

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 1590 OF 2018

DIPEN KUMAR PATEL.....CLAIMANT

-VERSUS-

FIVE FORTY AVIATION LIMITED.....RESPONDENT

Coram

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

1. Vide a memorandum of claim dated the 5<sup>th</sup> of December 2018, the Claimant sued the Respondent and sought the following Orders:-
  - a) A declaration that the treatment of the claimant at the respondent's employment amounted to premeditated constructive dismissal for which the claimant is entitled to compensatory and general damages.
  - b) An order for the respondent to pay the claimant 12 months gross salary in compensation for the loss of employment at Kshs. 530, 000/- totalling Kshs.6,360,000/=.
  - c) An order for the respondent to pay the claimants terminal dues of Kshs. 4,051,000/-.
  - d) An Order for the Respondents to pay the Claimant his CRJ type rating investment of USD 25,000/-
  - e) An Order for the Respondents to compensate the Claimant for unpaid leave days amounting to 69 days totalling to Kshs. 1,218, 999/-

- f) An Order for the Claimant to be paid his freelance duties dues for the month of May and June 2017 amounting to USD 5,380/-
  - g) An Order for the Claimant to be paid his freelance duties dues for the month of June 2018 for 5.3 hours amounting to USD 530/-
  - h) An Order that the Respondents pay the Claimant Seventeen days (17) salary for the month of August 2018 amounting to Kshs.300, 333/- that were illegally and unlawfully deducted.
  - i) An order that the Respondents pay the Claimant one month salary in lieu.
  - j) An order for the respondents to pay the claimant general damages on account of the attendant unfair and ill-treatment covered in discrimination, mistreatment, humiliation, public embarrassment and ridicule and the trauma.
  - k) Costs and interest.
2. The Claimant in support of the claim filed his witness statement dated 5<sup>th</sup> December 2018; list of witnesses of even date; and list and bundle of documents of even date.
3. The Respondent entered appearance through the law firm of Njeri Ngunjiri Advocates, later changed to Mungu & Company Advocates on 17<sup>th</sup> October 2024 and filed an amended response to memorandum of claim, dated 31<sup>st</sup> January 2022. In support of their response, they filed a witness statement of NIMIT PATEL dated 7<sup>th</sup> February 2022; and index and bundle of documents dated 22<sup>nd</sup> August 2019. They later filed a supplementary list of documents dated 7<sup>th</sup> February 2022.
4. The Claimant replied to the response vide a reply dated 21<sup>st</sup> August 2023.

## Hearing and evidence

5. The claimant's case was heard on the 10<sup>th</sup> July 2025 when the claimant testified and adopted his witness statement dated 5<sup>th</sup> December 2018 as his evidence in chief and produced his documents under list of even date as C-exhibits 1-12. He was cross-examined by counsel for the respondent Ms. Ochieng and re-examined by his counsel.
6. The respondent's case was heard on the 25<sup>th</sup> September 2025. The witness was Donald Smith the Chief Executive of the Respondent. The witness adopted his witness statement dated 8<sup>th</sup> August 2025 as the respondent's evidence in chief. He produced the documents listed by the respondent dated 31<sup>st</sup> March 2019 as R- exhibits 1-8. He was cross-examined by counsel for the claimant, Gitonga. There was no re-examination.

## The Claimant's case in summary

7. The Claimant's case is that he was offered employment by the Respondent on or about 26<sup>th</sup> June 2014 as a Pilot within the Respondents organization. At the time he was approached, he was in full time employment with West Wind Aviation as a Captain on a single engine aircraft. The respondents offered the Claimant better working conditions and terms. The Claimant's duties upon acceptance of employment with the Respondents as advised were: flying the company's aircrafts on a regular schedule; being available to fly freelance, meaning the company could loan him out to other aviation companies at a fee when the need arose; and generally conducting or performing the roles required of a pilot. To perform his duties, full co-operation was required from the Chief Executive Officer and all the requisite departments.
8. The claimant states that during his employment, there were fundamental breaches of his employment terms in a premeditated scheme to frustrate him out of employment, which

culminated in the Claimant's summary dismissal on 16<sup>th</sup> August 2018 without cause and/or due process. Specifically, the Respondent's Chief Executive Officer would insult the Claimant whenever he would make inquiries on the deteriorating state of the work environment including the unilateral deduction of the Claimant's salary. Following his dismissal, the Claimant was not paid for work done before his dismissal, and paid his terminal dues.

9. It is the Claimant's case that he was frustrated out of employment, and constructively dismissed. Further he argues that the Respondent in terminating him from employment, contravened his Article 41 Constitutional rights, and well as the provisions of the Employment Act on fair procedure.

#### Respondents' case in brief

10. The Respondent admits that the Claimant was its employee, having been employed by the Respondent on 26<sup>th</sup> June 2014, and summarily dismissed on 16<sup>th</sup> August 2018. After his employment, the Claimant duly obtained his license for the CRI type rating.
11. It the Respondent's case that the circumstances leading up to the Claimant's summary dismissal were that on diverse dates, the Claimant committed acts and omissions that consisted of insubordination, forcing the Respondent to take disciplinary action against him. In particular, the Claimant flouted rules by the Kenya Aviation Authority to the detriment of the Respondent organization.
12. The Respondent attempted to address the problems with the Claimant by organizing meetings with him scheduled for dates when the Claimant was not on duty, but the Claimant failed to

attend such meetings citing frivolous reasons for his non-attendance. The Claimant only wrote an undated letter in response to the security breach. Due to the Claimant's non-cooperation, the Respondent had no option but to summarily dismiss the Claimant as he neglected the best interest of the company, per Clause 8 of the Claimant's letter of appointment.

13. The Respondent denies that they contravened the provisions of the Employment Act on fair procedure or violated the Claimant's Constitutional rights. They further state that the Claimant is not entitled to the remedies he seeks, save for his terminal dues which will be paid upon return of his Crew Pass to the Respondent. On the claim for wages for work done prior to his termination from employment, the same is denied on the premise that the journey logs presented by the Claimant have not been authenticated.

#### **DETERMINATION**

14. The court having heard the parties and their witnesses and on perusal of the submissions discerned the issues for determination in the suit to be-

- a. Whether the termination of the employment was fair
- b. Whether the claimant was entitled to relief sought

#### **Whether the termination of the employment was fair**

The claimant Employed 26<sup>th</sup> June 2014 and summarily dismissed on 16<sup>th</sup> August 2018. He alleged that the termination was premeditated and was exposed to acts by the respondent that amounted to constructive dismissal. The claimant was issued with a letter terminating his services dated letter dated 16<sup>th</sup> August 2018. The letter disclosed the reason for the termination. The letter is reproduced as follows- '*Dear Dipen,*

*Re: Termination of Employment*

*We refer to the above matter and to the security breach reported by the Kenya Airports Authority in their letter dated 31<sup>a</sup> July 2018.*

*The report from the Authority indicate that on the 26th July 2018, yourself and other employees, evaded screening at the International arrivals in Terminal II and entered the country through the Domestic Arrivals in the same Terminal. That as a result of the said breach, the Chief Executive Officer of this Company was summoned by the Authority to explain the reasons for the said breach by his employees.*

*Further information has indicated that prior to the said breach, you were once again involved in a security incident wherein you refused to undergo screening prior to a flight and as a result, were asked by the Authority to disembark from a flight.*

*Reports have also indicated that you have also continuously failed carry out your after landing duties that entail the handing over of paperwork to the Operations office after completion of your flights. We regret to note that in spite the several verbal and written warnings, you have continued to handover your paperwork late and only after follow-up by Operations.*

*In the foregoing, we consider that your actions constitute serious misconduct warranting summary dismissal and thereby summarily dismiss you from your employment with the Company.*

*Your dismissal is effective immediately and you are therefore required to immediately return all Company Property in your possession.*

*Yours faithfully,*

*For and on behalf of FIVE FORTY AVIATION LIMITED''(emphasis given)*

The claimant is a pilot. During cross-examination, the claimant confirmed he can be dismissed for drunkenness. He denied the email of the CEO of 15th June 2018, where he was warned of being drunk. He confirmed the statement of being drunk did not amount to a warning. The claimant confirmed having received a letter by Kenya Airports Authority(KAA) dated 31<sup>st</sup> July, 2018 on non-compliance with the regulations. The letter authored by the Kenya Airports Authority Airport Manager read as follows- *'RE: SECURITY BREACH*

*This is to bring to your attention that on 26th July 2018 at 1350hrs, the following crew working for your airline refused to be screened and bypassed security screening and entered the country unprocedurally. The concerned crew are:*

*1. Willy Mugo Captain*

*2. Depen Patel-First Officer*

*3. Adan Hassan Flight attendant*

*4 Dennis Kyalo Flight attendant*

*The circumstances are that on the aforementioned date and time, the above mentioned crew evaded screening at the International arrivals in Terminal II and entered the country through the Domestic Arrivals in the same Terminal. The Immigration officers tried to advise them to undergo screening but they ignored them.*

The action by the crew violated the requirements of the Airport Security programme under section 3.2.11 in regard to inbound security screening and the provisions of Annex 9 Appendix 1 (the General Declaration).

The purpose of this letter is to request you to advise the concerned crew to avail themselves in my office on 3rd August 2018 to explain why they failed to observe Airport procedures (emphasis given). The claimant admitted the alleged response to KAA letter had no evidence of having been received by the authority. On being asked if he appeared before KAA the claimant said they did not find the officer who summoned them. The claimant confirmed having received email of 16<sup>th</sup> August 2018 requesting him to report to Human Resource of the respondent for a meeting on 17<sup>th</sup> August 2018 at 10.00 a.m. The claimant told the court that he attended the meeting on 20th August 2018 and not 17th August 2018 on the basis that he had written an email to the chief pilot. The claimant confirmed he had received an email on 24<sup>th</sup> May 2018 stating he had refused to obey lawful orders and stated he responded. The claimant denied having received an email dated 7th February 2018 from Captain Kuria warning him of his conduct. The court concluded that there were valid reasons related to the claimant's conduct. The allegation that the termination was premeditated was defeated by fact that the claimant was accused by KAA, a government regulator and his crew of violation of the aviation rules by unprocedural entry into the country vide letter dated 31<sup>st</sup> July 2018(reproduced above and R-exhibit 3) and the allegations the claimant was not cleared of by the regulator. That was one of the reasons for the termination, and the court found that the reason met the threshold of the fairness test under sections 43 and 45 of the Employment Act. The employer is entitled to question an employee's conduct, and that cannot be said to have amounted to constructive dismissal.

16. Procedural fairness – it is a mandatory requirement that the employer must comply with section 41 of the Employment Act before termination even where a valid reason exists. Whereas the claimant was summoned to appear before the Human Resources, the court finds that the summons to the meeting did not meet the threshold of section 41 as the claimant was not issued notice prior to the meeting, and the reason for the meeting was not disclosed in compliance with section 41, that is, in contemplation of termination. The court finds the process was flawed. The court holds that the reason for termination was valid, but the procedure was flawed, for which the claimant is entitled to compensation under section 49 of the Employment Act.

**Whether the claimant was entitled to reliefs sought**

17. The claimant sought for the following reliefs-

- a) A declaration that the treatment of the claimant at the respondent's employment amounted to premeditated constructive dismissal for which the claimant is entitled to compensatory and general damages.
- b) An order for the respondent to pay the claimant 12 months gross salary in compensation for the loss of employment at Kshs. 530, 000/- totalling Kshs.6,360,000/=.
- c) An order for the respondent to pay the claimants terminal dues of Kshs. 4,051,000/-.
- d) An Order for the Respondents to pay the Claimant his CRJ type rating investment of USD 25,000/-
- e) An Order for the Respondents to compensate the Claimant for unpaid leave days amounting to 69 days totalling to Kshs. 1, 218, 999/-
- f) An Order for the Claimant to be paid his freelance duties dues for the month of May and June 2017 amounting to USD 5,380/-

- g) An Order for the Claimant to be paid his freelance duties dues for the month of June 2018 for 5.3 hours amounting to USD 530/-
- h) An Order that the Respondents pay the Claimant Seventeen days (17) salary for the month of August 2018 amounting to Kshs. 300, 333/- that were illegally and unlawfully deducted.
- i) An order that the Respondents pay the Claimant one month salary in lieu.
- j) An order for the respondents to pay the claimant general damages on account of the attendant unfair and ill-treatment covered in discrimination, mistreatment, humiliation, public embarrassment and ridicule and the trauma.
- k) Costs and interest.

18. At cross-examination the claimant told the court he sought for terminal reliefs amounting to Kshs.4,051,000. He had worked for 4 years and at exit net salary was KShs.375,000/-.

19. The Court proceeds to analyse and decide on the reliefs.

#### Compensation for unfair termination

16. The court held the reason for the termination was valid but procedural flawed. The court will not compensate an employee for own misconduct. The court finds 1 month notice pay gross salary was due for procedural unfairness and was granted. The Claimant pleaded gross salary of KShs.530,000. The employer did not plead an alternative figure. During cross-examination, the claimant stated his net salary was Kshs. 375,000. The court adopts the pleaded figure of gross salary of KShs.530,000 and awards as notice pay.

Claim for salary arrears for 17 days worked in August 2018

17. The Respondent submitted, that regarding the claim for 17 days' salary for August 2018, the Respondent concedes this amount but notes that payment was conditional upon clearance and return of company property, including the KAA pass. The Claimant has yet to comply with these requirements. His monthly salary was Kshs. 300,333/=, and his 17-day entitlement should be computed on a pro rata basis. The court held the gross salary pleaded of Kshs. 530,000 was not controverted by the respondent and thus on prorata basis the claimant is award unpaid salary of 17 days as sought Kshs. 300,333 (gross).

CRJ Type rating investment claim

18. The claimant referred to clause 6 of the contract and told the court that he was provided for training under the rating of CRJ and renewed the certificate. The claimant confirmed that the contract clause did not state that the USD 25000 was refundable. The claimant at cross-examination confirmed he was trained under rating of CRJ and issued with the certificate. The court then finds no basis to grant prayer for CRJ type 25,000. The claim is disallowed.

19. On leave – The claimant confirmed that in the leave form of 11th October 2012, stated he had 14 calendar days left as at 31<sup>st</sup> December 2017. He confirmed he received the form. He said he wrote email to state he had 69 days. The employer's burden is discharged by the production of employment records. The employer produced a form indicating leave days to be 17 days as at 31st December 2017. The Claimant acknowledged that he received the form. He said he wrote an email stating he had 69 days. The report finds no basis to find 69 days were due when the employer produced a record as the custodian of employment records (section 74 of the Employment Act). The Claimant in re-exam said he did not know how many days of leave

were pending when he received the leave form. Among the documents produced by the Respondent was a tabulation of the final dues of the claimant (supplementary document dated 7th February 2018), where leave days were indicated as 44.5 days. The Witness did not produce the document but it was already in the record and was not expunged. The court under section 20 of the Employment Act is not to decide cases on technicality. The respondent being the custodian of records and having filed the final dues tabulation indicated as 44.5 days the same is adopted and awarded to the claimant.

#### Claim for unpaid freelance services

20. The court found evidence on balance of probabilities that the Respondent was liable to pay the Claimant for the freelance service offered to East African Safari express as per email correspondence produced by the claimant which confirmed the payment claims were before the Respondent's CEO for approval. At the cross-examination, the Claimant confirmed the claims were approved by the CEO. The claimant had not produced his bank statements. The court finds that it was the burden of the Respondent to prove the payment of the freelance claim, the Claimant having alleged and produced evidence of his claim. The court awards the claim for freelance as sought.

#### Conclusion

21. In conclusion, the court held that the reason for the termination was valid, but the procedure was flawed. Judgment is entered for the claimant against the respondent as follows-
- a. The Claimant is awarded freelance claim for US\$ 530 and US\$ 5380 as sought.
  - b. Unpaid leave is granted for 44.5 days thus Kshs.786,166.67.
  - c. Unpaid salary for 17 days in August 2018 thus  $17/30 \times 530,000$  thus Kshs.300,333/-.

d. Costs and interest at court rate from judgment date.

22. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF  
FEBRUARY, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Domba holding brief Odedo

Applicant /Respondent: Ms Ochieng