



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

(ON Makau J on 18th March, 2026)

CAUSE NO. E018 OF 2024

**ROBIN
KARIUKI.....CLAIMANT**

-VERSUS-

**AIRWORKS
LIMITED.....RESPONDENT** **KENYA**

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 5th January 2024, the Claimant alleged that he was casually dismissed from employment by the Respondent prayed for the following reliefs:-

a) A declaration that the Respondent's aforesaid actions to casually dismiss the Claimant from

employment amounted to unlawful and unfair dismissal.

b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs. 11,508,450/=

d) Interest on (c) above at Courts rate from the date of filing claim till payment in full.

e) Cost of this suit plus interest.

2. The Respondent filed Defence and counterclaim dated 24th July 2024 denying that it dismissed the Claimant as alleged and prayed the suit to be dismissed with costs. It further averred that the Claimant left employment on 15th September 2023 without giving it one month prior notice. Therefore it counterclaimed against him the following:-

a) Kshs. 562500 being one month salary in lieu of notice.

b) Costs

c) Interest on (a) above.

Facts

3. The Claimant was employed by the Respondent as Fleet Captain of the Respondent's C208B Aircraft under one year from 19th October 2021. His work station was Juba and his

net monthly salary was USD 3750 (Kshs. 562,500) but whenever he went to work in Nyala, Sudan he was entitled to a per diem of USD 50. He was required to go office work 14 days every month, to discharge assigned duties as Fleet Captain.

4. The contract lapsed and it was never renewed or extended formally, but the Claimant continued working for the Respondent who continued paying his salary. On 15th September 2023 the Claimant stopped attending work and wrote to the Respondent raising concern that his salary for August 2023 and per diem totaling to USD 800 had not been paid. He never reported to work again despite receiving salary for August and September 2023. He also refused to go to the office to discuss contract renewal and the particulars of his claim for per diem. He then brought this suit 22nd January 2024 accusing the Respondent of constructive dismissal.

Evidence

5. The Claimant testified as CW1 and adopted his statement dated 5th January 2024 as his testimony. He then produced five (5) documents as exhibits. In brief, his evidence was that he was employed as a Captain of the Respondent's C208B Aircraft vide a contract dated 15th October 2021 for a net monthly salary of USD 3750.

6. Between 9th October 2023 and 29th October 2023, he was on his 21 rest days and he wrote emails to the Respondent about his unpaid salary equaling to USD 8,098 (Kshs. 1,214,700) No response was given until 26th October 2023 and 29th October 2023 when the Respondent's Managing Director reached out to him, not about the unpaid salary but requesting him to help the company to stand in for sick crew members and also to induct a new Captain.
7. He contended that the conduct by the Respondent of failure to pay his salary for work done and resulting to hire him on casual terms amounted to constructive termination of his employment. He further faulted the employer for insisting that he goes to the office to provide information concerning salary, which he had already provided. He prayed for the reliefs sought in the suit.
8. On cross examination he stated that he signed a contract on 19th October 2021 for a fixed term of 12 months and it lapsed on 18th October 2022. Thereafter he continued working up to September 2023. Between October 202 and September 2023 he worked for 261 days and had 52 RNR days.
9. He denied ever resigning or absconding from duty and maintained that he was on his RNR. He contended that the

Respondent failed to pay him per diem while working in Juba, Rubek and Somalia in addition to his salary for August 2023. He admitted that his contract provided for payment of per diem for Nyala station only. He further admitted that he maintains a log book which if produced in court would show all his flights made for the Respondent and other companies.

10. He relied on Whats App texts from the Respondent's Managing Director to prove that his employment was terminated. He was replaced for alleged absconding/resignation even before his dues were paid. He admitted that his flights schedule (Page 27 of Respondent's bundle) showed his flight schedule from 2021 to 15th September 2023. However he contended that the flight schedule conflicted with the payment schedule showed that he was paid on 26th October 2023.
11. The Respondent's Managing Director one Eric Mutinda Kivindu testified as RW1. He adopted his written statement dated 24th July 2024 as his evidence and produced 3 documents as exhibits. He confirmed that the Respondent employed the Claimant on a 12 months fixed term contract from 19th October 2021 to 18th October 2023 for a salary of USD 3750 plus a daily per diem of USD 50 to cater for meals only when in Nyala, Sudan.

12. He contended that the Claimant was paid all his salary and per diems during the period of the said contract between 20th October 2022 and 15th September 2023 he never attended work for 200 days from 15th September 2023 he absconded from duty and never reported back. He denied allegation that the Respondent dismissed the Claimant.
13. As regard the counterclaim, he contended that the Claimant should pay the Respondent one month salary in lieu of notice because he resigned without giving prior notice. He further stated that the Claimant was erroneously paid salary for October 2023 yet had absconded duty for the company.
14. On cross examination, he contended that due to the long history with the Claimant, the Respondent never demanded refund of the salary for October 2023 which was erroneously paid to him. He admitted that Claimant's salary for July and September 2022 and June 2023 were not paid late in arrears.
15. He contended that after the lapse of the contract the Claimant was engaged on need basis as shown in the schedule on Page 27 of the Respondents list of documents. He clarified that the company has no work station in Nairobi and therefore the days indicating that Claimant was in Nairobi means that he was not working for the Respondent.

16. He contended that the Claimant absconded duty and never went back to do handing over he contended that Standard Flight Relation is 105 flight hours and 160 duty hours for every 28 days but according to the flight schedule produced shows that the Claimant flew for fewer hours meaning that it was working for other people.
17. After the hearing, both sides filed written submissions. Having considered the pleadings, evidence and submissions, the following issues fell for determination:-
 - a) Whether the Claimant absconded duty or he was constructively dismissed.
 - b) Whether the Claimant is entitled to the reliefs sought in the suit.
 - c) Whether the Counter Claim is merited.

Analysis

Absconding or constructive dismissal

18. The Claimants case was that he never absconded duty but he was constructive dismissed. Bothe constructive dismissal and absconding are not defined in the Kenyan Employment Act. However, courts have explained the meaning of the two legal concepts in **Coca Cola East & Central Africa Ltd v. Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal held that:-

“ The key element in the definition of constructive dismissal is that the employer must have been entitled to or have the right to leave without notice because of the employer’s conduct.

Entitled to leave has two interpretations which gives rise to the test to be applied.

The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this I the contractual test.”

19. The Black’s Law Dictionary (Tenth Edition) defines constructive dismissal as:-

“ An employers creation of working condition that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leave the employee almost no option but to quit.”

20. It follows that constructive dismissal arises where an employee is forced to leave employment due to the employers conduct that amounts to a repudiatory breach of the contract of service or that creates an intolerable working environment.
21. On the other hand, absconding from duty is defined in the Black's Law Dictionary as follows:-
- “ 1. To depart secretly or suddenly, esp. to avoid arrest, prosecution, or service of process.
2. To leave a place, usu. Hurriedly, with another's money or property.”***
22. In common parlance, it refers to an employee's conduct of absenting from duty with no intention of reporting back. The Respondent averred that the Claimant absconded work or resigned without giving prior notice from 15th September 2023.
23. I have carefully considered the evidence on record. It is clear that the parties were involved in dispute about unpaid per diems dating back to August 2022 and unpaid salary for August 2023 until 15th September 2023 when the Claimant stopped flying for the Respondent. The said dispute was not resolved until 29th October 2023 when the Claimant turned

down request to report back to fly for two weeks and familiarize Captain Nguti on the G1000.

24. By a What App text sent on 29th October 2023, he notified RW1 that he was on his RNR since 18th September 2023. RW1 responded by the same means:-

“ Just let us know if you have gotten another job so that I can confirm some applications that have been pending.

I mean we have applications on pending check outs we can do to bridge our crew.”

25. The Claimant responded on 30th October 2023:-

“ The reason I am in Juba is I had to look for money since you had not paid me for two months. Plus per diem arrears. I wrote to you saying how desperate I needed the money. Someone else offered me something and I could not refuse. I have a family that depends on me. I have had nothing but passion for work and I believe I have proven myself to you more than once, but with no incentive it becomes hard to fulfil my duties to my family. I denied your call because you have not yet paid my per diem arrears and salaries and I don't wish to add more debts. We can plan ahead if all you owe me is cleared. Please let me know on the payment plan. Looking forward to hear from you. Thanks.”

26. RW1 responded that it has found a replacement for the Claimant and asked for his data to establish his RNR and work schedule for the past 12 months in order to verify was payments were due to him. RW1 reminded him that he had disobeyed lawful instructions to report back to work and went to work for another company without tendering resignation. The Claimant clarified that he was only freelancing to earn money to pay bills after the Respondent delayed his funds. He promised to submit a resignation since the Respondent had found his replacement.
27. On 6th November 2023, RW1 invited the Claimant to the office on a Wednesday but he responded that he was not available. On 8th November 2023, the Claimant asked RW1 why he was inviting him to the office. RW1 responded that he had in his possession Claimant's Rotations which he wanted to discuss with him and agree on the correct amount payable.
28. The Claimant shared a summary of the requested data, clarifying that he worked for 261 days and had 52 RNR days. However RW1 insisted that the Claimant should go to the office to reconcile what he shared with the operations and then clear with the company in order for his dues to be worked out.

29. The foregoing correspondences brought out a picture of an employee who was unhappy with the employers conduct, If delaying salary for August 2023 and per diems for August 2022. It also draws a picture of a frustrated employer trying to understand his employees actual claim for per diem and making him understand office protocols.
30. One clear thing from the foregoing Whats App correspondences, is that the Claimant did not resign from employment despite the conduct and breach of contract by the Respondent. In a Whats App text made 2nd November 2023, he stated:-

“ Well noted. I have not handed in my resignation because I was free lancing to get some money to pay bills since you had a delay on funds on your side. I am not employed by any company yet. Since you already have a replacement I will hand in my resignation soon.”

31. The Claimant never submitted any resignation but kept demanding for his delayed payment and the last text on the Claimants exhibits was by RW1 who responded to Claimants text of 13th November 2023 thus:-

“ Just do what I have advised you and we close this chapter. There must be some order in doing things going forward especially now. It’s not me

to go to operations it's you to go to operations submit your resignation letter and we..."

32. The emerging jurisprudence from our courts is that for a case of constructive dismissal to succeed, the employee must demonstrate that he/she resigned from service with or without notice because of the employer's unjustified conduct. In this case, the delayed salary from August 2023 to November 2023 was a valid ground for the Claimant to resign and sue for constructive dismissal but he did not. Consequently I find and hold that the alleged constructive dismissal has not been proved on a balance of probabilities. This conclusion is fortified by the definition of constructive dismissal given by the Black's Law Dictionary and the Court of Appeal in **Coca Cola case** above.
33. The opposite is correct as regards the Respondent's case that the Claimant absconded duty. In the his Whats App text of 29th October 2023, he told RW1 that his RNR started on 18th September and in paragraph 2 of his written statement he stated that he was on his 21 rest days from 9th October 2023 to 29th October 2023. As at 13th November 2023 he had not yet submitted any resignation and had even expressly admitted that he was freelancing elsewhere to earn money.
34. The foregoing evidence is clear that the Claimant absented himself from duty between 16th September 2023 and 8th

October 2023 before taking a 21 rest days upto 29th October 2023. Thereafter he absented himself from duty and ignored the instructions to report back to work.

35. He never produced as exhibit any resignation letter or a termination letter from the Respondent. Consequently, I find and hold that the Respondent has proved on a balance of probability that the Claimant absconded/deserted his employment on his own free will. I say so because his claim for salary for August 2023 and per diem arrears were contested by the employer and he declined an invitation to go to the office for reconciliation of his data and the data in the Respondent's operations office.

Reliefs sought by Claimant's

36. The Claimant prayed for unpaid salary of Kshs. 1,214,700 in paragraph 4 of his memorandum of Claim he pleaded an unpaid salary of Kshs. 1,214,700 equaling to USD 8,098. No particulars were pleaded on how the said sum was arrived at. During his testimony he also never showed how the sum was computed.
37. Having said that, I am clear in my mind that as per the flight schedule produced by RW1, the Claimant worked for the Respondent upto 15th September 2023. He was therefore entitled to salary upto that date. His salary was a net of USD

3750 per month as per his contract of employment. Accordingly the salary due to him as at 15th September 2023 was USD 5625 (Kshs. 843,750).

38. The Respondent produced payment transaction reports and payment schedule to prove that it paid the Claimant Kshs. 536,911.20 on 26th October 2023. The Claimant did not produce any evidence to rebut the said payment. It follows that the unpaid salary after the payment on 26th October 2023 stood at Kshs. 843,750 - 536,911.20 equaling Kshs. 306,838.80.
39. The Claimant prayed for salary in lieu of notice but I have already made a finding of fact that he is the one who absconded/deserted employment without prior notice. The prayer for notice pay must therefore fail.
40. The Claimant prayed for leave for one years. He did not give particulars of the year in issue. This claim must also fail for lack of particulars and evidence.
41. The Claimant further prayed for House allowance for 2 years at 15% of Kshs. 562,500 totaling to Kshs. 2,025,000. The contract of employment provided for a net salary of USD 3750 per month. My understanding of a net salary means that it was the balance after deducting taxes and statutory deductions. There is nothing to show that it included housing

allowance. Consequently I award the prayer for house allowance of 15% of the salary of USD 3750 for period worked from 18th October 2021 to 15th September 2023 equaling 22 months. Hence $22 \times 3750 \times 15\% = \text{USD } 12375$ (Kshs. 1,856,250).

42. The Claimant prayed for service pay for two years. However that prayer is not justified as there is evidence that the employer remitted National Social Security Fund contribution for him. By Whats App messages on 10th May 2023, he sought clarification on pension and he was informed that only National Social Security Fund was available. He never challenged that information.
43. Finally, the Claimant prayed for compensation for unfair termination of his employment. However, that prayer fails because the Claimant did not prove unfair termination. He actually deserted his job to work elsewhere.
44. In concluding this part, I return that the Claimant is entitled to housing allowance of Kshs. 1,856,250. Plus unpaid salary of Kshs. 306,838.80.

Counter claim

45. The Respondent prayed for one month salary in lieu of notice against the Claimant for deserting work without giving prior notice. He computed it at Kshs. 562500. I have already made

a finding that indeed, the Claimant deserted work without prior notice.

46. After the initial contract ended on 18th October 2022, it was never renewed but the Claimant continued working and receiving salary on monthly interval. Therefore he was obliged under section 35 (1) (c) of the Employment Act to serve one month prior notice or pay salary in lieu of notice. He never gave the notice and therefore I find merits in the counterclaim and accordingly I award it as prayed.

Conclusion

47. I have found that the Claimant was not constructively dismissed by the Respondent but he deserted work without giving prior notice. I have found that he is entitled to the prayer for unpaid salary of Kshs. 306,838.80 housing allowance of Kshs. 1,856,250. I have further found that the Respondent's is entitled to the sum of Kshs. 562,500 sought in the counterclaim. Consequently I enter judgment for the Claimant as follows:-

a) Kshs. 2,163,088.80 - Kshs. 562,500 = Kshs. 1,600,888.80

b) The award is subject to statutory deductions.

c) The Claimant is awarded interest on (a) above at court rate from the date of the judgment.

d) Each party shall bear own costs since they have both succeeded in their respective claims.

DATED SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 18TH DAY OF MARCH 2026.

**ONESMUS MAKAU
JUDGE**

Appearance

No appearance for the Claimant

Talu for Mugalo for the Respondent