



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1500 OF 2011**

**ASCRAT GILAMICHAEL WOLDEGABRIEL ..... CLAIMANT**

**VERSUS**

**FIVE FORTY AVIATION LIMITED ..... RESPONDENT**

Mr. Onyango for Claimant

Mr. Kibet Kimeto for Respondent

**JUDGMENT**

1. The Claimant is a pilot employed by Five Forty Aviation Limited on 15<sup>th</sup> December 2010.
2. He flew F28 and CRJ Aircrafts as the Captain until the 26<sup>th</sup> July 2011, when his employment was terminated. He earned a consolidated salary of US Dollars 5,500 (Approximately Kshs.511,500.00 per month net of taxation but was paid in Kenya Shillings duly converted monthly rates by the Respondent.
3. In terms of the contract of employment the Claimant was entitled to one month notice or payment in lieu of a month's notice upon termination.
4. The Claimant states that due to arbitrary conversion of the US Dollars rate to Kenya Shillings, he lost earnings equivalent to US Dollars 8,500 which is Ksh.790,500.00. He claims the same.
5. In addition the Claimant seeks damages for the wrongful dismissal in the sum of Kshs.1,000,000.00, interest and costs on the award. He too claims salary for days worked.
6. **Admission**

The Respondent admitted it owed the Claimant salary for days worked in July 2011 and salary in lieu of notice and judgment was entered for Kshs.726,339.00 in respect thereof.

7. The Respondent also admitted that the contract of employment entitled the claimant to be paid in US Dollars net of taxation.

The Respondent however avers that government regulations do not allow payment in US Dollars hence the conversion.

## 8. Damages

The Claimant states that he was unlawfully and unfairly dismissed from employment and seeks payment of damages as prayed.

## 9. Defence

The Respondent filed a statement of defence filed on 8<sup>th</sup> November 2011 in which it denies that it dismissed the Claimant unlawfully and unfairly and puts him to strict proof.

The Respondent avers that on 13<sup>th</sup> July 2011, the Claimant declined to operate flight 525 from Dar-es-salaam to Mwanza without any justification or valid reason.

10. That on 25<sup>th</sup> July 2011, the Claimant switched off his phone or declined to answer calls from the Chief Pilot when required for duty. On 26<sup>th</sup> July 2011, he was served with a termination letter detailing the aforesaid misconduct.

11. The Respondent states that the Claimant was on extended probation and therefore his employment was terminated with immediate effect.

12. A letter dated 15<sup>th</sup> April 2011, had extended the probation period for Claimant for a further three months. The Claimant had as a matter of fact served slightly more than six months as at the date of termination.

## 13. Testimony

The Claimant testified under oath and the Respondent called RWI Mr. Brown Elukaga Francis the General Manager of the Respondent.

14. The Claimant in his testimony said he was a national of Eritrea based in Kigali, Rwanda. He supported his particulars of Claim. He admitted that he declined to fly from Dar-es-salaam to Mwanza on 13<sup>th</sup> July 2011, because on the night of 12<sup>th</sup> July 2011, he had flown from Nairobi to Dar-es-salaam and arrived at 9.45 p.m. in the night. That he was entitled to fourteen (14) hours rest in terms of the Aviation Act, hence he declined to fly since he had not rested as required.

Furthermore, when he arrived at night, he had to book himself in a hotel and could not get dinner.

15. On 23<sup>rd</sup> July 2011, he refused to fly to Mombasa as alleged because the Respondent had not paid him for the hours in excess of sixty five (65) hours. He was paid and flew accordingly.

16. On 25<sup>th</sup> July 2011, the Claimant said he was not in a mental state to fly and this was within his right as a pilot.

The Claimant wrote to say he was under too much stress due to lack of rest time within flight schedules.

The Claimant submits therefore that he had legitimate reasons not to fly when he declined to and therefore there was no valid reason to terminate his employment.

Furthermore he was not subjected to a disciplinary procedure before the termination and therefore the termination was unfair.

## 17. Determination

The Claim for arrear salary and notice pay was compromised upon payment by the Respondent.

The only outstanding claims are for refund of underpayment arising from an erroneous dollar conversion to Kenya shillings and compensation for unlawful and unfair termination.

18. **Currency**

The Employment Act, 2007, provides at Section 17(1) that;

*“subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya .....”*

19. **Section 10 (3)(e)(iii)** provides an exception only where the employee contracted in the country is to provide services outside the country.

Whereas this is the case, it is wrong for an employer who has the primary responsibility to draft a contract of service, as in the present case to make provision for payment of salary in foreign currency and then relies on the provision purport to the detriment of the employee.

The Respondent cannot benefit on what it submits to be unlawful provision to the detriment of the Claimant.

The Respondent was unable, in Court’s view to defend the arbitrary application of currency rates on the Claimant’s salary payment.

20. In any event, **Section 17(1)** of the Act does not proscribe provision of a salary in a local contract in any other currency provided the actual payment is paid in the currency of Kenya.

21. In this case, the contract provided for payment of the Claimant in US Dollars but the actual payment was done in Kenya Shillings.

The initial contract placed him on three (3) months probation during which period the contract may be terminated by either party by giving one (1) month notice.

22. The probation period was extended for a further period of three months on 15<sup>th</sup> April 2011, four (4) and half ( $\frac{1}{2}$ ) months after the date of initial employment.

23. The Respondent states that it was entitled to terminate the employment of the Claimant without providing any reason because he was still serving on probation, it being common cause that the Claimant was not subjected to a disciplinary process but was provided with reasons for the termination.

24. **Section (12)(1)** of the Employment Act provides:

*“the provision of **Section 41** shall not apply where a termination of employment terminates a probationary contract.”*

25. Sub-section (2) provides;

*“a Probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”*

26. From the facts of the case the Claimant completed three months probation on 15<sup>th</sup> March 2011 and worked for a month thereafter until 15<sup>th</sup> April 2011, when the Respondent terminated his employment.

27. Accordingly, the Claimant has proved on a balance of probabilities that he was underpaid by virtue of an erroneous Dollar conversion rate to Kenya shillings.

The Court awards him Ksh.790,500 as claimed in this respect.

## 29. **Computation**

It is trite law that once a specified probationary period has expired, and same is not immediately extended in writing, the employment of the affected employee is deemed to have become one on permanent terms. This is clearly the case in the present case.

30. The Claimant was no longer on probationary contract as at 15<sup>th</sup> July 2011 when the Respondent purported to terminate his employment without following the procedure set under **Section 41** of the Employment Act, 2007.

31. The Court finds that the Respondent was under obligation to subject the Claimant to a disciplinary process by giving him a notice to show cause containing charges levelled against him and afford the Claimant opportunity to explain why his employment should not be brought to an end.

32. The Claimant has demonstrated that he had reasonable explanation to the charges levelled against him by the Respondent and therefore, has proved on a balance of probability that a wrongful dismissal took place contrary to **Section 45(2)(a)** as read with **Section 47(5)** of the Employment Act 2007.

33. The Claimant is therefore entitled to compensation in terms of **Section 49(1)(c)** as read with **Section 49(4)** of the Employment Act.

The Claimant had worked for seven and a half (7<sup>1/2</sup>) months as a pilot / captain and clearly wished to continue with his employment.

34. The employer imposed unlawful terms on his employment a practice that should be discouraged as it has implications on the safety of the passengers and the pilot.

35. The Court finds that the Claimant did not contribute to the dismissal.

The Claimant was not paid any terminal benefits immediately upon dismissal. The payment was done in the course of the hearing of this case.

36. The Court awards the Claimant four (4) months salary as compensation in the sum of Kshs.2,046,000.00.

Total award to the Claimant is Kshs.2,836,500.00.

The award is payable with interest at Court rates from the date of judgment till payment in full.

The Respondent is also to pay the costs of the suit.

**Dated and Delivered at Nairobi this 15<sup>th</sup> day of May, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**