



**Nyambura v East Africa Safari Air Express Limited (Cause 1399 of 2018) [2024] KEELRC 540 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 540 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1399 OF 2018  
SC RUTTO, J  
MARCH 8, 2024**

**BETWEEN**

**RUTH NYAMBURA ..... CLAIMANT**

**AND**

**EAST AFRICA SAFARI AIR EXPRESS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that she was employed by the Respondent as a First Officer with effect from 1<sup>st</sup> July 2013 on Caravan 2018 (C208). She avers that she performed her duties diligently and in April 2016, she was made Captain of Aircraft B-1900. However, her salary was not increased to match captain duties. She avers that the Respondent phased out B- 1900 and introduced Dash 8. She was made captain for Dash 8 as well.
2. The Claimant further avers that it was a company policy for pilots to undergo ground training and simulator training in South Africa and the Respondent was to pay per-diem, travel expenses and accommodation.
3. It is the Claimant’s case that she successfully completed training for Caravan 208, B-1900 and Dash 8-300. She was issued with relevant training records, certificates of completion and reports.
4. She further avers that all pilots underwent a 10-day ground training by Dave Moris but she was rushed through a 3-day ground training which according to her was discriminatory. Further, she was scheduled to attend a ground school training conducted by Dave Moris from 15<sup>th</sup> February 2018 but her name was dropped at the last minute. No reason was given. She attributes this to her pregnancy hence contends that she was discriminated on the basis of pregnancy.
5. The Claimant further avers that her salary was unilaterally, irregularly and illegally reduced from Kshs 400,000/= to Kshs 250,000/=. No notice was given on the salary reduction. That further, she was not



- paid salary for May and June 2018. The Claimant contends that the Respondent's actions violated her right to fair labour practices as stipulated under Section 41 of *the Constitution*.
6. It is the Claimant's case that she raised the foregoing issues with the Respondent through several emails and through her Advocates, but the Respondent failed to resolve the issues. Instead of addressing the issues raised, the Respondent summarily dismissed her through a letter dated 12<sup>th</sup> July 2018.
  7. It is against this background that the Claimant seeks to be granted a slew of reliefs including declaratory orders, compensatory damages, unpaid salary, unpaid expenses and one month's salary in lieu of notice.
  8. Opposing the Claim, the Respondent has denied that the Claimant performed her duties diligently. The Respondent avers that the Claimant met the most basic requirements and standards at work.
  9. The Respondent further contends that its policy is and has been that per diem must be approved and is only payable in advance of travel.
  10. The Respondent further states that the Claimant underwent computer-based training which mode of training is approved by the Kenya Civil Aviation Authority (KCAA) but was conducted in tandem with the Respondent's other pilots who all managed to pass the same while the Claimant did not.
  11. The Respondent further states that there is no requirement that Dave Moris must conduct initial ground school training approved by the KCAA.
  12. It is further contended by the Respondent that the Claimant was compensated adequately, as per its internal policies.
  13. Terming the Claimant's assertions as factually incorrect, the Respondent avers that it settled all dues owed to her. It contends that the Claimant's salary for May and June was duly remitted to her through her Advocate on record.
  14. That further, the Claimant was aware that her remuneration was to be evaluated periodically and it is for this reason that her remuneration was reviewed downwards. In this regard, the Respondent has termed the Claimant's assertions that her salary was reduced as a result of her pregnancy untrue, malicious and mischievous but solely meant to taint its reputation and intimidate them into paying a salary that she is not entitled to.
  15. The Respondent further avers that it practices best fair labour practices and the Claimant is deemed to have acquiesced to the salary she was receiving having not raised any issue at the time payment was being made.
  16. On account of the foregoing, the Respondent prays that the claim be dismissed with costs.
  17. During the trial which proceeded on 30<sup>th</sup> October 2023, the Claimant testified in support of her case. The Respondent despite filing a witness statement and identifying a witness, George Kivindy, failed to appear in Court on 27<sup>th</sup> November 2023 for defence hearing. Accordingly, the Respondent did not tender oral evidence.
  18. It is also worth pointing out that the Respondent's Advocate on record filed an Application dated 20<sup>th</sup> November 2023 seeking leave to cease acting for the Respondent. The said Application was allowed hence moving forward, the Respondent was unrepresented.

### **Claimant's Case**



19. As stated herein, the Claimant testified in support of her case and at the outset, sought to adopt her witness statement to constitute his evidence in chief. She further produced the list and bundle of documents filed alongside the Memorandum of Claim as exhibits before court.
20. It was the Claimant's evidence that she checked out as Captain as follows; Captain Caravan from November 2015 to February 2016; Captain B – 1900 from March 2016 to January 2017 and Captain Dash 8 from September 2017. However, her salary was never adjusted to match her captain duties.
21. Therefore, contrary to best labour practice and Employment law on equal pay for equal work and equal opportunity for everyone, she was constantly underpaid.
22. She further averred that vide a letter dated 16<sup>th</sup> November 2016, her salary was reviewed to a consolidated net monthly of Kshs 400,000= to match her captain duties on the B1900.
23. That she was paid Kshs 325,000 during March and April 2018 instead of Kshs 400,000. Further, she is yet to receive salary for May and June 2018. In the Claimant's view, this is further discrimination and deliberate acts to frustrate her despite the fact that she had just given birth and was on maternity leave.
24. The Claimant contends that a similar issue arose in 2015-2016 when she was pregnant and upon resuming work after maternity leave, despite being made the Caravan (C-208) and Captain of B1900, her salary was not increased to match her Captain duties.
25. She had two loan facilities with NIC Bank which the Respondent is aware of. Due to the illegal/unilateral reduction of salary, she has been unable to pay the loan as and when the same falls due.
26. The Claimant further averred that the unilateral/illegal reduction of her salary and discrimination brought about undue pressure, inconveniences health complications (high blood pressure and diabetes) bearing in mind that she was pregnant.
27. Further, she proceeded to maternity leave on 31<sup>st</sup> May 2018 and is entitled to a three months maternity leave.
28. The Claimant further termed her summary dismissal unlawful, un-procedural and unfair as she was not given any notice or hearing.

### **Respondent's Case**

29. As stated herein, the Respondent did not call oral evidence hence its case was as per its Defence

### **Submissions**

30. The Claimant submitted that her contract clearly stated that the instance when an employee will be dismissed summarily is when such a person has been declared bankrupt or suspended for a second time over the same offence or wrongful conduct within a space of twelve months. With respect to this, she submitted that she had not been adjudged bankrupt or suspended hence the condition that must be met for summary dismissal was not satisfied.
31. The Claimant further submitted that she was not given an opportunity to be heard and to defend herself before she was summarily dismissed.
32. The Respondent did not file submissions.



## Analysis and Determination

33. Flowing from the pleadings on record, the evidentiary material before me as well as the Claimant's submissions, it is apparent that the Court is being called to resolve the following questions: -
- i. Whether the Respondent has proved that it had a fair and valid reason to terminate the Claimant's employment;
  - ii. Whether the Claimant was afforded procedural fairness prior to termination;
  - iii. Is the Claimant entitled to the reliefs sought?

Whether the Respondent has proved that it had a fair and valid reason to terminate the Claimant's employment

34. Section 43(1) of the *Employment Act* requires an employer to prove the reasons for termination of employment and in default, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act provides that a termination of employment 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; ...
35. Fundamentally, beyond proving the existence of reasons to justify termination of employment, an employer is required to prove that the said reasons were fair, valid and related to the employee's conduct, capacity or compatibility.
36. In the instant case, the Claimant's termination from employment was effected through a letter dated 12<sup>th</sup> July 2018, partly couched:

“Pursuant to a pilot contract dated 16<sup>th</sup> July 2013, you are required to comply with all Kenya Civil Aviation Authority (KCAA) regulatory requirements with respect to ground school training and simulation training. You have continuously failed to meet the said necessary requirements as laid down by the KCAA, which failure is a ground for dismissal.

Moreover, it has come to our attention that you revealed private confidential company information to third parties without authority and contrary to the terms of your contract.

Finally, we further note that in spite of the grievance procedure/conflict resolution mechanism that has been provided in your contract, you have chosen not to address any grievance that you may have with the company in the provided manner.

In the foregoing, we consider that your actions are not in line with the interests of the company and are warranting summary dismissal. This letter hereby serves as your summary dismissal from your employment with the company.

Your dismissal is effective immediately and you are therefore required to immediately return all Company property in your possession.”

37. According to the Claimant, she passed the initial ground and simulation training which was conducted in South Africa. She further averred that she was to attend a ground school training conducted by Dave Moris from 15<sup>th</sup> February 2018 but her name was dropped at the last minute and no reason was given.



38. The Claimant further exhibited a copy of a Simulator Training Report dated 5<sup>th</sup> February 2017, in which the instructor made the following comments: “competent in all aspects”.
39. In another Simulation Training Report, dated 19<sup>th</sup> February 2017, the remark “Good overall” was made under the section “General Assessment of Candidate.”
40. Further in an email dated 21<sup>st</sup> March 2018, the Claimant addressed the Respondent’s Chief Executive Officer, Don Smith as follows with regards to her training:

“I think you have your facts wrong Don. I didn’t fail sim twice, please let’s be objective and I think we even had a word with you after my second simulator training and agreed I would sit in a Dave Moris ground school and have a fair shot just like anyone else...”
41. Notably, the Claimant’s position was not controverted by the Respondent by way of evidence. If anything, there was no evidence from the Respondent’s end confirming that the Claimant failed her ground training and simulator training despite being given an equal opportunity to train like her counterparts.
42. As such, the Respondent failed to satiate its evidential burden by proving that the Claimant had continuously failed to meet the necessary regulatory requirements with regards to ground school training and simulator training.
43. In addition to the foregoing, the Respondent failed to discharge its evidential burden by proving that the Claimant revealed private confidential company information to third parties. First, these third parties were not named and second, there was no proof from the Respondent’s end that the Claimant had disclosed the said confidential information.
44. That is not all. The Respondent further failed to adduce evidence proving that the Claimant had failed to address her grievances in the provided manner through the company’s grievance procedure/ conflict resolution mechanism. In this regard, the Respondent did not lead evidence in whatever form or manner to prove that it had a grievance-handling mechanism in the first place and that the Claimant had failed to adhere to the same.
45. What’s more, the Claimant exhibited copies of emails emanating from her end to the Respondent, raising her complaints with regards to training, reimbursement of the expenses she incurred in South Africa during her first simulator training and reduction of her salary.
46. Aside from an email of 21<sup>st</sup> March 2018 from the Respondent’s Chief Executive Officer Don Smith, there is no evidence that the Respondent took any steps to address the Claimant’s complaints or redirected her to channel her complaints through the proper conflict resolution mechanism. If anything, the record bears that the Claimant’s complaints fell on deaf ears hence she opted to engage an Advocate.
47. In total sum, I cannot help but find that the Respondent has not satisfied the requirements of Section 43 as read together with Section 45(2) (a) and (b) of the Act, in that it had a valid and fair reason to summarily dismiss the Claimant on account of the reasons contained in the letter of termination.

### **Fair process?**

48. Section 45 (2) (c) of the Act, requires an employer to prove that an employee’s termination from employment was effected in accordance with fair procedure. Section 41 of the Act captures the specific requirements of a fair procedure in the following manner: -



- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
49. From the record, there is no evidence that the Claimant was subjected to the process contemplated under Section 41 reproduced above. I say so because first, there is no evidence putting the Claimant on notice that her termination from employment was being contemplated for whatever reason, let alone those laid out in the letter of termination.
50. Second, there is no evidence that the Claimant was invited to defend herself in any forum, against whatever allegations the Respondent may have had against her.
51. I find it imperative to underscore that the provisions of Section 41 of the Act are mandatory hence it follows that anything short of that process, is unprocedural unfair. See the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR in which the learned Judges of the Court of Appeal expressed themselves as follows:
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-
- (i) an explanation of the grounds of termination in a language understood by the employee;
  - (ii) the reason for which the employer is considering termination;
  - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
52. Applying the aforementioned precedent to the case herein, I arrive at the inescapable conclusion that the Claimant’s termination from employment was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the Act.
53. The total sum of my consideration is that the Claimant’s termination was neither fair nor lawful hence was unjustified in all respects.

### **Reliefs?**

54. As the Court has found that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment and that it subjected her to a fair process prior to termination, the Court awards her one (1) month’s salary in lieu of notice and compensatory damages equivalent to eight (8) months of her gross salary. This award takes into consideration the length of the employment



relationship as well as the circumstances attendant to the Claimant's exit from the Respondent's employment. Most of all, the Court has taken into account the Respondent's conduct in the process leading up to the Claimant's termination from employment, key among them being the reduction of the Claimant's salary for no justified reason.

55. The Claimant is further awarded withheld salary for the months of May and June 2018, there being no evidence from the Respondent's end that the same was paid out to her.
56. The Claimant has also sought to be paid the sum of Kshs 300,000/= being the amount illegally and unlawfully deducted from her salary from January to April 2018. It is noteworthy that the Respondent did not dispute that the Claimant's salary was reviewed downwards. Indeed, the salary reduction is confirmed by the Respondent's letter from George Kivindy which reads in part:

“Please note that from 1<sup>st</sup> January 2018, your salary was downgraded from Kshs 400,000 to Kshs 325,00. This was done in line with the Company's internal policies and regularized with other pilots of the same position.”

57. It is unequivocal that the Claimant's salary was a significant term of her contract of service hence any change was to be done in line with the provisions of Section 10(5) of the Act which provides as follows:
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
58. In line with the above statutory provision, the Respondent was duty-bound to obtain the Claimant's prior approval in writing before downgrading her salary. Evidently, this was a unilateral decision emanating from the Respondent's end. There is no evidence at all that the Claimant was consulted prior to the reduction of her salary and that she accepted the same.
59. Therefore, the Respondent's action was in contravention of the provisions of Section 10(5) of the Act.
60. If I may add, the Respondent's reaction to the Claimant's complaint over the issue is quite astonishing, to say the least. The response from Respondent's Chief Executive Officer, Don Smith through his email of 21<sup>st</sup> March 2021 goes as follows:

“What do you have in writing from the company re(sic) your salary staying the same?...”

61. I reiterate that the Claimant's salary was a fundamental term of her contract of service. Therefore, it was not open for the Respondent to tinker with the same as it wished. It did not have any right to do so.
62. The Claimant has further sought to be reimbursed the sum of 1350 USD being the outstanding amount for per diem, transport and fuel expenses she incurred while in South Africa for her simulator training.
63. In this regard, the Claimant avers that she was to be paid 60 USD per day totalling 1320 USD, and was also to be reimbursed for her transport expenses. According to the Claimant, she was given 800 USD of which 300 USD was for car rental. She contends that she incurred transport cost of R7500 (750 USD), for hiring a vehicle and 80 USD for fuel expenses. As such, 820 USD is outstanding for per diem, 450 USD for transport and 80 USD for fuel expenses.
64. In support of her case, the Claimant exhibited copies of receipts to evidence her expenses during the trip.



65. On the other hand, the Respondent did not lead any evidence to discount the Claimant's assertions with regards to her entitlement and to confirm that indeed, she was paid what was due to her in the circumstances. In this regard, the Claimant's claim to this end succeeds and I return that she is entitled to 1350 USD as pleaded.
66. The Claimant has further sought to be paid the sum of Kshs 800,000/= being the difference in salary that she was to earn as Captain. On this score, the Claimant failed to adduce evidence for instance a grading and pay structure, demonstrating what was payable to a pilot designated as Captain vis a vis what she earned during the period in question. In this case, the Claimant only adduced evidence confirming the dates she checked out as Captain. However, the crucial evidence to prove what she was to earn at the time, was conspicuously missing from the record. In that regard, she failed to establish her claim to the requisite standard hence the same cannot be sustained.
67. The claim for payment of outstanding annual and maternity leave is similarly declined as the Claimant did not specify the period for which she is seeking the said reliefs. If anything, she has been awarded full salary for the months she was not paid hence her claim to this extent is as good as spent.
68. With respect to the claim for damages for discrimination on account of pregnancy, I will decline to award the same as the Claimant failed to establish a prima facie case for discrimination. Admittedly, by dint of Section 5(7) of the Act, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that section. Be that as it may, the Claimant was first required to establish the ground for discrimination in order for the burden to shift.
69. In this case, the Claimant did not establish that at the material time, she was pregnant. Save for alluding to her pregnancy in the emails she dispatched to the Respondent, there was no evidence in the form of medical records or birth notification to confirm that indeed, she was pregnant at the time, hence belonged to a protected class.
70. It is also notable that in an email of 21<sup>st</sup> March 2018, George Kivindyo addressed the Claimant as follows with regards to her pregnancy:
- “Ruth,
- I have just gone through your file at the H/Q and interestingly, we do not have notification or details of your pregnancy.
- I am told you are already on ground duties but no supporting documents from your doctor.”
71. The bottom line is that beyond asserting that she was pregnant at the time, the Claimant needed to corroborate her assertion with some form of evidence to prove as much. In this case, she didn't, hence her claim to this extent collapses.

## Orders

72. In the final analysis, I enter Judgment in favour of the Claimant against the Respondent in the following manner:
- a. A declaration that the Claimant's termination from employment was unfair and unlawful.
  - b. The Claimant is awarded one (1) month's salary in lieu of notice being Kshs 400,000.00.



- c. The Claimant is awarded compensatory damages in the sum of Kshs 3,200,000.00 being equivalent to eight (8) months of her gross salary.
- d. The Claimant is awarded unpaid salary for the months of May and June 2018 being the sum of Kshs 800,000.00
- e. The Claimant is awarded salary withheld by the Respondent from January to April 2018 being the sum of Kshs 300,000.00.
- f. The Claimant is awarded the outstanding amount of per diem, transport and fuel expense being 1350 USD.
- g. Interest shall apply on the awards above at court rates from the date of Judgment until payment in full.
- h. The Claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant Mr. Kimanzi

For the Respondent No appearance

Court Assistant Millicent Kibet

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

