



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1985 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 7th April, 2015)

MAHASIN ELBASHIR ABDALLA.....CLAIMANT

VERSUS

LIBYA OIL KENYA LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

Background

1. On 23/11/2011. The Claimant instituted this case by filling her Memorandum of Claim through the firm of Mutua & Company Advocates. The Respondents on the other hand, a Limited Liability Company filed their Memorandum of Response on 16/12/2011 through the firm of Ochieng Onyango, Kibet and Ohaga Advocates.

This case was heard by Judge Madzayo (as he then was) before the establishment of the current Employment and Labour Relations Court as a Court of the same status as the High Court.

Upon establishment of this court, judgment in the matter was written and delivered by Hon. Justice B. Onyaga on 5/10/2012.

2. The Claimants filed an application to review this judgment on 23/4/2013 vide the Notice of Motion filed in court on even date. The Claimant Applicants prayed that the court would review the award delivered on 5/10/2012 by Hon. J. Byram Ongaya and order a fresh trial in respect of the contested claims. This application was heard by Judge Nzioki Wa Makau who allowed the application and made an order of review only to the extent that the case was to be reopened only on contested issues but the uncontested issues were to remain undisturbed.

My understanding of the proceedings and in consideration of evidence already adduced and considered by this court the matter which were uncontested and for which judgment is already delivered related to the following orders:-

1. ***That Claimant be paid pro-rated 13th salary in accordance with paragraph 4(b) of the contract being 5000 Euros.***

2. ***That Claimant be paid airline tickets and one passenger car to the country of origin in accordance with Clause 4 (c) of the contract.***
3. ***Door to door shipment of the claimant's household effects and one passenger car to country of origin in accordance with clause 4 (c) of the contract.***
4. ***Salary for November – 5000 Euros.***
5. ***17 days balance of leave – 3,542.50.***

3. As directed by Judge Nzioki Wa Makau, hearing was reopened and this court is to only consider the contested issues.

Claimant's case

4. The Claimant gave fresh evidence before me wherein she told court that she had been engaged by the Respondent in various capacities and had worked for Uganda Telcom between 2007 to 2010 before coming to Kenya to work for Respondent. Her averment is that the Respondent Oil Libya was a company owned by Gaddafi International Foundation where she worked before. She apparently was a close friend of the Gaddafi's and due to this affiliation, worked for the Gaddafi children before she was now introduced to Libya Investment Authority in Africa. It is this company that connected her to Uganda Telcom and later to the Respondent herein where she was to serve for a period of one year contract from 1/12/2010. Her salary was 5000 Euros per month.
5. She served the Respondent as anticipated and in October 2011, she went for a Hajj in Mecca. When she came back to work on 21/11/2011, she was apparently served with a letter terminating her contract. The letter was dated 14/10/2011 (ME 3). It is her position that the contract she was serving was renewable in her understanding as per clause 6 at management's discretion. The management was to refer to Libya African Investment for authority for this renewal which the Respondent failed to do.

The Claimant further avers that following this termination, she was barred from accessing her office even to get her personal effects and was denied her benefits as per this claim hence this suit.

6. She avers that she was unfairly terminated and seeks various orders as follows:

1. Permanent Injunction to restrain the Respondent from terminating her employment.
2. Mandatory Injunction for the Respondent to reinstate her to her position of employment.
3. Alternatively damages amounting to 270,000 Euros broken down as follows:

- a. ***Service pay for 18 years – 90,000 Euros.***
- b. ***Years salary upto the retirement age – 120,000 Euros.***
- c. ***Maximum 12 months compensation for wrongful and/or malicious dismissal – 60,000 Euros.***

4. Maximum 12 months compensation for wrongful and malicious dismissal.
5. Costs of this suit and interest.
6. The Claimant also sought payments as per the terms of the contract which include the uncontested issues above.

The Respondent's Case

7. The Respondents on their part denied the Claimant's averment save for those admitted. It is the Respondents' case that the Claimant was never terminated but that her contract expired by effluxion of time on 30/11/2011. They also aver that before the contract ended, the Claimant had not made any communication of her desire to have it renewed.

On 14/10/2011, she was given a letter notifying her that the contract will expire on 30/11/2011. She was required to clear with the company and hand over company property as was the normal practice. She declined to do so. She filed this case on 23/11/2011 and nothing else could be

discussed amicably.

8. The Respondents further contend that they were very separate and distinct from Gaddafi Investments and even Uganda Telcom and the two companies were not involved in the running of the Respondent. They deny that the claimant was seconded to their company by Uganda Telcom or any other company. They deny that events in Libya which saw Gaddafi ousted did not influence their dealings with the Claimant.
9. The Respondents admit that the Claimant was entitled to door to door shipment of her goods on expiry of her contract but this was not done as due process was not followed and their attempt to seek clarification from the Claimant failed.

On issue of air ticket payment, they aver that this was not payable after the expiry of the contract.

Issues of determination

10. As ordered this court will only consider contested issues which I narrow down as follows:

- a. ***Whether the Claimants services were unfairly terminated or did it simply expire by effluxion of time.***
- b. ***Whether the Claimant is entitled to service pay for the years served.***
- c. ***Whether the Claimant is entitled to a refund of air ticket of USD 744 being the air ticket taken by the Claimant after the expiry of her contract.***
- d. ***Whether the Claimant is entitled to a refund of USD 13,500 being the cost of storage and shipment of goods to Sudan as per her contract of service.***
- e. ***What other remedies if any the Claimant is entitled to.***

11. Starting with the 1st issue, the contract the Claimant had a contract with the Respondent dated 1/11/2010. It is written on the letter head of the Respondent – Oil Libya. Part of the contract read as follows:

“Effective date of this assignment and duration = 1st December 2010, for one year”.

The reading of this contract signed between the Claimant and the Respondents’ Managing Director is that the contract was to run for one year meaning that it was to terminate on 30/11/2011.

This contract could however be renewed as per paragraph 6:-

“ ·This Assignment could be renewed at management discretion.

· The Assignment may be terminated upon written consent between you and the host.

· The host has a right to amend or terminate this Assignment for any reason permitted under the Labour Code and Local Regulation in force in Kenya.

· This Assignment will be ended if LOHL or TAHL no longer holds any interest in the host.

· This assignment could also be amended if there is a change in the fiscal regime which may have a material adverse effect to LOKL and/or to yourself”.

12. None of the above provisions were invoked to terminate the Claimant’s services but on 14/10/2011 a written exhibit ME -3 was addressed to the Claimant. It read as follows:

“Dear Mahasin,

END OF CONTRACT AGREEMENT

This is to inform you that your contract agreement will expire on November 30th 2011. Having received no further instructions on your assignment the contract will not be renewed.

As per your contract agreement, please make arrangements to formerly hand over any company property in your possession to your supervisor before your final day of office.

You are also required to make arrangements to settle all outstanding debts you may owe the company prior to your departure.

You are reminded that you are prohibited from disclosing any proprietary information that may have come to your possession by reasons of your employment with the company.

Attached is a clearance form which must be completed and handed over to your supervisors. Your final dues will be paid to you once you have cleared fully with the company.

We wish you success in your future endeavors.

Yours faithfully,

Signed

Rida Hassan Elamir

Managing Director “

13. My reading of this letter is that the Claimant was being reminded that her contract was coming to term as per the contract provisions. It could only have been renewed if there was consent by both parties but it was at the discretion of the Respondent, the employer. The Claimant has insisted that the contract was to be renewed automatically and that the Respondent deliberately failed to seek instructions for the renewal because of her association to the Gaddafi regime.

There is nothing to suggest that position as this court finds that the contract between the Claimant and Respondent terminated by effluxion of time.

14. On the 2nd issue of service pay, paragraph 4(e) of the contract stipulated as follows:-

“13th month

You will be entitled to a payment representing one month remuneration (i.e., the amount stipulated in the above section 3) per year of service. This amount will be prorated if you don't work for the full year. This amount will be settled by Libya Oil Kenya, the host affiliate”.

This in my understanding is the service pay package the Claimant is entitled to having served for 1 year. The prayer of service pay for other years against other companies she worked for cannot be loaded on the Respondent as the Claimant has not established that there was a link between the other companies and the Respondent and even if there was any such link, a provision in the

contract that transferred the previous companies' obligation to pay service charge to the Respondent.

15. On the issues of payment of refund of air ticket of USD 744 used by the Claimant after expiry of the contract, it is this court's finding that the claimant is entitled to it. The Claimant adduced evidence that she was barred from accessing the Respondent's premises after 23/11/2011, 7 days before the contract expired and within that period she still had a chance to ask for utilization of this ticket. It is therefore this court's view that within that one week, she would have exercised her right to use this ticket and was denied the same. She is therefore entitled to that ticket refund of USD 744.

16. On the issue of refund for shipment of USD 13,500 the contract between the Claimant and Respondent at paragraph 4(d) stated as follows:

“Relocation arrangement

At the end of your assignment, the company will provide you and your accompanied dependants (if any) with airline tickets (economy class) or reimburse the costs from the country of assignment to your country of origin (or residence). The same provisions apply in case of assignment to another country.

Also, at the end of your assignment and at the company account; you will be entitled to a door to door sea freight shipment from the country of origin (or residence) for the following items:

- ***One passenger car***
- ***Upto one 40 commercial vessel container of household effects.***

The above are subject to the following conditions:

- ***All arrangements are done and approved through and by the company.***
- ***No legislation or regulatory barriers may deny this arrangement.***
- ***Customs duties and/or other taxes and/or fees at the country of original (or residence) are for your personal account”.***

17. It is therefore important to examine if the above was done under the conditions set. In her evidence, the Claimant's case was that she shipped her goods on her own on 21/12/2013 after attempting to get the Respondent to do so without success. However from the evidence on record the Claimant was expected to ship the goods the following conditions provided.

18. This is as per clause 4(d) of the Claimant's letter of appointment. In furtherance of this benefit the Respondent wrote to the Claimant asking for details of items to be shipped on 2nd November 2012. There was no response until 2nd August 2013. In this communication, the Claimant indicated that she would communicate on costs and the intended date of shipment for Respondent's approval.

There was no subsequent communication until 2nd December 2013 when the Claimant forwarded an invoice of 3rd September 2013 for shipment of USD 11,500 as well as the list of items to be shipped. There was no mention of the intended date of shipment or storage charges. The issue of storage charges came up on 28/1/2014 and this was raised after the expense was incurred.

19. From the above it is apparent that the claimant went against the express provisions of this clause and shipped her goods without the approval of the Respondent. The issue of storage charges was never part of the agreement of course unless the Claimant can establish that the delay in shipment was occasioned by the Respondent.

20. That notwithstanding the goods were shipped and there is no fraud established on Claimant's part

to warrant suspicion of the claim, I will therefore award the Claimant the shipment charges amounting to USD 11500 less 2000 USD storage charges which was not part of the agreement.

Total awarded therefore is as follows:

1. USD 11,500 shipment charges.
2. USD 5000 13th month salary as service pay.
3. USD 744 unutilized air ticket.

Total 17,244 USD

She will also be issued with a Certificate of Service.

The Respondents will pay costs of this suit.

Dated and delivered in open Court this 7th April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wandati holding brief for Mutua for Claimant

Miss Makaka holding brief Mrs. Oduor for Respondent