



**Mamita v Solenta Aviation Kenya Limited (Cause 986 of 2015)
[2024] KEELRC 576 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 576 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 986 OF 2015
B ONGAYA, J
MARCH 15, 2024**

BETWEEN

SAMUEL MURAYA MAMITA CLAIMANT

AND

SOLENTA AVIATION KENYA LIMITED RESPONDENT

RULING

1. The claimant filed on 16.11.2023 the application by the notice of motion dated 15.11.2023 and through Shapley Barret & Company Advocates. The application was under Order 45 rule 1 of the [Civil Procedure Rules](#), sections 80, 1A, 1B, and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. The applicant prayed for orders as follows:
 - a. That the Honourable Court be pleased to review and set aside- the orders in the judgment delivered on 30.10.2023 whereof the learned Judge erroneously held that the claimant duly compensated for unfair termination.
 - b. That the Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.
 - c. That costs of the application be in the cause.
2. The application was based upon the annexed supporting affidavit of the applicant and upon the following grounds:
 - a. The Court found in the judgment correctly that the procedure for terminating the employment of the applicant was unfair for want of a notice to the applicant and the labour officer.
 - b. In the judgment delivered on 30.10.2023 the Court further observed that the amount paid to the applicant by the respondent was sufficient without taking into account the award the



claimant was entitled to for unfair termination as found by the Court. The Court made an error apparent on the face of the record for failing to award the claimant relief for unfair termination for want of notice to the labour officer and the claimant and considering payment made in August 2016 to be fair. The judgment ought to be reviewed upon that error apparent on the record.

- c. The Court placed upon the claimant to prove that he was entitled to 28 leave days in 2016. The finding was erroneous because it was the respondent who was the custodian of the leave form records and thus rightly placed to prove that the claimant had not accumulated the 28 leave days.
3. The respondent did not file a replying affidavit. The applicant relied upon the application and supporting affidavit.
4. To answer the 1st issue, the Court returns that there is no error apparent on the record established for the applicant. In particular, the applicant is seeking to ask the trial Court to change its clear findings and reasoning in the judgment delivered on 30.110.2023. The Court in declining to grant compensation for the unfair termination on account of notice to the applicant and the labour officer exercised discretion in consideration of the factors in section 49 of the Employment Act, 2007 and stated, thus, “Turning to compensation claimed at 12 months for unfair termination, the Court considers the factors in section 49 of the Act as follows. The Court has considered the money already paid to the claimant. Clause 2.2 of the prevailing contract provided for 3 months’ termination notice which were paid by way of what the respondent has pleaded as salaries for June, July and August 2016 – and which the Court finds were indeed paid as there is no claim for the same by the respondent. The Court considers that the payment as agreed and effected was way above the one-month redundancy notice to the employee and the further pay in lieu of a month’s notice prescribed under section 40 of the Act. The Court has considered the parties’ conduct prior to the termination. The evidence is that parties engaged seriously including on alternatives to the redundancy. Of particular interest is the mutual position by the parties that the claimant was offered continued employment with Airworks (K) Limited dated 12.05.2016 but the claimant declined the offer. The start date was to be on 01.06.2016 on permanent employment as a Captain or Pilot. It therefore appears to the Court that the alternative offer for continued employment and the amounts already paid serve as a full mitigation in favour of the respondent and the claimant will not be awarded compensation under section 49 of the Act. It appears to the Court that the respondent had clear negotiations for the claimant’s continued employment but the claimant opted out at the last minute and invoked the unfair termination in breach of section 40 of the Act. Otherwise, parties would have separated through mutual agreement and is not true that the claimant was not involved as submitted. For the respondent’s efforts in that regard and the consideration to comply with section 40 of the Act and the contractual provisions as far as was possible within the fast running time, each party will bear own costs.” Similarly, on the issue of the claimed leave days, the Court found that the respondent had shown leave had been paid while the claimant had failed to provide due evidence for the claimed 28 leave days. The applicant has failed to show why trite law that, one who alleges must prove, should not apply especially in circumstances that the employer had shown 19 leave days had been paid without grievance in that regard and until the suit was filed.
5. It appears to the Court that the applicant has failed to establish an error apparent on record but instead is dissatisfied with the Court’s findings and opinion in the judgment. In that view, the applicant’s proper path of attacking the judgment would be to appeal and not to seek a review.
6. To answer the 2nd issue, the Court returns that the applicant failed to invoke the relevant Employment and Labour Relations Court (Procedure) Rules. Whereas the provisions of the Civil Procedure Act and Rules invoked are substantially similar to the Court’s statutory provisions on review, the failure to



invoke the Court's rules operates as a impetus for dismissing the application. The respondent did not attend as expected and each party to bear own costs of the application.

In conclusion, the claimant's application for review dated 15.11.2023 and filed on 16.11.2023 is hereby dismissed and each party to bear own costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

