



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 23 OF 2013
(Originally Nairobi Cause No. 1569 of 2011)

ESTHER WANJIKU NDERITU (Suing as Administrator/Personal

representative of the Estate of James Marekia hereinafter referred

to as the Deceased)

CLAIMANT

v

AFRICAN QUEST SAFARIS LIMITED

RESPONDENT

JUDGMENT

1. James Marekia (Claimant/deceased) was employed by African Quest Safaris Ltd (Respondent) with effect from 1 May 1994 as a Senior Tour Officer. The Claimant rose to a Manager. Through a letter dated 11 May 2011 the Claimant tendered a letter of resignation effective immediately. The resignation letter indicated that he was forfeiting his salary for May 2011 to offset payment in lieu of notice.
2. By the time of resignation, the Claimant's salary had risen to a gross of Kshs 120,560/-.
3. On 19 May 2011, the Claimant's legal advisers wrote a demand to the Respondent seeking payment of terminal dues amounting to Kshs 2,067,000/- made up of severance pay, overtime, outstanding leave and salary for April 2011. The Respondent's through their advocate responded on 24 June 2011 denying the claims and stating that the Claimant had caused the Respondent losses over Kshs 2,000,000/-.
4. On 14 September 2011, the Claimant filed a Memorandum of Claim seeking Kshs 1,977,000/- being service pay, overtime, holidays worked and outstanding leave. The Respondent in turn filed its Memorandum of Reply on 18 October 2011 denying the claims.
5. On 21 March 2013, Mr. Nanji for the Respondent informed the Court that the Claimant had died and on 16 May 2013, Ms. Mtekele for the Claimant informed the Court that the firm had received letters of administration and needed to apply for substitution.
6. On 17 July 2013 the Court allowed the motion for substitution and Esther Wanjiku Nderitu as the

personal representative of the Claimant came on board. To this end an Amended Memorandum of Claim was filed on 7 August 2013. Apart from adding the personal representative, the Claimant dropped the Claim for service pay.

7. The Cause proceeded to hearing on 27 February 2014. Both parties called oral testimony and the Claimant filed written submissions on 21 March 2014 while the Respondent filed its submissions on 17 April 2014.

8. Because the present Cause does not relate to a complaint of unfair termination/wrongful dismissal but seeks dues which either must have a contractual or statutory foundation the Court finds it unnecessary to set out the respective parties cases in any detail. The Court however has considered the submissions and authorities cited by the parties.

Sundays, overtime/public holidays

9. Esther Wanjiku Nderitu who testified on behalf of the Claimant stated she was the widow of James Marekia and that the Claimant used to go to work on Sundays and did not have any holidays and that she was not aware whether the Claimant got any off days in lieu of working on Sundays/public holidays. She further stated that for the 17 years the Claimant served the Respondent, he never went on leave.

10. When shown leave applications by the Claimant, the witness denied that the Claimant ever went on leave. The attention of the witness was also brought to clause 2 of the letter of appointment on working hours.

11. For the Respondent, its Chief Executive Officer and Managing Director, Tasneem Adamji stated that the letter of appointment provided for the working hours and that the Claimant was number 3 in the chain.

12. According to the witness, it was not possible to tell whether the Claimant worked Sundays/public holidays and in any case he had keys to the offices. The witness further stated because of tourism trends it was possible to call an employee to work even at night or work shorter hours. Further, the Claimant would get offs in lieu of work on Sundays/public holidays.

13. The letter of appointment set out the working hours and put the Claimant on notice that at times he may be required to work outside the normal working hours.

14. Therefore at a contractual level, it was permitted for the Respondent to require the Claimant to work on Sundays, beyond the set times and on public holidays.

15. However, the contract did not provide whether the Claimant would get any extra remuneration for work on Sundays, outside the normal working hours or public holidays.

16. The service of the Claimant straddled two different statutory regimes, to wit, the Employment Act, cap 226 (repealed) and Employment Act, 2007.

17. Section 90 of the Employment Act has put a limitation period of three years in respect of causes of action arising out of a contract of service. This means any claims 3 years prior to 2011, i.e 2008 would be time barred.

18. The Employment Act, 2007 came into operation on 2 June 2008. Section 27 thereof has provided that an employer shall regulate working hours in accordance with the Act and any other written law. It also provides that an employee shall be entitled to one rest day per week.

19. The Employment Act, 2007 has not explicitly provided for what should happen in case an employee works during his rest days or public holidays. Section 10(3) of the Employment Act, 2007 appears to suggest the issue is left to parties' autonomy.

20. The Court is aware that some employers would give off days in lieu of work done during public days and rest days. Some may opt to pay cash in lieu. As already stated the contract between the parties did not make any provision in this regard.

21. The discussion therefore must turn to consider whether there are any other written laws which have addressed the issue. The Labour Institutions Act, 2007 came into force on 2 June 2008. The Act itself has not addressed the question but section 46 has given the Cabinet Secretary responsible for Labour the power to publish Wages Orders to prescribe/constitute minimum terms of conditions of employment within specific sectors of industry.

22. The Regulation of Wages (General) Order has set out the hours of work and for payment of overtime and the formula for calculating the overtime. It has also provided for weekly rest days and for the deferment of the weekly rest days by mutual consent, and holidays with full pay.

23. The Claimant's contract provided for days off whenever the Claimant worked on Sundays or during public holidays.

24. The Respondent's witness testimony was that records were not kept for attendance at work on Sundays and public holidays (Court will refer to leave records later).

25. Considering the position of the Claimant in the Respondent organisation it is the view of the Court that the parties should have negotiated on how to deal with the issue of work on Sunday and public holidays.

26. The question which arises is therefore whether the provisions of the Regulation of Wages (General) Order should be applicable to the Claimant in this case.

27. As a matter of legal principle, the Regulation of Wages (General) Order should have been applicable to the Claimant. But sight must not be lost of the fact that the Employment Act had left the issue to the parties autonomy.

28. The Claimant was no ordinary employee. He was number 3 in the chain of command. He was a senior person in the organisation. The practice and custom in this country has been that Managers would be expected to put in extra hours/work over holidays without payment of overtime. Different employers have developed different mechanisms of recognizing the role of managers for this. Some employers pay a responsibility allowance or an extraneous duty allowance or the like.

29. In the view of the Court, the Claimant has not made out a case for the Kshs 360,000/- sought under this head of claim.

Leave

30. Under this head, the Claimant sought Kshs 900,000/- on account of outstanding leave for 10 years. Pursuant to clause 4 of the letter of appointment, the Claimant was entitled to 24 working days annual leave with full pay.

31. Because of the limitation provision of section 90 of the Employment Act, 2007, the Court will discuss the issue of leave from 2008, though records for 2005 and 2007 were produced.

32. An approved leave application form for 2008 was produced. It showed that the Claimant had applied for 24 days leave with effect from 13 May 2008 to 11 June 2008. The application was approved. Similar application and approval for 2011 was produced. It showed the Claimant had applied for 24 days leave from 18 April 2011 to 21 May 2011.

33. No records for 2009 and 2010 were produced. The evidence tendered in Court was that earlier records had been archived in a container and were destroyed by rats. As to why only records for these 2 years

were destroyed were not indicated though the Court would assume all the records were kept together.

34. But the Court notes that in the records for 2011 there was no indication as to the number of days of leave which were remaining/outstanding from the previous year. The space was left blank. It was the duty of the Respondent to fill it up by it would have easily shown the balance of leave days remaining/outstanding as of 2010. The form was not fully completed.

35. The Court would therefore presume in favour of the Claimant that he did not go on leave for 2009 and 2010 and find that he is entitled to payment in cash, in lieu of the leave for those two years.

36. Leave is normally granted with full pay. The Court was not informed how much the Claimant was earning between 2009 and 2010. In July 2007 the salary was Kshs 90,000/- while in February 2011 it was Kshs 120,560/-. In the pleadings a sum of Kshs 90,000/- was used.

37. The Court would award the Claimant the sum of Kshs 180,000/- in lieu of the leave for the two years.

Conclusion and Orders

From the foregoing discussion the Court finds and holds that

- i. The Claimant has not made out a case for Sundays, overtime and public holidays.
- ii. The Claimant has proved and made out a case for payment of leave for 2009 and 2010.

39. The Court therefore orders the Respondent to pay the Claimant the sum of Kshs 180,000/- in lieu of leave.

40. The Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Mombasa on this 13th day of June 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Wafula instructed by Cootow and Associates Advocates

For Respondent Mr. Nanji instructed by Kishore Nanji Advocate