



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njonjo v Dac Aviation (Ea) Ltd & another (Cause E235 of 2021)  
[2025] KEELRC 956 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 956 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E235 OF 2021  
BOM MANANI, J  
MARCH 27, 2025**

**BETWEEN**

**SHEILA WANJIRU NJONJO ..... CLAIMANT**

**AND**

**DAC AVIATION (EA) LTD ..... 1<sup>ST</sup> RESPONDENT**

**PONANGIPALLI VENKATA RAMANA RAO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant has instituted this suit against the Respondents through her Amended Statement of Claim dated and filed in court on 18<sup>th</sup> July 2024. She contends that the 1<sup>st</sup> Respondent employed her as a C-208 First Officer through a contract of service dated 8<sup>th</sup> January 2014. She further contends that the 1<sup>st</sup> Respondent promoted her to the position of Captain through its letter dated 12<sup>th</sup> January 2016.
2. The Claimant avers that her entry salary was Ksh. 176,103.00. She contends that this amount was later revised upwards to Ksh. 247,480.00 upon her promotion to the position of Captain.
3. The Claimant avers that of the aforesaid sum of Ksh. 247,480.00, the 1<sup>st</sup> Respondent would pay her Ksh. 178,000.00 per month in Kenya Shillings directly through her bank account. The difference, comprising of USD, 2,420, would be paid to her in cash in USD.
4. The Claimant contends that she performed her duties diligently as required of her under her job description. However, she asserts that towards the end of 2018, the 1<sup>st</sup> Respondent breached the contract between them when it began to delay the release of the monthly instalment of Ksh. 178,000.00 into her bank account. Further, she contends that the 1<sup>st</sup> Respondent stopped to pay to her the part of her salary that was supposed to be paid in cash in USD in the months of September, October and November 2018. She contends that the sum due to her in USD for this period is 7,260.



5. The Claimant avers that the 1<sup>st</sup> Respondent created a hostile work environment which made it difficult for her to carry on with her duties. For instance, she avers that whilst on duty in Somalia, she was detained at a hotel alongside her colleagues after the 1<sup>st</sup> Respondent failed to settle the hotel bills. She contends that the 1<sup>st</sup> Respondent only paid the bills after several reminders.
6. The Claimant contends that due to the 1<sup>st</sup> Respondent's actions, she suffered emotional distress, frustration and inconvenience. She avers that their detention at the hotel in Somalia as a result of the 1<sup>st</sup> Respondent's inaction caused her extreme embarrassment.
7. The Claimant avers that owing to the high employee turnover at the 1<sup>st</sup> Respondent's establishment, she was forced to undertake extended rotations without pay. She contends that although the 1<sup>st</sup> Respondent was aware of this challenge, it did not redress the matter. She avers that this caused her extreme mental and emotional distress.
8. The Claimant avers that the 1<sup>st</sup> Respondent allowed her to undertake training to fly a Dash 8 aero plane. However, after she attained qualifications in this respect, the 1<sup>st</sup> Respondent did not upgrade her to a Dash 8 pilot. She contends that this development caused her distress thus rendering the work environment intolerable.
9. The Claimant avers that because of the intolerable work environment, she made a conscious decision to resign from employment. As such, she tendered her resignation on 7<sup>th</sup> January 2019.
10. The Claimant contends that her resignation from the 1<sup>st</sup> Respondent's employment was not voluntary. She avers that she was forced into taking the decision in reaction to the intolerable work environment. As such, she contends that she was a victim of constructive dismissal from employment.
11. The Claimant prays for various reliefs to wit the following:-
  - a. A declaration that she was constructively dismissed from employment.
  - b. A declaration that the constructive dismissal from employment amounted to unfair termination of her contract of employment.
  - c. One month salary in lieu of notice.
  - d. Unpaid salary for September, October and November 2018.
  - e. Compensation for unlawful dismissal which is equivalent to her gross salary for twelve months.
  - f. A Certificate of Service.
  - g. Costs of the case.
  - h. Interest on the liquidated claims.
12. The 1<sup>st</sup> Respondent entered appearance and filed a defense to the claim through the Law Firm of Litoro & Omwebu Advocates. However, the said Law Firm withdrew from representing it (the 1<sup>st</sup> Respondent) as from 20<sup>th</sup> March 2024.
13. By an application dated 16<sup>th</sup> April 2024, the Claimant's Advocates sought leave of the court to join the 2<sup>nd</sup> Respondent to the suit in his capacity as the Receiver/Manager of the 1<sup>st</sup> Respondent. They further sought leave to amend the Claimant's Statement of Claim to add the proposed Respondent.
14. On 5<sup>th</sup> July 2024, the court granted the aforesaid application. As such, the 2<sup>nd</sup> Respondent was added to the action and the Statement of Claim amended accordingly.



15. The record shows that the Respondents were served with the amended Statement of Claim. However, they did not file pleadings in response. As a matter of fact, the 2<sup>nd</sup> Respondent did not enter appearance in the cause.
16. The matter was listed for trial on 10<sup>th</sup> February 2025. The record shows that the Claimant's advocates served the Respondents with notice for hearing through email. There is an affidavit of service placed on the court file evidencing this fact.
17. On 10<sup>th</sup> February 2025, the Respondents did not attend court. As a result, the suit proceeded as undefended.
18. The Claimant testified on oath. She adopted her witness statement and produced the several documents in the list and bundle of documents dated 18<sup>th</sup> July 2024 as her exhibits.

### **Analysis**

19. During the trial, the Claimant applied to amend her witness statement so as to state that the 1<sup>st</sup> Respondent did not pay her part of her salary for the month of December 2018. Although the request was granted, the court notes that she omitted to apply for similar changes to her amended Statement of Claim.
20. As such, notwithstanding the changes to her witness statement, her pleadings do not show that the 1<sup>st</sup> Respondent withheld part of her December 2018 salary. Consequently, the court will not make any determination relating to the un-pleaded part salary for December 2018.
21. The Claimant tendered in evidence the contract of service dated 8<sup>th</sup> January 2014 between her and the 1<sup>st</sup> Respondent. The contract is signed by the two parties. Based on it, the court finds that the Claimant and 1<sup>st</sup> Respondent had an employment relation as from 8<sup>th</sup> January 2014. The court further finds that the 1<sup>st</sup> Respondent hired the Claimant's services as a First Officer.
22. The Claimant further tendered in evidence a letter by the 1<sup>st</sup> Respondent dated 12<sup>th</sup> January 2016. Through this letter, the 1<sup>st</sup> Respondent promoted the Claimant to the position of Captain at a gross pay of Ksh. 247,480.00.
23. The Claimant avers that she was forced to resign from her employment due to the intolerable work environment which the 1<sup>st</sup> Respondent had created. She tendered in evidence her letter of resignation dated 7<sup>th</sup> January 2019.
24. The record shows that the 1<sup>st</sup> Respondent acknowledged the Claimant's aforesaid letter. In its letter to the Claimant, the 1<sup>st</sup> Respondent asked her to return all company property in her possession. It further offered to pay her terminal dues as set out in the letter.
25. Although the Claimant's letter does not speak to the reasons why she resigned from employment, she stated on oath during her oral testimony that she did not wish to state the reasons in the letter. She contended that she preferred to exit quietly without creating a scene.
26. Notwithstanding the foregoing, the Claimant maintained on oath that the reason why she gave up on her job was that: the 1<sup>st</sup> Respondent had failed to pay her part of her salary for September, October, November and December 2018. She further stated that her experience in Somalia when she was detained for non-payment of hotel bills had drained her emotionally. She further contended that the failure by the 1<sup>st</sup> Respondent to allow her fly Dash 8 aircrafts after she had attained qualifications for this purpose left her feeling frustrated at the workplace.



27. The Claimant's evidence in this respect was not controverted by the Respondents. As such, it remains the sole evidence on the matter.
28. Constructive dismissal arises when an employee is forced to resign from his/her job because of intolerable working conditions created by the employer. If the employee resigns as a result of this, it is considered that it is the employer who has terminated the contract (Kenya *Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023)* [2024] KEELRC 843 (KLR) (18 April 2024) (Judgment)).
29. Perennial failure to remunerate an employee, either wholly or in part, is a ground for the employee to consider the work environment as intolerable. Besides such action subjecting the employee to servitude, it amounts to breach of a fundamental term of the contract of service by the employer. Consequently, the affected employee is entitled to resign and plead constructive dismissal from employment (Mokaya v Christ the King Parish & another (Cause 386 of 2015) [2024] KEELRC 28 (KLR) (25 January 2024) (Judgment)).
30. The Claimant avers that the 1<sup>st</sup> Respondent withheld part of her salary for the months of September, October, November and December 2018. In the court's view, this action by the 1<sup>st</sup> Respondent created an intolerable work environment for the Claimant.
31. The 1<sup>st</sup> Respondent had a statutory duty to pay the Claimant's salary in full as and when it became due. Withholding part of her salary amounted to a fundamental breach of the contract between the parties. As such, the Claimant was entitled to resign and plead constructive dismissal from employment.
32. Accordingly, the court finds and declares that the 1<sup>st</sup> Respondent constructively terminated the Claimant's contract of employment by perennially withholding part of her salary. As such, the court declares that the Claimant's employment was unfairly terminated.
33. The 1<sup>st</sup> Respondent having unfairly terminated the Claimant's employment, she is entitled to compensation for the unfair termination of her contract. Having regard to the fact that the parties had not been in the employment relation for long and considering that the Claimant was able to secure employment after she quit the 1<sup>st</sup> Respondent's employment, I award her (the Claimant) compensation for the unfair termination of her contract which is equivalent to her gross salary for five (5) months. As such, the amount awarded under this head works out to Ksh. 247,480 x 5 = Ksh. 1,237,400.00.
34. The Claimant avers that the 1<sup>st</sup> Respondent failed to pay her part of her salary for the months of September, October and November 2018. She contends that the amount that the 1<sup>st</sup> Respondent failed to remit was the part of her salary that was to have been paid in cash in USD. The sum was stated to have been USD 2,420 per month. As such, default for three months amounts to USD 7,260.
35. Although the Claimant's Advocate sought to include a claim for the month of December 2018, he did not amend the Statement of Claim to reflect this fact. He only amended the Claimant's witness statement. The foregoing being the case, the court can only entertain this claim in so far as it relates to the months of September, October and November 2018.
36. The Claimant testified on oath that she was not paid the aforesaid amount by the 1<sup>st</sup> Respondent. As the record demonstrates, the Respondents did not offer evidence to counter the Claimant's testimony. As such, her evidence was uncontroverted.
37. In the premises, the court finds that the Claimant has proved her case on a balance of probabilities. The court finds that the 1<sup>st</sup> Respondent did not pay the Claimant part of her salary for the months



of September, October and November 2018 totaling USD 7,260. As such, I enter judgment for the Claimant for this amount.

38. The Claimant has prayed for pay in lieu of notice. In terms of section 35 of the *Employment Act*, the obligation lay on her to give the 1<sup>st</sup> Respondent one month's notice for her resignation. However, in her letter of resignation dated 7<sup>th</sup> January 2019, she expressed her desire that the resignation takes effect immediately (on 7<sup>th</sup> January 2019). As such, she is the one who was obligated to pay the 1<sup>st</sup> Respondent notice pay equivalent to her salary for one month. There is no evidence that she did so. Accordingly, the court declines to award her the claim for notice pay. Instead, the court orders that the amounts awarded to her will be less Ksh. 247,480.00 towards this obligation.
39. The Claimant has prayed for a Certificate of Service. By virtue of section 51 of the *Employment Act*, this is an entitlement of every individual who exits employment. Consequently, I order the Respondents to issue the Claimant with the requisite Certificate of Service.
40. The amount awarded to the Claimant in this judgment is subject to the applicable statutory deductions.
41. I award the Claimant interest on the amount awarded to her at court rates from the date of this decision.
42. I award the Claimant costs of the suit.

#### **Summary of the findings and award**

43. The court:-
  - a. Finds and declares that the 1<sup>st</sup> Respondent constructively dismissed the Claimant from her employment.
  - b. Declares that dismissal of the Claimant from employment was unfair.
  - c. Awards the Claimant compensation for the unfair termination of her contract of service which is equivalent to her gross salary for five (5) months, that is to say, Ksh. 1,237,400.00.
  - d. Awards the Claimant unpaid salary for the months of September, October and November 2018 totaling USD 7,260.
  - e. Declines to award the Claimant pay in lieu of notice.
  - f. Finds that the Claimant did not issue the 1<sup>st</sup> Respondent one month's notice of termination of her contract in terms of section 35 of the *Employment Act*. As such, the Claimant is obligated to pay to the 1<sup>st</sup> Respondent a sum which is equivalent to her salary for one month in lieu of notice in terms of section 36 of the Act. Accordingly, the court orders that the amount payable to the Claimant under this judgment shall be less Ksh. 247,480.00 on this account.
  - g. Orders the Respondents to issue the Claimant with a Certificate of Service.
  - h. Orders that the amount awarded to the Claimant is subject to the applicable statutory deductions.
  - i. Awards the Claimant interest on the amount awarded at court rates from the date of this decision.
  - j. Awards the Claimant costs of the case.

**DATED, SIGNED AND DELIVERED ON THE 27<sup>TH</sup> DAY OF MARCH, 2025**



**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondents

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court. \*\*

**B. O. M MANANI**

