



Makau (Suing as the Legal Representative of the Estate of Daniel Kiplangat Ng'etich (Deceased)) v DAC Aviation (EA) Limited (Cause E826 of 2022) [2025] KEELRC 2486 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2486 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E826 OF 2022
SC RUTTO, J
SEPTEMBER 19, 2025**

BETWEEN

**EDITH NDUNGE MAKAU CLAIMANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL
KIPLANGAT NG'ETICH (DECEASED)**

AND

DAC AVIATION (EA) LIMITED RESPONDENT

JUDGMENT

1. The Claimant herein, Edith Ndunge Makau, is the wife of the late Daniel Kiplangat Ng'etich, who filed the initial Statement of Claim, dated 12th November 2022. On 27th January 2025, the Court allowed an application for the substitution of the late Daniel Kiplangat Ng'etich, who, from the record, passed away on 5th April 2023. Subsequently, an amended Statement of Claim was filed, and Edith Ndunge Makau was substituted in the place of Daniel Kiplangat Ng'etich (deceased).
2. In the Amended Statement of Claim, the Claimant avers that vide an employment contract dated 26th November 2018, the Respondent offered and the deceased accepted employment in the position of a Line Maintenance Engineer Level III effective 26th November 2018. It is further averred that the deceased was entitled to, among other payments, a basic monthly salary of Kshs 250,000/-, which was later increased to Kshs 280,000/-.
3. It is further stated in the Amended Statement of Claim that the deceased held his position until 26th November 2019, when his employment contract expired and was thus terminated vide a letter dated 25th November 2019.
4. That the deceased was informed that his terminal dues amounting to Kshs 558,599/- would be paid on his last day of employment, being 26th November 2019.



5. That the Respondent in blatant breach of the parties' contract and in breach of the letter dated 25th November 2019, knowingly and negligently refused to pay the deceased his terminal dues.
6. The Claimant further avers that the deceased incurred expenses for his full rotation from 11th August 2019 to 2nd October 2019 and was entitled to per diem amounting \$2,700 (Kshs 337,500/=). That the same was approved by Mr. Fred Lwika, Flight Operations Kabul Afghanistan, who forwarded the same to Mr. Kilonzi via an email dated 17th September 2019, to effect the payment. That in contravention of Clause 5.3 of the Employment Contract dated 23rd November 2018, the Respondent has refused to pay the amount to date.
7. The Claimant further avers that on or about 1st August 2019, the deceased was sent to work in Afghanistan. As per the Company policy, he was to work there for 6 weeks and return on 2nd October 2019. In line with the parties' contract, the company paid for the deceased's return air ticket and issued him with copies of travel tickets. While in Afghanistan, on 2nd September 2019, the Taliban attacked the Respondent's employees' camp at Green Village and the UN counsellor recommended for immediate change of crew. All the crew were changed except the deceased.
8. The Claimant avers that the deceased was requested by the Respondent to stay because there was no engineer to replace him. He stayed as requested and during the period, the deceased carried out his duties with the expected faithfulness, diligence and professionalism, thereby fulfilling all demands of his job and in full compliance with his employment contract, albeit with a lot of trauma.
9. The Claimant further states that the deceased sent his Line Manager, Wilson Otieno, an email informing him of his departure from Kabul Station at the end of his rotation to enable him attend to family commitments and PT6A training, which was scheduled to take place on 7th October 2019 and was already confirmed. The Line Manager, through a phone call, confirmed to the deceased that he would depart the station when the engineer who was to replace him arrived.
10. According to the Claimant, the engineer who was to replace the deceased arrived and he (deceased) oriented the new engineer through the airside procedures, tool control, parts inventory, and aircraft serviceability status. He fully handed over to the engineer who had come to replace him and ensured smooth operation all through.
11. As the deceased was preparing to leave Afghanistan, he received an email from his line manager telling him not to leave until the engineer who had come to replace him got his work permit. There was no time indication within which the work permit was to be obtained.
12. In response to the email, the deceased replied to the line manager and informed him that he was due for a change and that he had prior commitments (family commitments and PT6A training which he had booked and confirmed). The deceased informed the line manager about them and stated that he could no longer stay in Afghanistan. To the deceased's utmost shock, the line manager proceeded and cancelled his ticket 10 hours before his departure from Afghanistan.
13. Due to this cruel and inhuman action by the Line Manager, the deceased was forced to book a flight to Kenya using his own money at a cost of \$505.9.
14. The Claimant further avers that the Respondent in contravention of Section 31 of the [Employment Act](#), failed to pay the deceased house allowance or issue him with accommodation during the entire time he was in employment with them.
15. Against this background, the Claimant seeks the following reliefs against the Respondent:
 - i. Terminal dues as per letter dated 25.11.2019 Kshs.558,599.00/=



- ii. Unpaid per diem (\$2,700) Kshs 337,500.00/=
 - iii. Air ticket (\$505.9 dollars) Kshs 63,238.00/=
 - iv. Unpaid house allowance
(15%*250,000*3 months)+ (15%*280,000*9 months) Kshs.490,500.00/=
 - v. Interest on 1,2,3 & 4 above from 26th November 2019
(12%*4 4/12*1,449.837) Kshs.753.915 /=
Sub-Total Kshs.2,203,752.00/=
 - vi. Costs of the suit
 - vii. Interest on the above until payment in full
 - viii. Such further or other relief the Honourable Court may deem fit.
16. Opposing the Claim, the Respondent contends that at the expiry of the contract, the deceased was never entitled to any of the claims stated. According to the Respondent, there are no terminal dues payable or pending payments to the deceased.
 17. Putting the Claimant to strict proof, the Respondent has further denied breaching any term of the contract of employment.
 18. The Respondent has further denied the claim that it did not remunerate the Claimant as per the contract of employment.
 19. On the basis of the foregoing, the Respondent has asked the Court to dismiss the Claimant's claim with costs and find that the Respondent does not owe the dues in the Statement of Claim.
 20. When the matter came up for hearing on 9th June 2025, the Respondent's Advocate was not present. The Claimant's Advocate informed the Court that service had been duly effected on the Respondent's Advocates. To that end, she produced an Affidavit of Service sworn on 24th March 2025 by Ms. Brenda Kogai in which she depones that she served the Respondent's Advocates with the hearing notice electronically through the address advocateoduol@gmail.com. From the record, this was the email address disclosed by the Respondent's advocates in the Memorandum of Response.
 21. The Court, being satisfied with the return of service, proceeded with the hearing of the matter, the Respondent's absence notwithstanding.

Claimant's Case

22. The Claimant testified in support of her case as CW1 and at the outset, she adopted her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside the initial Statement of Claim, as her exhibits before court.
23. The Claimant asked the Court to award her the reliefs contained in the Amended Statement of Claim.

Submissions

24. Only the Claimant filed written submissions. It was the Claimant's submission that the Respondent refused to pay the deceased his terminal dues upon the expiry of his contract, amounting to Kshs. 558,599.00/=. That further, the deceased incurred expenses for his full rotation from 11th August 2019 and 2nd October 2019 and was entitled to per diem amounting to \$2,700/=. It was further submitted



that the Respondent failed to provide the deceased with reasonable accommodation or pay him house allowance for the entire period he was in employment.

Analysis and Determination

25. Flowing from the pleadings by both parties, the evidentiary material before Court and the Claimant's submissions, it is apparent that the singular issue falling for the Court's determination is whether the Claimant is entitled to the reliefs sought.

Terminal dues

26. The Claimant has sought to be paid in the sum of Kshs 558,599/- being due to the deceased upon the expiry of his contract of employment. In support of this claim, the Claimant exhibited a letter dated 25th November 2019, from the Respondent, referenced "Expiry of Contract". In the said letter, the deceased was notified that his net terminal dues were in the sum of Kshs 558,599/-. This was to be paid on the deceased's last day of employment.
27. Despite the Respondent's assertion that it does not owe the Claimant terminal dues, there was no evidence that it settled the sum of Kshs 558,599/- as expressly stated in its letter dated 25th November 2019. As such, the Court has no reason to doubt that the deceased's terminal dues are still outstanding. To this end, the Claimant is entitled to the same.

Unpaid per diem

28. The Claimant has further sought to be paid the sum of \$2,700 being unpaid per diem. On this issue, it is the Claimant's case that the deceased incurred expenses for his full rotation from 11th August 2019 to 2nd October 2019 and was entitled to per diem amounting \$2,700. According to the Claimant, the same was approved by Mr. Fred Lwika, Flight Operations Kabul Afghanistan, who forwarded the same to Mr. Kilonzi via an email dated 17th September 2019 to effect the payment.
29. In support of this claim, the Claimant exhibited a copy of an email dated 17th September 2019 from Fred Lwika in which states as follows:

"Dear Kilo,

Find below AFG per diem for Ngetich,

D. Ngetich \$ 1,900 as from 11th August to 17th Sep 2019

For his full rotation until 2nd October 2019. See below,

D. Ngetich \$ 2,700 as from 11th August to 2nd October 2019.

Kind regards."

30. In response to the said email, Kennedy Kilonzo stated, "Noted with thanks".
31. Once again, the Respondent's denial of this claim was bare and was not accompanied by any evidence. In this regard, there was no evidence that the deceased was paid per diem as per the approval by Mr. Lwika and as acknowledged by Mr. Kilonzo. Consequently, the Court finds that the same is due to the Claimant as prayed.



Air ticket

32. In the Amended Statement of Claim, the Claimant has sought to be paid the sum of \$505.9, being the amount the deceased spent on an air ticket from Afghanistan to Kenya. The basis for this claim is that the deceased was scheduled to depart Afghanistan upon the arrival of the engineer who was to replace him. It is the Claimant's case that as the deceased was preparing to leave Afghanistan, he received an email from his line manager telling him not to leave until the engineer who had come to replace him got his work permit, but there was no time indication within which the work permit was to be obtained.
33. According to the Claimant, the deceased informed the line manager that he could no longer stay in Afghanistan on account of family commitments and PT6A training, which he had booked and confirmed. The Claimant avers that the line manager proceeded and cancelled the deceased's air ticket 10 hours before his departure from Afghanistan. As such, the deceased was forced to book a flight to Kenya using his own money.
34. In support of this position, the Claimant exhibited a copy of an air ticket and receipt which indicates that the cost of the flight from Kabul, Afghanistan to Nairobi, Kenya was \$ 505.9.
35. The Respondent did not dispute that the Claimant was in Afghanistan on an official assignment and that he personally met the cost of his return flight from Afghanistan to Kenya. Revisiting the deceased's contract of employment, it is clear that Clause 5.3 is couched as follows:
- “The company will reimburse the employee for reasonable business expenses incurred in the course of his/her employment.”
36. There is no evidence that the Respondent reimbursed the Claimant for the cost of the air ticket he incurred to fly from Afghanistan, where he was on an official assignment, to Kenya. Consequently, the Claimant is entitled to the costs of the air ticket, being \$ 505.9.

House Allowance

37. The Claimant has further averred that the Respondent failed to pay the deceased house allowance or issue him with accommodation during the entire time he was in employment with them.
38. Schedule A of the contract of employment describes the Claimant's remuneration as being “gross pay” in the sum of Kshs 250,000/-.
39. The Black's Law Dictionary (10th Edition p. 880) defines gross income as the “Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings.”
40. A clear construction of the above definition is that the term “gross” refers to all income payable. Presumably, these include allowances. I draw support from the case of Samson Omechi Ongera v Tusker Mattresses Limited [2018] eKLR, where the court found that “Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime.”
41. The Court will arrive at a similar finding in this case and determine that the deceased's salary being in “gross”, was inclusive of house allowance. As such, the Claimant's prayer in that respect is denied.

Orders

42. The total sum of my consideration is that judgment is entered in favour of the Claimant against the Respondent as follows: -



- a. The Claimant is awarded the sum of Kshs 558,599.00 being the deceased's terminal dues.
- b. The Claimant is awarded \$ 2,700 being unpaid per idem.
- c. The Claimant is awarded \$505.9, being air ticket expenses incurred by the deceased from Afghanistan to Kenya.
- d. Interest on the amount in the amount in (a), (b) and (c) at court rates from the date of filing the suit until payment in full.
- e. The Respondent shall also bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2025

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Nyabuta instructed by Ms. Kogai

For the Respondent No appearance

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

