



**Munya v Freedom Airline Express (Cause 114 of 2017)
[2025] KEELRC 1595 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1595 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 114 OF 2017**

**JW KELI, J
MAY 23, 2025**

BETWEEN

MOSES MWEMA MUNYAE CLAIMANT

AND

FREEDOM AIRLINE EXPRESS RESPONDENT

JUDGMENT

1. The Claimant, upon termination of his employment as a Pilot Captain with the Respondent, instituted a suit by filing a Statement of Claim dated 24th January 2017 against the Respondent received in court on even date seeking the following Orders:
 - i. One Month salary in lieu of notice. Kshs.600,000.00
 - ii. Leave pay for the year 2016.Kshs. 600,000.00
 - iii. House allowance .360,000.00 iv. Service pay for 4 months worked...Kshs. 115,384.60
 - v. Unpaid salary for the month of December 2016 . Kshs. .600.000.00
 - vi. 12 months salary as compensation for termination.....Kshs. 7,200,000.00
2. In support of the claim, the claimant filed on even date his witness statement dated 24 January 2017 and list of documents and the bundle. The claimant further filed a further undated witness statement and further list of documents all received in court on the 15th March 2023. The claimant also filed reply to defence and defence to the counterclaim dated 20th March 2017.
3. The Respondent entered appearance and filed a response dated 8th March 2017 to the claim and a counterclaim where it claims the following:-
 - i. Special damages for lost income under the terminated lease agreement. .USD.1,512,000.00



- ii. Special damages being amount deducted for the inoperative days..USD.23,864.00
 - iii. General damages for termination.
4. The respondent in support of its response and counterclaim filed verifying affidavit of Antony Muriithi and his witness statement and list of documents all of even date of 8th March 2017 and the bundle of documents.
 5. The claimant's case was heard on the 24th January 2025 where the claimant testified as CW1. CW1 adopted his witness statement dated 24th January 2017 and the further statement dated 15th March 2023 as his evidence in chief and produced his documents as exhibits 1-4. He was cross-examined by Mr. Etemera for the respondent.
 6. The respondent's case was heard on the 27th January 2025 where RW1 was Antony Muriithi who adopted his witness statement dated 8th March 2027 as his evidence in chief and produced the respondent's documents under list dated 8th March 2017 as Exhibits 1-9. He was cross-examined by counsel for the claimant Mr. Kalwa.
 7. The parties filed written submissions on close of the respondent's case

Claimant's case in brief:-

8. The claimant's case was that he was employed by the respondent as a Pilot (Captain) on 10th September 2016 and posted to their station in Khartoum by the respondent. The respondent was contracted by another company call Midair, a Sudanese company, to carry passengers within Sudan and its environs. The nature of this employment was permanent with an initial salary of USD 5000 for the first two months and thereafter at USD 6000/= upon completion of the probation period. During the hearing, the claimant adopted his two statements as evidence, as well as producing his documents as exhibits. In a nutshell and without replicating his evidence as contained in his statement, the claimant's issues leading to this litigation started on 29th October 2016 when the claimant was scheduled to fly back to Nairobi enroute to Abu Dhabi from Khartoum. However, due to licensing issues, they could not be allowed exit from Khartoum and consequently, the flight had to be cancelled, thus necessitating the burning of excess fuel since the aircraft had already been fuelled in readiness for the trip. The burning of the excess fuel was done on 30th October 2016 when the respondent claimed that the claimant delayed in reporting. However, the claimant denied any allegation of delay or being unreachable as his phone was on, secondly, he was housed in the respondent's house where he, and other crew members were not permitted to leave the company's premises without authority. The respondent did not proffer any evidence as to how the claimant could not be reached. It was his evidence that he effectively flew the aircraft and burned the excess fuel as required and in line with instructions given. The following day, 31st October 2016, the claimant did his sectors with the last one being from Khartoum to Kadugli. This trip was to take approximately one hour whereby his arrival at Kadugli was to be at night and since the airport at Kadugli was not lit, he could not land and endanger the safety of his passengers and crew and therefore he flew back to Khartoum. However, midair, he was instructed by one of the air marshal in the flight that he should fly to El Boid and not back to Khartoum. However, since he had been instructed by his superiors one Mr. Ali to fly back to Khartoum in case he was unable to land at Kadugli, he was unable to take instructions from the said air marshal as he was not answerable to him and secondly it was not the duty of such officer to divert flights. Further, it was the claimant's evidence that he was being forced to compromise on his hours of rest after duty hours yet the law was very clear. When he raised those concerns, the respondent considered that as an act of insubordination despite the importance of such rest to the pilot and other crew members. It was his evidence that he could not compromise the safety of his crew and passengers at the behest



of the respondent's commercial demands that bordered on breach of the law. He thus confirmed that he worked within the confines of the law and that as a responsible captain, he had to put his safety, that of his crew and passengers first as he was acting within the provisions of the Civil Aviation Act. Additionally, it was his evidence that on 4th, 5th, and 6th they could not work as the flight officer was sick and had been unwell since 31st October 2016. The failure to fly on 4th, 5th, and 6th was not because of his fault as he could not fly without a first officer. On 2nd December, 2016, the claimant received a letter of dismissal back dated to 10th November 2016 dismissing him for gross-misconduct.

Respondent's case

9. The Respondent called its witness Anthony Muriithi, the respondent's Human Resource Manager, who adopted his witness statement and produce documents as part of his evidence and as exhibits during the hearing of the matter. It is the Respondents evidence that the Claimant was hired particularly to operate its aircraft having secured the Lease agreement with Mid Airline Limited a company operating in Sudan. The Claimant's employment commenced on the 10th September, 2016 until his employment was terminated on 10th November, 2016 due to gross misconduct. The Respondent's witness testified that the Claimant only worked for the Respondent for a period of one month and two days commencing from 5th October, 2016 to 7th November, 2016 and proceeded to adduce evidence to that effect. He further testified that weeks into the claimant's employment and while working under Mid Airlines Limited, the Respondent started getting reports of concerning the Claimant's conduct and that of his crew, which was causing the Lessee financial loss. More particularly the on the 29th October, 2016 there was a scheduled flight as per the Lessees schedule however due to permit issues the flight was cancelled, having informed the Claimant of the cancellation they were informed of the next flight times, however, they delayed in arriving at work which caused the flight to be cancelled. The Respondent witness further testified that due to the fact that the aircraft had been fully fueled the Claimant was asked to fly so as to burn fuel since defueling the aircraft was not practical during the hour, it was reported that the Claimant refused to comply. The Claimant having refused to fly on the 29th October, 2016 he was requested to arrive early the next day so as to burn off the fuel before the 1st Scheduled flight. He arrived late which further caused the Lessee to lose yet another flight which further caused them to lose business as the contract as their contract with their client was terminated. It was the Claimant's evidence that when the Lessee's driver came to pick him up from his house he sent him away and told him to go pick him later sighting that he had not reached his required rest time period. It was testified that the Claimant arrived late after being unreachable for hours which led to the mentioned cancellation of flight and further the termination of the contract. It is the Respondents evidence that the Claimant only flew one flight on 30th October, 2016 which was to burn off the fuel. That further on the 31st October, 2016 the Claimant and his crew were scheduled to stay overnight in Kadugli. Having that the Last flight was as dusk which would take an estimate of 1 hour the Claimant was informed if landing at Kadugli would pose a challenge that he should proceed and land in El Boid however he refused to do as instructed by the Lessee's officer claiming that he does not take orders from him and turned back to Khartoum. It was the Respondent's evidence that the claimant further failed to fly on the 4th, 5th and 6th of November 2016 sighting sickness of his first officer, however the same was not corroborated by any evidence or call the 1st officer as his witness.
10. It is the Respondent's evidence that the Claimants behavior caused the lessee to terminate the Aircraft Lease Agreement which led to the loss of business, both for the Respondent and the Lessee (Mid Airlines Limited). The Respondent's witness further produced evidence that due to the termination of the Lease agreement, the Lessee deducted USD. 23,864.00 on account of the days that the Claimant and his crew were inoperative. He further testified that due to the termination of the Lease agreement and the reported gross misconduct of the Claimant his employment was terminated on the 10th November, 2016, however the Claimant refused to accept or collect his final dues.



Determination

Issues for determination

11. The claimant identified and submitted on the following issues:-
 - a) Was the termination of the claimant's employment unfair, unlawful and wrongful?
 - b) Is the claimant entitled to the relief sought
 - c) Is the respondent entitled to counterclaim
 - d) Who bears the costs of the suit.
12. The respondent addressed the same issues as the claimant.
13. The court then found the issues placed by the parties before the court for determination in the dispute were as follows:-
 - a) Whether the termination of the claimant's employment was fair.
 - b) Is the claimant entitled to the relief sought
 - c) Is the respondent entitled to counterclaim
 - d) Who bears the costs of the suit

Whether the termination of the claimant's employment fair.

14. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR.
15. The burden of proof in employment case is as stated in section 47(5) of the *Employment Act* as follows:-'47 (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

The reasons for the termination.



Claimant's submissions

16. In order to be able to fully understand why the claimant insisted on following law and procedures in piloting, it is imperative to appreciate that the pilot in command commonly known as "Captain" holds the ultimate responsibility for the safety of the aircraft and passengers with his final decision making being the cornerstone to the overall safety of all involved and as such the law has taken this important role by authorizing how many hours of duty time should have corresponding hours of rest. The reasoning is based on the fact that pilot fatigue, stress and distractions can significantly impact safety and therefore making proper rest and mental health is crucial. It is as a result of the foregoing that pilots are encouraged to report incidents and near misses to help identify safety issues and prevent future accidents. According to International Civil aviation organization, safety is the most fundamental objective in aviation and any economic decision should not jeopardize this principle. This means that even when facing cost pressures, airlines and aviation authorities must prioritize safety measures above purely economic considerations. While maintaining a safe operation can sometimes incur higher costs, the potential economic consequences of an accident far outweigh them, impacting not only the airline but also public trust and overall industry stability. Therefore, according to International Civil Aviation Organisation, any airline should create a balancing Act by striving to optimize operations by maintaining cost effectiveness, through efficient maintenance, practices, fuel management and route planning as well as maintaining a healthy and efficient human resource but without compromising on safety. Therefore, with that summation on the role Captain/Pilot in aviation Industry and the incidents thereto; the question is "did the claimant conduct himself in a manner inconsistent with his role as a pilot with regard to his contract?"
17. The respondent's grounds for summarily dismissing the claimant can be summarised as follows; On 29th October, 2016- this day, the aircraft had been fueled in anticipation of a trip from Khartoum to Abu-Dhabi through Nairobi but due to issues of licensing (exit permit by Khartoum Government) the flight had to be cancelled. This cannot be attributed to the claimant. The respondent demanded evidence, about non-licensing, but the claimant is not expected to keep license for his employers. The claimant discharged the burden of proof on a balance of probability and since the respondent wished the court to believe that all relevant licenses were valid and available and that the cancellation of that flight was due to the claimant and his crew failure, nothing would have been easier than; I. Availing all relevant records on work sheet confirming when the claimant and his crew reported to work and what exact time they were expected to report if the time they reported was not correct. These records are within the custody of the respondent and the claimant is not expected to have them but they chose to withhold them. As would be expected, lateness leading to cancellation of flight has far reaching implications, not only to the passengers but the integrity of the airline. Therefore, if such delay was occasioned by the claimant and/or his crew, reasonably it would be expected that punitive steps like warning letters, notice to show cause etc would not only be issued to the claimant but also the entire crew since each individual/crew member has an independent contract with the respondent as an employee. III. The respondent did not even call the person who was in charge of the operations in Khartoum to give evidence and instead relied on the respondent's current witness who confirmed that his primary source of information was as relayed by the claimant and one Mr. Ali Hussain Ali making such information hearsay with little probative value. That in view of the foregoing, there were indeed some licenses that were unavailable for the claimant to fly the aircraft and this cannot be considered as an abdication of duty.
18. On 30th October, 2016, the respondent claims that the claimant came late to work and that he had switched off his mobile line. However, the claimant's evidence was that he reported at the agreed time and there was no way he could be unreachable when required for the reason that he and his crew were



housed in the respondent's premises and any time they would be needed, a driver could be sent to pick them up. A case in time is the picking up of the claimant before time on 1st November 2016. Thirdly, the claimant and his crew were not permitted to leave the company premises without leave of the respondent. It has not been alleged that he left and was not reachable. Therefore the allegation of being late or not reachable is farfetched and only calculated to put the claimant in bad light. The respondent evidence being hearsay, it would have been plausible for him to avail records of reporting time at least to make the court confirm that indeed the claimant was expected to report at a particular time but reported out of time. This is so considering that there are no definite reporting time but the flight logs determine that. The person who also informed the respondent witness that the claimant reported late was not called as a witness to verify such allegation. That since the evidence adduced by this witness was as relayed to him by his counterparts in Khartoum, its veracity cannot be established as it is not primary evidence and hearsay in nature and therefore the claimant evidence should prevail.

19. On 31st October, 2016 the respondents complaint were two fold. The Claimant refused to spend the night at Kadugli during his last flight and also defied instructions to land at Elboid. b. That he delayed in the rescheduled flight of 31th October, 2016 which was to take place on 1st November, 2016. The evidence given by the respondent's witness was that if the claimant would find the landing at Kadugli not feasible, he should either return to Khartoum or to El boid. The claimant due to non-lighting of Kadugli airport found it dangerous to land and as a result, he returned to Khartoum. While mid-air an Air Marshall in charge of security directed him to fly to Elboid but since he was not accountable to him and considering that he had agreed with his superior Mr. Ali Hussain Ali to fly back to Khartoum, he duly followed his boss's instructions and therefore he cannot be faulted for being obedient and in any event the said Air Marshall did not offer him any reason why he should fly to Elboid notwithstanding the fact that he was not even supposed to instruct the claimant.
20. The claimant submitted that decision making in piloting is crucial and a pilot is given the finality. The respondent raised the issue that subsequent to the rescheduling of the last flight to Kadugli due to time, the claimant was expected to fly these rescheduled passengers back to Kadugli on 1st November 2016. However, he had clocked 11 hours of duty time on 31s October 2016 and was therefore expected to have at least 11 ½ Hours of rest. It was the claimant's evidence that since he concluded his duty time at 8.30 p.m on 31st October, 2016, his rest hours were to run up to 9.00 am on 1st November 2016. However, the claimant confirmed that he had agreed the previous night with Mr. Ali Hussain Ali that he will accept to reduce his rest time and report at 8.00 am in order not to over inconvenience the passengers who had been returned from Kadugli after it became impossible to land. On 1st November 2016, at around 6.00 am the respondent driver came to pick up the claimant from his residence but he explained to him that he was resting and will report at 8.00 as earlier on agreed and thus sent the said driver back. It was the claimant's evidence that despite reducing his rest time by one hour, the respondent's act of sending the driver to pick him up at 6.00 am would have amounted to compromising three (3) of his hours of rest which would definitely have interfered with his general wellbeing and thus compromising on the general safety of the flight that he would have taken. This would definitely amount to unprofessionalism in upholding high standards of safety and breach of well-established procedure and the law. Equally, it would have amounted to elevating economic considerations at the expense of the safety of the aircraft, passenger crews and the captain himself.

Respondent's submissions

21. It is the Respondents submissions that the Conduct amounted to insubordination where on several occasions he was sighted to causing delays which caused flights to be cancelled, he was requested to burn off fuel on the 29th October, 2016, he declined and when requested to arrive early the



following day he deliberately went to work late causing further delays. The conduct amounts to gross misconduct/insubordination. Section 44 (4) e of the *Employment Act* provides instances as to when an employer may consider summarily dismissing an employee from his employment where it provides:- “an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;” It was held in *Abraham Gumba v Kenya Medical Supplies Authority* [2014] eKLR Rika J held: “Insubordination was defined by the Mississippi Supreme Court in the case of *Sims v. the Board of Trustees Holly Springs Municipal Separate District School*, 414 SO. 2d 431 [Miss. 1982], as a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.” Insubordination may also occur where the Employee engages his manager or Supervisor in an inappropriate verbal confrontation. It is the Respondent’s Submission that the Claimant’s blatant refusal to obey orders amounted to gross misconduct warranting dismissal. The Claimant on the 31 October, 2016 was given strict instructions to fly to Kadugli and if the same was not forceable, he was instructed to land in El Boid he refused to do so and flew back to Khartoum, section 44 (4) (e) provides that:-an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer; ”The Claimant in his evidence provided that he was directed to land in El Boid however he testified that he informed the officer that he does not take orders from him, it is important to note that the lessee’s officer was mandated to give the instructions to which the claimant denied to abide by. The Claimant in his testimony provided that his first officer fell ill and thus they were unable to fly for three days, the Respondent was never notified of such sickness neither did the Claimant adduce evidence to that effect it has been earlier been provided that where any person wants to rely on or depend on his evidence he must comply with the stipulated standards of proof, it is the Respondents submission that the Claimant failed to provide proof and therefore his evidence remains mere statements. Section 43(1) of the *Employment Act* requires that in every claim arising out of termination of contract of service, the employer shall prove the reason(s) for the termination while subsection (2) provides that: - “The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Decision

22. The Respondent vide letter dated 10th November 2016 terminated the service of the claimant as Captain with immediate effect. The reason for the termination was stated as ‘due to gross-misconduct raised by the Lessor (Mid Airlines) of the CRJ 200 in Khartoum which brought about the cancellation of two scheduled flights and a VIPflight. That this also resulted to the termination of the contract between Freedom Airlines (Kenya) and Mid Airlines(Sudan). The company has also lost huge revenue due to the contract cancellation by Mid Airlines. ...’
23. At the outset the court on the validity of the reason is guided by section 43 of the *Employment Act* and case law. The recent decision of the court of appeal in *Ondari v National Hospital Insurance Fund* [2025] KECA 687 (KLR) the court on reasons for termination observed:- ‘The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court’s duty was not to verify the truth of the reasons advanced for terminating employment. According to him, the trial court’s reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed.’ During cross-examination the claimant told the court that he had worked for 2 months and 22 days. He did not have proof of the license having expired and the reason for not taking the flight



on 29th October 2016. He stated that he burnt fuel on 30th October 2016 without passengers stating the licence was for the passengers. That on 31st October he flew passengers as the license had been renewed. On not flying 4th 5th and 6th he stated that they went to the hospital and the 1st pilot was given three days off. On being asked if he sought permission, the claimant responded in the affirmative and said the plane had to be grounded for lack of 1st officer. On proof of the officer having been unwell, he told the court the record was with the Human Resources Officer and that the officer was still in service.

24. During further cross-examination, the claimant told the court his employer was Freedom Airlines and none of the licences of the employer had expired. The licences were owned by Freedom airlines which had leased the aircraft from Midair. The claimant told the court that he could not take the flight of 1st November 2016 for lack of rest. That he ended duty at 8.30 pm of 31st October 2016. He had flown 6.4 hrs on 31st but said duty time was 11 and ½ hours. He admitted to have rested on 29th October but said the rest is not stored. He stated that though the driver came to pick him for a flight at 6 am on 1st November he did not go as he had agreed with the boss on pick up for 9.30am. He said that the flight took off at 8.15 am as the bosses pleaded. He was aware the lease was terminated stating he insisted on regulations. He denied liability for the losses on basis of compliance with regulations.
25. During cross-examination of RW1 admitted the Captain had right to decide on the interest of the aircraft and passengers. RW1 was the human resources officer based in Nairobi and their role was to ensure compliance with regulations while daily operations were by Khartoum office . RW1 admitted that the claimant had option on being unable land in Kadugli to return and land either at Khartoum or Eiboid. RW1 told the court that they had all licences for the claimant to fly to Abu Dhabi on 29th October 2016 but not in court. RW1 denied the claimant was following regulations and attributed all losses suffered to the claimant. RW1 admitted that the claimant reported to him the 1st officer was unwell. RW1 told the court there was no evidence. He stated that he could not get hold of the 1st officer alleged to have been unwell. He said it was the Captain who should have provided the evidence. He admitted that the 1st officer was still employed. That he had not since then asked the 1st officer for the evidence. On re-examination RW1 told the court on cancellation of flights on 29th October the issue of the licence never came up. That there was no evidence that landing in Eiboid was not feasible.

Decision

26. The court having evaluated the evidence found that the claimant had worked for less than three months and the relationship with the respondent was characterized by lack of agreement on the working of the claimant. The court was of the opinion that the claimant was too rigid and in some cases unreasonable like not agreeing to pick up on the 1st November by driver at 6 am insisting on rest hours yet he had not worked on the 29th and 30th October and failing to take instruction from the air marshal without justification. The employer's business was compromised. The claimant admitted that the Freedom Airlines was his employer and there was no issue of its licence. The court was not persuaded that all licenses were in order seeing the respondent allowed the burning of the fuel consequently and there was no evidence from any person who was on duty on material date to confirm the same. RW1 admitted he did not deal with daily operations of the aircraft. The court found that the relationship between the claimant and the respondent had broken down. The court for the foregoing reasons and guided by the decision in *Ondari v National Hospital Insurance Fund* [2025] KECA 687 (KLR) where the Court of Appeal on reasons for termination observed:- ‘The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court's duty was not to verify the truth of the reasons advanced for terminating employment. According to him, the trial court's reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer,’ The Court



holds that the reason by the respondent met the reasonable employer test in *British Leyland (UK) Ltd v Swift*.

27. To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (*Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.) In the instant case the claimant's letter stated with immediate effect. There was no procedural fairness as envisaged under section 41 of the *Employment Act*. Section 41 of the *Employment Act* is couched in mandatory terms. There was no compliance. Every employee including those on probation are entitled to procedural fairness under section 41, section 42 of the *Employment Act* having been declared unconstitutional in *Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another* [2021] eKLR, a decision of a bench of three judges of the ELRC (Mbaru, Abuodha and Ndolo, JJ.) which was upheld by Court of Appeal in *Red Lands Roses Ltd v Mugo* (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR) (24 January 2025) (Judgment. The court held: "to the extent that section 42(1) of the Act excludes an employee on probation from the provisions of section 41 of the Act, it was inconsistent with Articles 41 and 47 of *the Constitution* and therefore null and void." The termination was unfair for lack of procedural fairness.

Whether the claimant was entitled to reliefs sought

Claimant's submissions

28. Under S. 49 of the *employment act* it is outlined what remedy a claimant who has been dismissed either unfairly or wrongfully is entitled. The section is discretionary and has certain parameters that guides the court including and not limited to notice pay in case notice was not given, payment for the remainder of the notice period, losses consequent to the dismissal, compensation for a period not exceeding 12 months among others. We therefore propose the following as the damages payable to the claimant.
- a). payment in Lieu of Notice Your Ladyship, the claimant confirmed that he received the letter of dismissal on 2nd December 2016 though, the same was dated 10th November 2016. The respondent averred that they called the claimant to their office to compensate him for the month of November 2016 but he declined. No evidence of any communication was availed like for instance, how the said letter was served upon the claimant. It would appear that the letter was dated 10th November 2016 ostensibly to create the impression that the claimant did not complete his probationary period. The issue as to when the claimant received this letter was prominently dealt with by the claimant in his evidence where he confirmed when indeed he received the same as being 2nd December 2016 and therefore it was upon the respondent to at least lead evidence to confirm. a. In what manner was the said letter served. b. Who served him with the same. c. When he was served. d. Where he was served. e. Whether he acknowledged receipt of the same. Therefore, in the absence of such evidence, the only evidence available is as given by the claimant and it is to the effect that the date of receipt of this letter of termination was 2nd December 2016 and not the date of the letter 10th November 2016. The claimant submitted that the date of termination of this contract was after the probation period and therefore the respondent was duly bound to give one month notice of termination of employment equivalent to Kshs. 600,000/= by the exchange rate of kshs. 100/= per dollar.
29. On Leave, The claimant was entitled to annual leave for the year worked and prayed for payment of Kshs. 600,000/=.
30. House Allowance The claimant was entitled to house allowance equivalent to 15% of his salary which translates to salary x 15% x months worked. 600,000/= x 15/100 x 4 = Kshs. 360,000/=
31. Service pay for 4 months $4/12 \times 15/26 \times 600,000/- =$ Kshs. 115,384/=



32. Unpaid salary for November and December 2016 The claimant is entitled to two months' salary that he worked without pay Kshs. 600,000 x 2 = Kshs. 1,200,000/=
33. Compensation for wrongful dismissal This is based on 12 months' pay which translates to; 12 x 600,000/= Kshs. 7,200,000/=

Respondent's submissions.

34. Whether the Claimant is entitled to the reliefs sought? in light of its submissions the Claimant is not eligible for any damages as prayed. It was the respondent's evidence that the Claimant was dismissed from his employment on the 10th November, 2016 in the subsistence of his probation period, that he was called to the Respondent's head office to collect his final dues but refused to do so. The Claimant further Claimed for leave days. The respondent submitted that the Claimant only worked for a period of one month as evidenced by the flight logs adduced in court, both by the Claimant and the Respondent, thus the Claimant cannot pray for leave days which did not accrue.
35. Section 31 of the *Employment Act* associates itself with housing where it provides that: - (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. It is the Claimants and the Respondent's evidence as produced in the hearing that the Claimant was provided for accommodation at the Respondent's expense and thus, his claim for housing allowance thus fails
36. The Claimant further prays for service pay for a period of 4 months it is evidenced that the Respondent was compliant with section 35(5) and (6) of the *Employment Act*, it is the Respondent's submission that as provided in the Claimant's letter it paid the dues were paid as required, further the Claimant was under the employment of the Respondent for a period of one (1) month, therefore he is not eligible to the service pay.
37. The Claimant further claimed for unpaid salary for the month of December, 2016 it was demonstrated that the Claimant's employment was terminated on the 10th November, 2016 the termination letter adduced was served on the Claimant and as evidenced by the flight logs provided the Claimant did not work from the month of November, 2016 however he was paid for the month of November, consequently the Claimant having not worked for the month of December, his claim for the salary fails.

Decision

38. On the prayer for One Month salary in lieu of notice. Kshs.600,000.00.The court held there was no procedural fairness and notice pay is awarded under section 35 of the *Employment Act* for Kshs.600,000.00.
39. Leave pay for the year 2016-The claimant only worked for 3 months in 2016. He could not be entitled to leave for a month. Section 28 of the *employment act* reads:-‘ (1) An employee shall be entitled—
 - (a) after every twelve consecutive months of service with his employer to not less than twentyone working days of leave with full pay;
 - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three quarter days of leave with full pay, in respect of each completed month of service in that period, to be



taken consecutively.” Thus the claimant was entitled to 1 x ¾ x 3 months thus 5.25 days/30 x 600000 award of prorated leave of Kshs. 105,000.

40. House allowance claim. The claimant’s testimony was that he was housed by the respondent hence the claim has no basis.
41. Claim for Service pay for 4 months worked. Service pay is payable for complete year of service under section 35 (5) of the *Employment Act* to wit:- ‘ An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.’ The claimant was not eligible for service pay having worked for 3 months.
42. Claim for unpaid salary for the month of December 2016. The court did not find any evidence of the claimant having worked in December. The prayer is disallowed.
43. Claim for 12 months’ salary as compensation for termination. The reason was justified. The court finds that the award of notice pay for procedural fairness was sufficient.

Counterclaim

44. The Respondent submitted that it had demonstrated that the claimant’s conduct led to the loss of business and amounting to USD.1, 512,000.00. That the amount of USD. 1,512,000.00 is income which the Respondent lost due to the termination of the lease agreement. It was produced during the hearing that the sole reason the Lease agreement was terminated was due to the conduct of the Claimant and that of his crew members. Further to these delays and cancellation of flights and the termination of the Lease agreement the Respondent was charged damages for the inoperative days where the Claimant was scheduled to fly but he failed to do so being an amount of USD.23,864.00. The Respondent further claimed for general damages occasioned by the termination of the Lease agreement, and urged the court to assess and grant as it may please.
45. The claimant submitted that he adhered to law and procedure and therefore could not occasion any loss to the respondent thus the counterclaim should fail.
46. The court finds that it is trite that he who alleges proves. The claimant stated he did not fly on 29th October 2016 for lack of a licence for passengers. The respondent did not produce the said licence in court to rebut the assertion. The respondent admitted that the claimant reported the 1st officer was sick. RW1 stated that he could not reach the officer to confirm and at same time admitted the said officer was still in service. The respondent did not prove on a balance of liability that the claimant was solely liable for the alleged losses. The counterclaim fails.

Conclusion

47. The court held that the termination of the employment of the claimant was procedurally unfair. Judgment is entered for the claimant against the respondent as follows:-
 - a. Notice pay of Kshs. 600,000
 - b. Pay of untaken prorated leave Kshs. 105,000
 - c. Total sum awarded (a and b above) is Kshs. 705,000 payable with interest at court rate from date of judgment until payment in full.
 - d. Costs of the suit.
48. It is so Ordered



**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MAY ,
2025.**

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant : Kalwa

Respondent:-Nyoroku

