



**Aseka v South African Airways (Proprietary) Ltd (Cause 2149 of 2017)
[2024] KEELRC 20 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 20 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2149 OF 2017
JK GAKERI, J
JANUARY 24, 2024**

BETWEEN

ROSEMARY ASEKA CLAIMANT

AND

SOUTH AFRICAN AIRWAYS (PROPRIETARY) LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on 24th October, 2017 that was later amended on 20th November 2018 alleging unlawful termination of employment and non-payment of terminal dues.
2. The Claimant states that she had been an employee of the Respondent from the year 1995 to 19th October, 2017 where she held the position of Finance officer and was promoted to the position of Finance Supervisor in January 2013 earning a gross salary of Kshs 467,457/=.
3. The Claimant avers that in June 2017 the Respondent suspended her on allegations of holding a forged Bachelor of Commerce Degree Certificate.
4. The Claimant avers that the Respondent's move to suspend and dismiss her was orchestrated by one Jane Ngaira whose object was to replace the Claimant with another employee.
5. The Claimant avers that criminal proceedings were preferred against her in Criminal Case No 1225 of 2017 which is still pending determination.
6. The Claimant avers that she was not paid 2 months' salary in lieu of notice which amounted to Kshs 934,914/=.
7. It is the Claimant's case that she was never paid 19 days that she worked for the month of October 2017 which amounted to Kshs 341,603/=.



8. The Claimant further states that she was never paid leave which is tabulated as below;
 - (a) 2015 unpaid leave 2.5 days $382,664/(22 \times 2.5) = \text{Kshs } 43,485/=$
 - (b) 2016/2017 28 unpaid leave days $382,664/(22 \times 28) = \text{Kshs } 487,027/=$
 - (c) Feb to October 2017, 21.7 unpaid leave days $382,664/(22 \times 21.7) = \text{Kshs } 377,446/=$
9. The Claimant states that she was never reimbursed medical expenses which amounted to Kshs 50,000/= as per the respondent's policy.
10. The Claimant further states that she worked for the Respondent for 22 years and was therefore entitled to air tickets to destinations where the Respondent flew throughout her life as per the policy in force then.
11. The Claimant prays for service pay calculated at 15 days' pay $\text{Kshs } 191,332/= \times 22 \text{ years} = \text{Kshs } 4,209,304/=$.
12. The Claimant also claims for maximum compensation calculated as gross salary $\text{Kshs } 467,457 \times 12$ months plus the 13th cheque of $\text{Kshs } 382,664 = \text{Kshs } 5,992,148/=$.
13. It is the Claimant's case that the actions of the respondent were contrary to section 45 as read with 43(1) of the Employment Act, 2007 and that the Respondents allegations do not fall within section 44 of the Employment Act to justify the dismissal.
14. The Claimant prays for;
 1. A declaration that the dismissal of the claimant is unlawful, null and void.
 2. A declaration that the termination of the claimants services is unlawful, null and void
 3. A declaration that the claimant shall continue to serve in her job position until her term expires in a normal manner.
 - 3A. An order directing the Respondent to immediately pay the claimant the maximum compensation payment calculated as gross salary of $\text{Kshs } 467,457$ as at the year 2017 $\times 12$ months = $\text{Kshs } 5,609,484$ plus 13th Cheque $\text{Kshs } 382,664$ total $\text{Kshs } 5,992,148/-$
 - 4A. An order directed to the Respondent to immediately pay the claimant two months' salary in lieu of notice which she claims payment based on gross salary calculated as basic salary $\text{Kshs } 382,664/=$ plus Housing Allowance $\text{Kshs } 72,706/=$ plus transport allowance $\text{Kshs } 12,087/=$ $\times 2$ months Totals $\text{Kshs } 934,914/=$
 - 4B. An order directed at the Respondent to immediately pay the claimant 19 days she worked in the month of October at a rate of $\text{Kshs } 14,718/=$ per day for basic salary, plus Housing Allowance of $\text{Kshs } 2,796/=$ per day and transport being $\text{Kshs } 465$ per day $\times 19$ total $\text{Kshs } 341,603/=$
 - 4C. An order directed at the Respondent to immediately pay the claimant leave days for the month of February 2015, and the year 2015;
 - (a) 2015 unpaid leave 2.5 days $382,664/(22 \times 2.5) = \text{Kshs } 43,485/=$
 - (b) 2016/2017 28 unpaid leave days $382,664/(22 \times 28) = \text{Kshs } 487,027/=$
 - (c) Feb to October 2017 21.7 unpaid leave days $382,664/(22 \times 21.7) = \text{Kshs } 377,446/=$



- 4D. An order that the Respondent pays the claimant immediately medical reimbursements in the sum of Kshs 50,000/= as per the respondent policy.
- 4E. An order that the claimant is entitled to air tickets to destinations where South African Airlines flies throughout her life.
- 4F. An order directed at the Respondent to pay the claimant Claim for service pay calculated as follows 15 days' pay x 22 years that is Kshs 119,332 x 22 = Kshs 4, 209,304/=
- 4G. An order directed to the Respondent to give the claimant certificate of service
5. Costs of this suit and interest at courts rate.
6. Any other relief or further relief that this honourable court may deem fit and just to award to the claimant in the circumstances.

Respondent's case

15. In response to the statement of claim the respondent filed a memorandum of response dated 8th November, 2017 denying the averments of the claimant.
16. The respondent states that the terms of employment were reduced into a letter dated 13th January, 2003 in compliance with South African Airways requirements for employment and adherence to guidelines.
17. The Respondent states that in the month of May or June 2016 the claimant with the intent to deceive the respondent presented a Degree Certificate No IU/DEG/0499 purporting to be a genuine certificate issued by The Inoorero University. That upon the Respondent suspecting the forgery, reported the matter to the Directorate of Criminal Investigations and a decision was reached to charge the Claimant in Nairobi Criminal Case No 1225 of 2016.

Claimant's evidence

18. The claimant testified in support of her claim by adopting her statement dated 24th October 2017 as her evidence in chief.
19. On cross-examination, the Claimant testified that she was unfairly terminated on allegations that an academic certificate from Inoorero University was forged. She testified that she was admitted as a student in November 2011 but did not have her admission letter, bank slips or payment slips as the same was never requested for.
20. The claimant further testified that she never took any study leave as examinations were being conducted in the evenings after work.
21. She testified that the alleged matter was reported to the DCI and she was charged in a criminal court but she is yet to be tried for the offence.
22. The Claimant testified that she was issued with a notice of suspension dated 29th June, 2017 and responded vide a letter dated 10th July, 2017.
23. The witness testified that disciplinary hearing did not take place but admitted that she was in the boardroom with Jane Ngira and could not recall whether Mr. Nyamwara was also there.
24. The Claimant confirmed that she had not been charged by the time she was suspended by the Respondent.



25. The witness stated that she had not seen the report from a document examiner stating that the degree certificate she held was a forgery.
26. It was her testimony that she was not given a hearing but a termination letter.
27. CW2, one Dr. Charles Mwalala testified in support of the claimant's case. In his testimony, Dr. Malala stated that he was the Vice Chancellor of Inoorero University and the claimant was a student there.
28. The witness confirmed that the institution was initially International School of Professional Studies but later changed to Inoorero University.
29. It was his testimony that the claimant joined the university in 2011 but cannot recall the exact day or the month as it was a long time ago.
30. The witness confirmed that he was no longer an employee of the Inoorero University as he joined Mt. Kenya University where he worked until 2017.
31. The witness stated that he did not have the convocation i.e. the document used to confer a degree upon the student because the court did not ask for it.
32. It is his testimony that the degree certificate on record is genuine and he is the one who signed it as he was the Vice Chancellor of the university at the time.

Respondent's evidence

33. Austine Nyawara, an employee of the respondent testified in defence of the respondent. He adopted his witness statement dated 6th October 2022 as his evidence in chief.
34. The witness stated that the claimant was lawfully terminated vide termination letter dated 16th October, 2017 and the decision was reached after the claimant declined to participate in the disciplinary inquiry on 17th September, 2017.
35. It is his testimony that according to the Respondent, the degree certificate is a forgery and that Inoorero University was contacted but he could not remember what its response was.
36. The witness stated that the claimant was charged in Nairobi Criminal case No 1225 of 2017 for the offence of forging documents which case is still pending determination.

Claimant's submissions

37. Counsel for the Claimant highlighted two issues for determination; whether termination of the Claimant's employment was unfair and unlawful and whether the claimant is entitled to the payments claimed.
38. On the first issue, counsel submitted that the Respondent terminated the claimant on the grounds of presenting a forged document, an issue pending in court in Criminal Case No 1225 of 2017.
39. Counsel submitted that the decision to terminate the claimant's employment was null and void and the same was orchestrated by one Jane Ngaira who wanted to place another employee in the position held by the claimant.



40. Counsel submitted that it is trite law that the reasons for termination must be valid, legal and within the tents of rules of natural justice and relied on the holding in *Ken freight (EA) Limited v Benson K. Nguti* (2016) where the Court of Appeal held that

“It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for termination is valid and fair, that reason related to the employees conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure”.

41. Counsel submitted that Section 43 of the *Employment Act*, 2007 provides that there must be valid reasons for termination of an employee’s employment which lacked in the instant case and the termination was contrary to the provisions of Section 43 of the *Employment Act*, 2007.

42. Counsel further submitted that the Respondent failed to discharge the burden to justify the grounds of termination of employment.

43. It was also submitted that the certificate allegedly forged was not the basis of the Claimant’s employment as she was employed in 1995-1996 and had earned promotions over the years.

44. Further, counsel submitted that the claimant was denied procedural fairness as termination was in contravention of Articles 41 and 47 of the Constitution of Kenya, 2010.

45. Finally, counsel submitted that the claimant is entitled to the prayers sought in the memorandum of claim and urged the court to award the same.

Respondent’s submissions

46. The Respondent’s counsel submitted that the termination of the Claimant’s employment was fair as it complied with the provisions of Section 41 of the *Employment Act*, 2007.

47. Counsel submitted that the claimant was given notice of a disciplinary hearing, she was supplied with all the documents she requested for but declined to participate in the disciplinary hearing without giving any reasons.

48. Counsel submitted that the claimant failed to adduce any evidence of her enrolment at Inoorero University, such as payment of tuition fees or any transcripts issued to her when she was a student.

49. Counsel submitted that the claimant’s claim must fail and urged the court to dismiss it with costs.

Findings and determination

50. From the pleadings, evidence and submissions by the parties, the issues for determination are;

- (i) Whether termination of the Claimant’s employment was unfair or unlawful.
- (ii) Whether the Claimant is entitled to the reliefs sought.

51. Before delving into these issues, it is important to dispense with the peripheral issue of whether the Claimant was targeted by one Jane Ngaira who the claimant alleges to have orchestrated the move to suspend and dismiss her for the purpose of deploying another person to the position the Claimant held.

52. The allegation above was not supported by any particulars and no evidence was adduced to substantiate the allegation.



53. In the court's view, it is clear that the Claimant's allegation that she was targeted for dismissal lacks supportive evidence and has no effect on this judgement.

Whether termination of the Claimant's employment was unfair or unlawful.

54. On the first issue, the claimant stated that she was employed by the Respondent and held the position of Finance Supervisor earning Kshs 467,457/= until her dismissal.
55. The Claimant stated that the Respondent dismissed her on allegation of presenting a forged Bachelor of Commerce Degree Certificate from Inoorero University which allegations she stated were untrue and that there is a Criminal Case No 1225 of 2017 touching on the same issue which is pending trial.
56. Both the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass the fairness test within the meaning of Section 45 of the *Employment Act*, 2007, it must be shown that there was a valid and fair reason to do so and the termination was conducted in accordance with a fair procedure.
57. As appropriately captured by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR,
“... for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness ...”
58. The provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 embody these two requirements.

Reason for termination

59. The termination letter dated 16th October 2017 reads
“Your disciplinary enquiry held on 13th October 2017 has reference.
In terms of the presiding officer's findings, you were found guilty and the sanction of dismissal was imposed. In light therefore the company hereby terminates your employment with immediate effect i.e your last date was 13th October 2017”
60. The Claimant's employment was terminated on the 13th October 2017.
61. In her testimony, the Claimant disputes having been subjected to a disciplinary hearing while the Respondent states that the Claimant was invited to the disciplinary hearing but opted not to participate in the proceedings.
62. The Respondent alleged the claimant had presented a forged degree certificate but no report was given to the Claimant or presented either during the disciplinary hearing or before the court to confirm the status of certificate.
63. It is not in dispute that the matter regarding the certificate is still pending trial before a criminal court.
64. Having read the charge sheet and the report prepared by Jane Ngaira, it is evident that the Respondent did not conduct thorough investigations to establish whether the certificate was forged and the Criminal Case is yet to be determined.



65. It is unclear to the court how the Respondent arrived at the decision that the degree certificate provided by the Claimant was forged. The burden of proof lay on the Respondent to prove that it genuinely believed that the certificate was forged.
66. The fact that the Claimant did not apply for leave to take her examinations and had no fees statements or transcripts cannot avail the Respondent. It had to demonstrate that it had reasonable grounds to believe that the degree certificate presented by the Claimant was forged.
67. Moreover, CWII confirmed that he knew the Claimant as a student as he was the Vice-Chancellor of the University at the time, evidence the Respondent did not controvert.
68. From the foregoing, it is the finding of the court that the reason for termination recommended by the Mr. Thabo Ndhlovu was not genuine as investigations had not been concluded at time the alleged disciplinary hearing was conducted. The court is satisfied that the Respondent did not comply with the provisions of Section 43 of the *Employment Act*, 2007.
69. Section 43(2) of the *Employment Act*, 2007 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.”
70. In the absence of forensic or other evidence raising doubts as to the authenticity of the degree certificate, it is difficult for the Respondent to prove that it genuinely believed that the certificate was forged.
71. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove that it had a fair and valid reason to terminate the claimant’s employment on 16th October, 2017.

Procedure

72. Section 41 of the *Employment Act*, 2007 prescribes the procedural steps to be complied with for a termination of employment to pass the procedural fairness test.
73. The specific elements have been isolated in a catena of decisions including by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR.
74. These requirements include, reason(s) for which termination of employment was being considered, explanation of the grounds of termination in a language understood by the employee and in the presence of a colleague of his or her choice or a shop floor representative, hearing and considering the representations made by the employee or his or her colleague or representative.
75. Whereas the Claimant maintained that she was not heard, the Respondent submitted that she was and was provided with all the documents she needed for the hearing.
76. However, RWI, Mr. Austin Nyawara testified that a hearing took place but the Claimant chose not to present herself.
77. Copies of documents on record reveal that the Claimant was suspended from employment vide letter dated 29th June, 2017 for having provided a Bachelor of Commerce Degree Certificate awarded by Inoorero University yet she did not hold the qualification on 15th June, 2016.
78. By letter dated 10th July, 2017, the Claimant responded to the Notice of Suspension requesting the Respondent to avail all the documents it intended to rely on at the hearing for purposes of preparation



- for the hearing, a letter the Claimant copied to the union and by letter dated 12th July, 2017, the Respondent forwarded the documents to the Claimant.
79. The Claimant contested the availment of the documents but had no evidence of having engaged the Respondent on the issue.
 80. More significantly, the Claimant's letter dated 18th July, 2017 acknowledges receipt of the four documents attached to the Respondent's letter.
 81. Strangely, the Claimant did not file the documents for perusal by the court.
 82. Equally, the Claimant's request to the Respondent not to have the disciplinary hearing from 21st July, 2017 to 2nd August, 2017, as she had examinations was granted vide letter dated 19th July, 2017.
 83. Intriguingly, the Claimant did not file a notice to show cause dated 9th September, 2017 which she admittedly received on 22nd September, 2017.
 84. In her letter dated 26th September, 2017, the Claimant sought involvement of the police in the matter, in urging her case and stated that the matter was not ripe for deliberation as it was already in court. This position may have led to the Claimant's non-participation in the hearing.
 85. However, it is trite law that pendency of criminal proceedings is not a bar to internal disciplinary proceedings as the two are patently distinguishable. They are anchored on different matters, namely; contract of employment and criminal law and the standard of proof is different, preponderance of probabilities and beyond reasonable doubt respectively.
 86. (See Okwengo JA in *Judicial Service Commission v Gladys Boss Shollei & another* (2014) eKLR, *Geoffrey Kiragu Njogu v Public Service Commission & 2 others* (2015) and *Attorney General & another v Andrew Maina Gitthinji & another* (2016) eKLR.)
 87. No doubt the Claimant was aware of the disciplinary hearing and testified that she indeed attended with a union representative but also testified that the hearing did not take place but could not recall who was with her in the boardroom other than one Jane Ngaira or the date of the hearing.
 88. Whether a hearing took place or not, the Respondent did not file minutes of the hearing or list of those in attendance as well as what transpired.
 89. The document on record identified as "sanction" makes reference to the proceedings on that day and was signed by one Mr. Thambo Ndhlovu on 13th October, 2017.
 90. The charges the Claimant confronted were dishonesty/misrepresentation and forgery and the document is explicit that the Claimant was found guilty of both charges.
 91. The document makes no reference to the evidence which informed the decision.
 92. Significantly, the Claimant did not deny that she did not enter a plea and walked out of the hearing as the record reveals.
 93. Although the Claimant alleges that she was not heard, she has not explained how having admitted that she attended the hearing with a representative, her case was not heard.
 94. From the documents on record, it is decipherable that the Respondent issued the requisite notices, responded to the Claimant's inquiries, availed the documents needed and invited her for the hearing and she attended but walked away before the hearing could take place.



95. Having been accorded the opportunity to be heard, it behooved the Claimant to attend and raise any concerns she had at the meeting for purposes of the record.
96. Her walking out without stating the reasons why, weakens her argument that she was not heard.
97. The law requires the employer to give the employee an opportunity to present his or her case and avail his or her defence.
98. It is the duty of the employee to avail him/herself with his/her witnesses and representatives, if any.
99. The Claimant was cagey as to whether she attended the meeting and could neither recall the persons present nor the date, which the court found curious as this is the committee that resolved to terminate her employment and was scheduled to sit on a particular date.
100. From the evidence on record, it is the finding of the court that the Respondent gave the Claimant an opportunity to defend herself but she did not do so and as such cannot turn round and accuse the Respondent for not hearing her.
101. The court is satisfied that the Respondent has on a balance of probabilities demonstrated that it complied with the provisions of the Employment Act, 2007 as regards procedural propriety.

Whether the Claimant is entitled to the reliefs sought

102. As regards the reliefs sought, the court proceeds as follows;

(a) Declaration

103. Having found that termination of the Claimant's employment was unfair for want of a valid and fair reason, a declaration that the termination was unfair is merited.

(b) 2 months' Salary in lieu of notice

104. From Collective Bargaining Agreement (CBA) between the Respondent and Transport Workers Union, it is clear under Clause No 27 that, an employee who has worked for a period exceeding 10 years is entitled to two (2) months' notice before termination. As the claimant worked for the Respondent for about 22 years, she is entitled to two (2) months salary as notice pay Kshs 934,914/= and the same is awarded.

(c) Unpaid salary

105. The claimant alleged not to have been paid for the 19 days she worked in the month of October, 2017. From the termination letter the claimant was terminated on 16th October, 2016 therefore entitled to payment for 16 days worked in the month of October 2017 being (Kshs 467,457/31 days = Kshs 15,079) x 16 days = Kshs 241, 268, unless paid.
106. The claimant alleges not to have been paid leave days for the months of February 2015 and the year 2016. The claimant has not supported this prayer with any evidence as neither the written statement nor the oral testimony make reference to any outstanding leave days.

The prayer is declined.

(d) Medical Reimbursements

107. The Claimant seeks medical reimbursement of Kshs 50,000/=. However the prayer is unsubstantiated as no evidence has been adduced to show that the Respondent was obligated to reimburse medical



expenses incurred. Similarly, the Claimant has not provided copies of receipts or other document as evidence of the amount she spent in order to qualify for reimbursement.

The prayer is dismissed.

(e) Travel Tickets

108. The Claimant prays for air tickets to the destinations of the Respondent throughout her lifetime. This prayer unsubstantiated and is declined.

(f) Service pay

109. The claimant prays for service pay for the 22 years she worked for the Respondent and referred the court to the Clause No 31.6 of the CBA. Regrettably, the clause is explicit that the entitlement is severance pay not service pay and it is only payable to those declared redundant which is not the case in this matter. The prayer is unsubstantiated and is dismissed.

(g) Certificate of service

110. The Claimant is entitled to a Certificate of Service by dint of Section 51 of the [Employment Act](#), 2007.

(h) General damages for wrongful dismissal

111. Having found that the termination of the Claimant's employment was unfair for want of a substantive justification, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007 as opposed to general damages.

112. In determining the quantum of compensation, the court has taken into consideration the following;

- (i) The Claimant was an employee of the Respondent for a period of about 22 years, which is a long time.
- (ii) The Claimant did not appeal the Respondent's decision or demonstrate her wish to continue working for the Respondent.
- (iii) Records reveal that the Claimant had been taken through a previous hearing and warned.
- (iv) The Claimant did not contribute to the termination of employment.

113. In the circumstances, the court is satisfied that the equivalent of 8 months' gross salary is fair.

114. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;

- (a) Declaration that termination of employment was unfair.
- (b) 2 month's salary in lieu of notice Kshs 934,914.00.
- (c) Unpaid salary for 16 days worked in October 2017, Kshs 241,268/=, unless paid.
- (d) 8 months gross salary.
- (e) Certificate of service.
- (f) Costs this suit.
- (g) Interest at court rates from date hereof till payment in full.

Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF
JANUARY 2024**

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

