



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Cause 811 of 2009**

**Captain Muhumed Abdi Mohamed.....Claimant**

**v**

**Executive Turbines Kenya Ltd..... Respondent**

**FINAL AWARD**

**Background**

1 Captain Muhumed Abdi Mohamed (the Claimant) filed a Memorandum of Claim against Executive Turbines Kenya Ltd (the Respondent) on 18 December 2009. The issue in dispute was stated as *termination of employment of Capt. Muhumed Abdi Mohammed by Executive Turbines Kenya Ltd as at 4<sup>th</sup> August 2009 and the non payment of claimants terminal benefits by the Respondent and tickets costs.*

2 The Respondent filed a Memorandum of Response on 24 February 2010 after which parties made several appearances before Justice Chemmutut. During one such appearance, the Claimant was granted leave to file a Detailed Tabulation of Claimants Claim which was done on 20 August 2010. This had the effect of amending the Memorandum of Claim and has been treated as such.

3 The parties during the pendency of the Claim successfully managed to negotiate and reach agreement on parts of the Claim. As a result on 28 May 2010, an Interim Award by consent was entered to the effect that the Respondent would pay the Claimant *One month's salary in lieu of Notice in the sum of Kshs 418,000/- and Annual leave not taken of 20 days in the sum of Kshs 278,160/- all totaling Kshs 696,160/-.* This consent in effect settled the Claimants claims enumerated under paragraph 5 (a) and (b) of the Memorandum of Claim.

4 Negotiations between the parties continued and on 25 October 2010 a Further Interim Award by Consent was entered in the terms that the Respondent would *pay to the Claimant Kshs 760,790/- on condition the Claimant withdrew the claim in respect of the ticket refund after returning from Ethiopia and severance pay.* This consent had the effect of disposing of the heads of claim enumerated in paragraph 5(c) of the Memorandum of Claim. There was another term of this consent to the effect that the Detailed Tabulation of Claimant's Claim be amended to read that 'difference due to wrong exchange rate as from June 2008 to December 2009'. I believe the reference to December 2009 is a typographical error because the consent letter signed by the parties Advocates dated 15 October 2010 referred 'Difference due to wrong exchange rate as from June 2008 to December 2008'.

5 The parties reserved for the Courts determination three issues and these were stated as an award in

respect of:

- (a) Twelve days worked in August 2009
- (b) Three weeks pay after outstation duty; and
- (c) Difference due to wrong exchange rate as from June 2008 to December 2008.

6 This award therefore is in respect of these three issues. The parties had agreed that the Court would determine these three issues based on written submissions and in this regard the Claimant filed his written submissions on 15 February 2011 while the Respondent filed its submissions on 28 February 2011. I have considered the pleadings and the submissions in my reaching my decision.

### **Evaluation of the pending issues**

#### ***Twelve days worked in August 2009***

7 It was the case of the Respondent that the Claimant worked for only 4 days in August 2009 and that he was paid for those four days. The basis of the submission by the Respondent is that the Claimant received his Notice of Termination of employment on 4 August 2009.

8 For the Claimant, it was contended that the Respondent did agree to reimburse the Claimant's ticket cost from Ethiopia and that this confirms that he worked for 12 days in August 2009. The ticket which was purchased by the Claimant indicates date of travel as 12 August 2009.

9 It is not and cannot be disputed from the pleadings and submissions that on 4 August 2009 the Claimant was in Ethiopia on the Respondent's business. Therefore his services were terminated while he was on a journey on the business of the Respondent.

10 The letter of termination though dated 4 August 2009 is unambiguous that the effective date of the termination was 3 September 2009. In my view therefore, contractually and legally the Claimant remained on the employment and payroll of the Respondent until 3 September 2009. But there appeared to be an implicit understanding between the parties that the Claimant was not expected to provide any further services to the Respondent effective 4 August 2009 and I will therefore not venture into what would have been the entitlements of the Claimant up to 3 September 2009.

11 What is material for the determination of this issue is that the services of the Claimant were terminated while he was on a journey and in my considered view there is and was an obligation upon an employer to repatriate its employee back to the normal station or base and at its cost.

12 The Respondent did not in its pleadings or submissions allude at all to what efforts it put in place to repatriate the Claimant back to Nairobi immediately on giving notice of termination and the only logical conclusion I can reach is that it should be responsible for any expenses incurred by the Claimant until his repatriation back to the normal station.

13 I have looked at section 39 of the Employment Act, 2007 on contracts expiring on a journey and I think it is fair and just that the contract of the Claimant be deemed to have been extended until the completion of the journey back to Nairobi, which was 12 August 2009.

14 The Claimant therefore succeeds on this issue save that it is admitted he was paid for 4 days and therefore these 4 days should be deducted from the 12 days. The Claimant was paid Kshs 48,000/- for the 4 days and therefore I would deduct this amount from the Kshs 167,200/- he sought and award him Kshs 119,200/-

15 One more word before I discuss the next issue. The termination letter of 4 August 2009 gave the Claimant notice of the termination of his services effective from 3 September 2009. At the same time, the

letter informed him that he was going to be paid one month salary in lieu of notice for redundancy. I believe this was in compliance with section 40(1) (f) of the Employment Act, 2007. But I would have thought that the Respondent was obliged to pay the Claimant wages up to 3 September 2009. In any case the Claimant did not claim wages up to 3 September 2009 and neither was this aspect an issue and therefore nothing turns on it.

### ***Three weeks pay after outstation duty***

16 There is a claim for Kshs 292,600/- based on account of an alleged normal practice of the Respondent to pay its employees an equivalent of three weeks' pay after serving out of station for six weeks. It was pleaded at paragraph 5 of the Memorandum of Claim that this was part of the employment contract. I have pored through the contract of employment but was not able to identify which clause of the contract made provision for this payment. The Claimant on his part did not refer the Court, either in the pleadings or submissions to the relevant part of the contract on which this claim was based.

17 Apart from placing reliance on the contract for this claim, the Claimant had also sought to rely on practice. Unfortunately, in my view, the Claimant failed to discharge the onus placed upon him to establish that there was such a practice. He could have very easily discharged this onus by exhibiting documentation relating to previous payments made to him or any other employee of the Respondent in respect of this head of claim.

### ***Difference due to wrong exchange rate as from June 2008 to December 2008***

18 Under this head the Claimant sought Kshs 385,000/- being the difference arising from the use of the wrong exchange rate for the dollar to the Kenya shilling. On behalf of the Claimant it was contended that the Respondent had admitted that it had used the wrong rate for the period January 2009 to July 2009 and made payments pursuant to the consent of the parties dated 15 October 2010 and therefore the claim for the period June 2008 to December 2008 should also succeed.

19 Regrettably the Claimant has failed to establish a case for an award under this head. I say so because in the Memorandum of Claim, the Claimant exhibited several email advisories marked as 'MM 4' from the Kenya Association of Air Operators setting the applicable exchange rates for the period January 2009 to September 2009 but none for the period June 2008 to December 2008.

### ***Conclusion and Orders***

20 Arising from what I have set out above the Claimant has partly succeeded in respect to the Claim for twelve days worked in August 2009 but has failed to establish that he is entitled to an award for three weeks pay after outstation duty and for underpayments arising from the use of the wrong exchange rate for the period June 2008 to December 2008.

21 I also note that the Claimant has been largely successful as an interim award and a further Interim award were entered in his favour by consent but no arguments were addressed as to costs.

22 It is therefore ordered that:

(a) A final award is entered in favour of the Claimant in the sum of Kshs 119,200/- being outstanding salary for August 2009.

(b) No order is made as to costs

*Dated and delivered in open Court on this 16<sup>th</sup> day of November 2012*

***Justice Radido Stephen***  
***Judge of the Industrial Court***  
***Appearances***

*Mrs. Nyaencha instructed by Kakai Mugalo &*

*Co. Advocates, For Claimant*

*Mr. Khaseke instructed by Mohamed Muigai Advocates, For Respondent*