents were for;

a) 14 years' service pay

b) Leave days for 63 days

c) Net pay of Kshs.1, 672,392.00

49. In response, only the 1st respondent replied to the claims. The 1st respondent acknowledged that prior to the year 1996, it was a sole proprietorship by the name Camerapix owned and managed by the Late Mohammed Amin who died and the company became dissolved in November, 1996. As a result two companies were registered *Camerapix Limited* and registered on 13th June, 1997 and *CameraPix Publishers International*. The claimant was an employee of Camerapix Publishers International and in October, 2003 he was transferred under Camerapix Pix Media Limited.

50. The claim was amended and a *Supplementary Statement of Claim* filed on 28th February, 2012. The claim was against *Camerapix Ltd* and *A24 Media Ltd*.

51. In the claim, the claimant avers that CameraPix Ltd and CameraPix Publishers International existed prior to their dates of registration and cannot deny employing the claimant.

52. The claimant amended his claim, and filed Amended Statement of Claim on 25th February, 2016 against *Camerapix* and *A24 Media Limited*. In reply and Amended Memorandum of Response, the respondents maintained that the 1st respondent existed as a sole proprietorship named Camerapix, owned and managed by the late Mohammed Amin who died on 23rd November, 1996 and he company was dissolved.

53. The amendments made to the memorandum of claim thus set out, the responses thereto appreciate the entity *Camerapix* was registered on 29th September, 1967 by Mohamed Amin as the sole Proprietor. In the list of documents filed by the claimant on 22nd September, 2016 the Certificate of registration is attached. It is not in dispute Mohamed Amin died on 23rd November, 1996.

Why then filed an Amended Claim on 25th February, 2016 against *Camerapix* despite the background Evidence?

54. Despite the claimant being in possession of the registration Certificate for Camerapix and noting the ownership, this matter having been raised by the respondents in the various responses, the Amendment made a repeat of the same assertions against the entity and 1st respondent as Camerapix. Such company is different to *Camerapix Limited* registered on 13th June, 1997 with the directors being Salim Amin and Farzana Amin. The claimant has the advantage of submitting these records.

55. The court adjourned hearings on several occasions as the record can show to allow the claimant amend his Memorandum of Claim. Without taking into account the averments in the defence, the claimant has reiterated that he was employed by the two entities as set out in his Amended Claim as being *Camerapix* and *A24 Media Limited*. The entity *Camerapix* dissolved with the death of its owner and sole proprietor.

56. Even where such entities were liable, claims arising therefrom are time barred. Even where employment ceased with the 1st respondent as alleged on 11th May, 2009 and the claim filed on 28th February, 2011 is against Camerapix Ltd. the Supplementary Claim reaffirms the same and the Amended Claim on 25th February, 2016 make claim against *Camerapix*. Such claims against an entity which dissolved in November, 1996 I find is way out of time in accordance with provisions of section 90 of the Employment Act, 2007. The claims against Camerapix cannot stand as set out.

57. Upon the claimant amending his claim, he filed a list of documents. Such records confirm the defence to the extent that Camerapix Limited was incorporated on 13th June, 1997 and the 2nd respondent registered on 16th May, 2008. In the Amended Claim, *Camerapix Limited* is removed from the claim. From the amendment and documents filed in support, the 2nd respondent was registered on 16th May, 2008.

58. As submitted by the claimant, and based on the law, only a legal entity can enter into a contract of employment. Where the entity *Camerapix Limited* is now removed from the claim with the last

amendments of 25th February, 2016 the claimant cannot rely on the principle set out under **Royal British bank versus Rurguand case**, to rely on the same would be to fail to appreciate the amendments to our national law and Employment Act, 2007 in appreciating how an employment relationship ought to be structured.

59. The claimant has had the benefit of time and indulgence of the court to make the necessary amendments to his claim. Such changes were to his advantage and to ensure he put into account the various changes taking place within the various entities which offered him employment, whether oral or in writing. Such is allowed under section 8 of the Employment Act, 2007. However, the amendments made to the claim on 25th February, 2016 negated the very claims the claimant had asserted when he commenced the suit in 2011. With the advantage of legal representation, such cannot be corrected at this stage.

60. The claims made for service pay since 1994 for work of 14 years and 8 months must therefore be assessed in view of the claimants' employment with the 1st respondent. Such a claim for service pay ended in 1996 with the dissolution of the company.

61. Any claims against the 2nd respondent A24 Media Limited, on the admissions by the respondents that they indeed had employed the claimant, service pay claims can only be assessment upon the registration on 16th May, 2008.

62. Service pay by its nature is due to an employee as under section 35(5) read together with subsection (6) thereof. Where an employer deducts and remits statutory deductions, the claim for service pay does not arise. There was no evidence by the claimant that these deductions were not remitted to the relevant statutory bodies. As such, no service pay is due.

63. Claim for leave days where earned and not taken is due upon termination of employment. The claim for 63 days for leave is premised on leave days not taken by May, 2009. The claimant does not tabulate as to how he arrived at the 63 days of leave due to him. He has challenged the work records submitted by the respondent and offered an expert witness with regard to the leave schedules submitted by the respondent.

64. Section 10(6) and (7) of the Employment Act, 2007 allow the employer such as the respondent to keep all work records of every employee. Where a suit such as this is filed with the court, it is the duty of the employer to submit the work records.

65. The claimant testified that before he left the employment of the respondents, he had taken leave in April, 2009. With the question of his employment resolved as above, the respondents asserting that Camerapix Limited was incorporated on 13th June, 1997 and the 2nd respondent registered on 16th May, 2008 and claims for leave earned can only arise from 1997 for Camerapix Limited or the one year period from 16th May, 2008 to May, 2009 for the 2nd respondent. As the 1st respondent is now removed from liability as analysed above, where the claimant took leave in April, only the 2nd respondent would take liability and such is dealt with the confirmation that leave had just been taken before exit from employment.

66. I have gone back to the various claims by the claimant and the amendments thereto. The assertion that he was unfairly terminated does not stand out. From his evidence, his main claim is that the computation of his final dues was wrong and failed to take into account the period he had served under the 1st respondent. As noted above, no claims lie against the 1st respondent. The claim for unfair termination raised in the Amended claim also fails.

67. A Certificate of Service herein can only issue from the 2nd respondent. The assertion and insistence by the claimant that there was employment between him and he 1st respondent Camerapix, such claims abated with time.

Accordingly, the claims must fail in their entirety. Noting the indulgence by the respondents herein, the vastness of information shared and available to enable the claimant make an appropriate claim which he failed to do, the respondents are hereby awarded 50% of their costs.

Delivered in open court at Nairobi this 30th day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants - David Muturi & Nancy Bor

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