



REPUBLIC OF KENYA



KENYA LAW

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**Kenya Airways PLC v Lumutu & another (Civil Appeal (Application)
E326 of 2020) [2024] KECA 1459 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1459 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E326 OF 2020
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
OCTOBER 25, 2024**

BETWEEN

KENYA AIRWAYS PLC APPLICANT

AND

HENRY OWINO OBONYO 1ST RESPONDENT

ALLOICE ODHIAMBO LUMUTU 2ND RESPONDENT

(Being an application to for leave to adduce further evidence in Appeal Nol. E326 of 2020 arising from the judgment and order of the Employment and Labour Relations Court of Kenya at Nairobi (Hellen Wasilwa, J) delivered on 30th July 2020 in ELRC No. 1515 of 2017)

RULING

1. The applicant's notice of motion dated 3rd March 2021, seeks leave to adduce additional evidence in this appeal that arises from the judgment of Wasilwa, J delivered on 30th July 2020 in the Employment and Labour Relations Court (ELRC) Cause No. 1515 of 2017.
2. On 30th July 2020, the trial court delivered a ruling on the applicant's notice of motion dated 24th January 2020, wherein the applicant had sought to review the aforesaid judgment on account that contrary to the finding of the court, that Alloice Odhiambo Lumutu the 2nd respondent, had been unable to secure alternative employment, the applicant discovered new and important evidence on 10th December 2019, to the effect that the 2nd respondent had been employed by the Kenya Civil Aviation Authority and Jubba Airways after his contract of employment was terminated by the applicant. The court declined to review its judgment, and the applicant being aggrieved by the said ruling, preferred this appeal.
3. On or about 3rd February 2021 while the appeal was pending, Kenya Civil Aviation Authority (KCAA), notified members of the public that it would host a live session on Facebook and YouTube



- under the theme: “Aviation Safety”, where it would respond to questions on aviation safety. One of the hosts of the said live session was identified as Alloice Lumutu, the 2nd respondent herein, who was employed by KCAA as its Airworthiness Inspector.
4. On 4th February 2021, the applicant wrote to KCAA and enquired whether the 2nd respondent was its employee and on 8th February 2021, KCAA confirmed in its response to the applicant’s letter that indeed the 2nd respondent was its Airworthiness Inspector, on renewable contract terms with effect from 4th June 2018.
 5. In its application, the applicant argues that: the additional evidence would not have been obtained with reasonable diligence for use at the trial; the evidence that the 2nd respondent is employed by KCAA as aforesaid, would have had an important influence on the result of the case as it would probably show that the 2nd respondent had not been terminated by the applicant contrary to the finding of the ELRC; that the additional evidence sought to be adduced is credible and needful and is not being utilised either for the purpose of removing lacunae or filling gaps in the evidence; that the additional evidence does not constitute a fresh case in the appeal, fill up any omission, or patch up the applicant’s case, and that it is in the interest of substantive justice that the orders sought in this application are granted.
 6. The 2nd respondent opposed the application. In his replying affidavit, the 2nd respondent stated that Jubba Airways and KCAA have stated in their letters to the applicant that they had engaged him on a contract basis for a period of 3 months and 1 year respectively; that since the termination of his employment by the applicant, he had not been able to secure employment that is comparable to the one he had with the applicant which was on permanent and pensionable terms; that the additional evidence the applicant is seeking to adduce is not new, and its contents are similar to an earlier letter from the KCAA stating that his employment was on contract basis; and that the applicant had knowledge of his engagement with KCAA even before the suit was heard before the trial court, since throughout his engagement with KCAA, he was constantly in touch with the applicant, and therefore the intended evidence is not new and should not be allowed.
 7. The 2nd respondent further contended that the application is an attempt by the applicant to make out a fresh case or improve its case by calling new evidence that came into existence subsequent to the impugned ruling and to allow it, would be to give an unfair advantage to the applicant. For these reasons, among others, we are urged to dismiss the application.
 8. When the application came up for hearing on 16th July 2024, the applicant was represented by Mr. Kiche who relied entirely on his written submissions dated 23rd April 2021, and equally, the 2nd respondent who appeared in person relied on his written submissions dated 28th June 2024.
 9. The 1st respondent was not present neither did he file anything in response to the application.
 10. We have perused the application, the affidavits sworn by the applicant and the 2nd respondent, the submissions on record as well as the authorities cited by the applicant and the 2nd respondent.
 11. The Supreme Court in *Hon. Mohamed Abdi Mahamad vs Ahmed Abdullabi Mohamad & 3 Others* [2018] eKLR set out the principles that must be satisfied by an applicant who seeks to adduce additional evidence on appeal. The Court held:
 - a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
 - b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;



- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

12. It is against the aforesaid factors as laid out by the Supreme Court that we shall consider and determine this application. The trial court declined to review its judgment after the applicant adduced a letter dated 9th December 2019 from KCAA where it confirmed that it had employed the 2nd respondent as an Airworthiness Development Inspector on a one-year contract that began on 5th June 2018. The applicant had also adduced a letter dated 5th December 2019 from Jubba Airways where it stated that it had employed the 2nd respondent as the Head of Quality. Despite the said annexures, the trial court held that the 2nd respondent had attempted to get alternative employment in two different organisations, and that he was terminated after it was established that his employment had been terminated by the applicant.

13. In its submissions, the applicant argues that the letter dated 8th February 2021 from KCAA sought to be adduced would have an important influence on the result of the case because it demonstrates that KCAA had employed the 2nd respondent as an Airworthiness Inspector on renewable contract terms with effect from 4th June 2018; it shows that the 2nd respondent wilfully deceived the trial court when he testified that he had been unable to secure jobs from other companies; that the 2nd respondent is currently employed by KCAA notwithstanding having been reinstated by the applicant; and that for all these reasons, the additional evidence sought to be adduced is relevant to the issues that are subject of the appeal.



14. In his opposition to the application the 2nd respondent argues that the additional evidence sought to be produced by the applicant came into existence after delivery of the impugned ruling and therefore it should not be allowed by this Court as it would give the applicant an unfair advantage and prolong the matter unnecessarily. In support of that submission, the 2nd respondent cited this Court's decision in *Khadija Hamis Shaffie vs Ali Mohammed Darani & Anor* [2019] eKLR. He further submits that the applicant was in communication with KCAA from 2018 and therefore, the evidence that it intends to adduce is not new.
15. In its impugned ruling, the trial court declined the applicant's invitation to review its judgment of 9th October 2019 where the court ordered reinstatement of the 2nd respondent's employment by the applicant without any loss of salary and benefits, and further granted him 10 months compensation for unfair termination of employment. The basis for his reinstatement was that the 2nd respondent was a trained specialist on aircraft types operated by the applicant, and had been unable to secure alternative employment.
16. Considering the nature of the additional evidence that is sought to be adduced by the applicant, we are satisfied that the intended evidence is relevant and conforms with all the requirements as set out by the Supreme Court in *Hon. Mohamed Abdi Mahamad vs Ahmed Abdullahi Mobamad & 3 Others (supra)*. We need not say more at this juncture lest it embarrass the bench that shall hear the appeal. Consequently, we allow the applicant's notice of motion dated March 3, 2021. The costs of this application shall be in the appeal

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

