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Judge:	
Citation:	JIMMY RENE PILLAY V OWNERS OF THE MOTOR TANKER "ALLY"[2012]eKLR
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**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Admiralty Claim 13 of 2006**

**ADMIRALTY CLAIM NUMBER 13 OF 2006**

**JIMMY RENE**

**PILLAY.....CLAIMANT**

**VERSUS**

**THE OWNERS OF THE MOTOR TANKER "ALLY".....DEFENDANT**

**J U D G M E N T**

**Introduction**

1. The Claimant was employed aboard the Motor Tanker "Ally" as Chief Engineer. He claims Kshs. 358,780.00 as unpaid wages, payment in lieu of leave, and provisions allowance. On 8<sup>th</sup> December, 2006 pursuant to an application by the Claimant, MT "Ally" was placed under arrest, and on 11<sup>th</sup> May, 2007, the court ordered the Defendant to provide security for costs in the amount of Kshs. 458,000/= by way of a bank guarantee.

2. The essential background to the matter is that, sometime in 2005, the MT "Ally", represented in Kenya by Oceanic Bunkering and Oil Products Limited ("OBOP") was put out of operation for repairs at Mombasa.

Consequently, the crew were allegedly discharged from employment pursuant, according to the Defendant, to an amicable agreement. The Claimant, however, asserts that his contract which was executed on 30<sup>th</sup> January, 2004, was extended orally, and he remained unpaid from February to May, 2006.

3. The hearing of this matter commenced on 5<sup>th</sup> November, 2002 before Sergon, J. when the Claimant gave his evidence. After a history of hiccups and appearances before several other judges, this matter was finally concluded before me in July, 2012. Only the Claimant and one witness for the Defendant gave evidence.

**Issues for Determination**

4. On the basis of the parties' pleadings and submissions, the issues for determination are as follows:

- a) Whether the Claimant's contract dated 1<sup>st</sup> February, 2004 was extended up to May 2006, and if so, on what terms.
- b) Whether the Claimant's claim is governed by the alleged employment, contract, or the Merchant Shipping Act or any other law.
- c) Whether the Claimant was involved in gross misconduct leading to the decommissioning or removal from service of the MT Ally.

I will shortly deal with these after setting out and analysing the evidence.

### **The Parties' evidence**

5. The Claimant's evidence was that he was a marine Engineer. He had been a Chief Engineer for about 20 years in many vessels; and latterly for the MT Ally. He produced PExb1, an employment contract between OBOP and himself dated 30<sup>th</sup> January, 2004. The employment commenced on 1<sup>st</sup> February, 2004, and was for three months, thus expiring on 30<sup>th</sup> April, 2004. The Claimant's wages were \$1,200 per month, all inclusive.

6. The Claimant stated that after expiry of the contract he continued working on the ship up to mid-May, 2006, but was paid only up to the end of January, 2006. He was then told by one Deepe Singh of Nanak Engineering, then in charge of engineering, that his salary would be reduced to Kshs. 39,000/= per month, to which he agreed. This is the amount he seeks for February to mid-May, 2006. He also stated in evidence that employees were normally entitled to leave every six months because they work for 24 hours. Finally, he stated that meals, namely breakfast, tea break, lunch, afternoon tea and dinner, were normally supplied by ship chandlers. But for the period between February and mid-May 2006, he carried his own meals, and he has therefore made a claim for provisions in respect thereof. He submitted PExh 2, his demand letter showing the claim break down as follows:

<b>Arrears of wages</b>	-	<b>Kshs. 136,500.00</b>
<b>Payment in lieu of leave</b>	-	<b>Kshs. 169,000.00</b>
<b>Provisions Allowance</b>	-	<b>Kshs. 53,280.00</b>

7. Finally, the Claimant said that daily records of the event occurring on a ship are kept in logbooks. He said he maintained the Engine Logbook which he handed over to Sultan Khan, but the Deck Logbook was retained by the Chief Officer.

8. In cross examination, he said his salary was slashed to Kshs. 39,000/= because he did not work 24 hours, and was not supplied with meals. He confirmed that there is a requirement for all persons working on a ship to have a written contract. His was, however, extended orally by Sultan Khan the Maintenance Manager, until the ship went for repairs. He said he was denied leave due to the Defendant's claim that some items and diesel went missing from the ship. His leave dues were US\$ 3 per day for 3<sup>1</sup>/<sub>2</sub> months, and he was further seeking 3<sup>1</sup>/<sub>2</sub> months pay in lieu of notice. His work was to

ensure the ship's three engines were kept maintained and run.

9. The sole Defence witness was Sultan Abdullah Khan, the former Maintenance Manager. He said the ship stopped operating between 2004 and 2005. He confirmed that the Claimant had been employed through the exhibited contract; but averred that it was not extended, as he was not authorised to make any extension. He denied entering any contract with the Claimant. He said he handled everything on the ship but the bosses gave him money to make payments. He confirmed that the Claimant's work was to ensure safety and looking after the engine compartment, tools and parts. The ship was at the time anchored at Mtongwe because it was not seaworthy. The hull was rusted and weak.

10. In cross-examination, Mr. Sultan said he did not know when the Claimant ceased employment, but he thought about Kshs. 38,000/= - Kshs. 39,000/= was then owed him. The personnel records were kept in the office. He knew that a Chief Engineer's logbook existed, but he did not know where it had been kept, and he did not have it with him.

11. When shown a letter by Claimant's counsel dated 16<sup>th</sup> June 2004 written by Mr. Langat, one of the owners, he asserted that all employees contracts were terminated on 16<sup>th</sup> June, 2004. Shown yet another letter dated 14<sup>th</sup> July, 2004 by Claimant's counsel, he confirmed that the claimant was recalled to work for another 3 months. However, he stated that he was not privy to letters between the owners and the Claimant and did not know when the claimant finally left employment.

12. In re-examination, Mr. Sultan said he had requested his bosses for permission for the Claimant to go to Dar es Salaam for a course in 2006, and he was allowed. He confirmed that the MT "Ally" was anchored at Mtongwe and nothing was working in it. Further, he confirmed that the contracts of the crew had no leave clauses in them. Finally, he said that when the ship was not operational the employees came to work monthly, but not on a written contract.

13. Having considered the evidence and the parties' written closing submissions, I am in a position to deal with the issues for determination.

#### **Whether the Claimants contract was extended to May, 2006 and if so on what terms.**

14. The terms of the last written contract were those contained in PExhb 1. In his evidence, Mr. Sultan for the Defendant admitted two extensions, the last being by a letter dated 14<sup>th</sup> July, 2004. These admissions were extracted from the Defence by virtue of the letters referred to by Claimant's counsel during cross examination of Mr. Sultan. Mr. Sultan also admitted that all records were kept on the ships, and that he did not know details of correspondence between Claimant and Defendants owners.

15. In the premises, I am satisfied that the Claimant has proved, on balance, that there were extensions to his contract. Mr. Sultan also said:

***"I do not know how much was owed to Pillay when he left, I think Kshs. 38,000 – 39,000/=. I do not know for which month...."***

Further, his evidence that he did not know when the Claimant left, does, on balance, leave the Claimant's assertions as to the fact of extension of contract entirely unchallenged.

16. In the absence of evidence to counter the Claimant's assertion that he left in mid-May, 2006, and having admitted that the Defendant maintained and held records of employees, and that in 2006 Mr. Sultan requested permission for Claimant to go for a course in Dar es Salaam, I find that the Claimant

worked up to mid-May, 2006, as claimed, on the terms, at least, of the last written contract.

**Whether the claimant's claim is governed by the alleged employment contract, or the Merchant Shipping Act, 2009, ("MSA"), or any other law.**

17. Other than the specific denial of the amounts claimed in the particulars of the Claimants claim, and the demand for strict proof thereof, this issue was first raised by the Defendant in its written submissions.

The assertion is that all contracts of ship crew members must be in writing under Section 119 of the Merchant Shipping Act ("MSA"). That Section provides not only for a written agreement, but also for a host of other provisions.

18. In the context of the present case, the Defendant submitted:

***"No such contract was produced in support of his (Claimant's) claim for wages. The Plaintiff alleged there was a 'gentleman's agreement' which 'verbal contract was extended indefinitely until the ship went for repairs.'"***

19. It is true that Section 119 (1) MSA provides that there should be a written agreement. Section 119 (2) provides for the matters to be contained in such agreement and the particular terms to be incorporated.

It is true, also, that in his cross-examination, the Claimant stated in relation to his entitlement to leave, that:

***"My claim is based on the Merchant Shipping Act and not on my contract. It comes automatically."***

20. None of the parties identified any provision in the Merchant Shipping Act relating to leave, and none is indicated in the contract exhibited by the Claimant. The exhibit is, of course, an agreement between the parties and, as I have already found, it was orally extended by the parties, because there was no voyage as the "Ally" was anchored and not on voyage. It was in fact admitted by Mr. Sultan in his re-examination as earlier pointed out, that:

***"When the ship was not operational, the few employees came monthly but not on a written contract."***

As I have already held, I am satisfied that in the circumstances, the last written contract was extended until mid May, 2006 on the amended term as to payment of Kshs. 39,000 and not \$ 1,200 per month.

21. On the question of leave, I have seen a provision in the Merchant Shipping Act at Section 156 which provides as follows:

***"156. (1) Every person is entitled after twelve months of continuous service on a Kenyan ship, or for the same employer, to an annual leave with pay, or to a proportionate part of the annual leave with pay, the duration of which shall be-***

***a) in the case of officers, not less than seventy two working days; and***

**b) in the case of crew members, not less than forty eight working days."**

22. The Plaintiff's assertion that he is entitled to payment in lieu of leave can be founded on the above provision. However, the Claimant has not provided evidence that he was fully engaged throughout the extension period and never took leave, or that it was denied when requested. Such evidence would have included letters requesting or denying leave or some similar documentation.

23. Plaintiff's evidence was that he was off board, for meals for example and did not work for 24 hours and therefore his extended contract cannot be treated like a normal contract on regular terms. I am not persuaded to allow more than one month's pay in lieu of leave. With regard to the claim on payment in lieu of leave therefore I am satisfied, that the Plaintiff is entitled to no more than one month's pay of KShs. 39,000/= which I hereby award.

24. The amendment of wages is not seriously contested as Mr. Sultan gave evidence that he thought the Claimant was owed Kshs. 38,000/- or Kshs. 39,000/-. He was not sure, the exact amount but he also gave evidence that he was the one who paid over the money provided by his boss.

In any event, the Claimant has adequately responded to the criticism regarding the written agreement, by pointing out that this is a claim under admiralty jurisdiction under Section 20 (2) (o) of the English Supreme Court Act, 1981, for a claim for wages by a master or member of a crew.

25. In concluding this issue, I would point out that under the Merchant Shipping Act, it appears that the responsibility of ensuring the existence of an agreement is placed, not on a crew member, but on the master. So also is the issuance of a Certificate of discharge or payment of a seafarers' final dues. That burden of proof in respect thereof therefore lies on the Defendant.

Accordingly, I find that irrespective of whether the applicable law is the Merchant Shipping Act or the general law of contract, it was for the Defendant or the Master, as the Defendant's agent, to ensure compliance.

**Whether the Claimant was engaged in gross misconduct**

26. This allegation was raised by the Defendant but no evidence was provided in respect thereof. I therefore, find the issue not proved.

**Conclusion**

27. In conclusion, I find for the Claimant on his claim for 3<sup>1</sup>/<sub>2</sub> month's wages at Kshs.39,000/= per month, the total being Kshs. 136,500.00.

28. With regard to the claim for payment in lieu of leave, I find that the Claimant is entitled to no more than one months pay in lieu of leave and hereby award Kshs. 39,000/=.

29. With regard to the claim for provisions allowance, the evidence is that the claimant was not working for 24 hours, and that the ship was not operational in any event. His job was proved to be merely to switch on the engines, and ensure they were run.

Further, the written contract shows that the Claimant's wages were clearly stated to be "all

**inclusive**". That, *prima facie*, presupposes it was inclusive of meals.

30. Accordingly, I enter judgment for the Claimant in the amount of Kshs. 175,500.00 together with interest thereon at court rates from the date of the claim. Costs follow the event, and the Claimant shall have the costs.

The decretal amount, including costs, taxed if not agreed, is to be satisfied from the security guarantee held in respect of the arrest of MT "Ally".

Orders accordingly.

**Dated, signed and delivered this 21<sup>st</sup> day of December, 2012**

**R.M. MWONGO**

**JUDGE**

**Read in open court**

**Coram:**

Judge: R.M. Mwongo

Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

- a).....
- b).....
- c).....
- d).....



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