



**Were v Kenya Aerotech Limited (Cause 661 of 2018)
[2024] KEELRC 2742 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2742 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 661 OF 2018
L NDOLO, J
NOVEMBER 7, 2024**

BETWEEN

ESTHER ANYONA WERE CLAIMANT

AND

KENYA AEROTECH LIMITED RESPONDENT

JUDGMENT

1. By an order made by Onyango J on 25th February 2019, the Respondent’s Memorandum of Response was expunged from the record. By its application dated 10th May 2023, the Respondent sought to set aside the order by my sister Judge, which plea I rejected by my ruling dated 27th July 2023. The matter therefore proceeded as an undefended cause.
2. The Claimant states her case in a Statement of Claim dated 3rd May 2018 and filed in court on 8th May 2018. At the trial, the Claimant testified on her own behalf and thereafter filed final submissions.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent as a Cabin Attendant, sometime in 2001 until 2nd February 2007, when she was promoted to the position of Customer Service Agent.
4. The Claimant worked well for the Respondent until 9th May 2017, when she received an unsigned show cause letter via a WhatsApp message sent to her by the Respondent’s Operations Manager, Jabes Okeyo.
5. The show cause letter notified the Claimant of a security investigation report on recovery of two laptops at Terminal 2 of Jomo Kenyatta International Airport. The Claimant was accused of attempting to divert and steal transit goods entrusted to the Respondent by its client, Fly540 Airline.



6. According to the Claimant, she received the show cause letter on 9th May 2017 yet, she was required to respond by 8th May 2017. The Claimant responded on 21st August 2017, denying the allegations levelled against her. On 15th September 2017, the Operations Manager called the Claimant, inviting her to a disciplinary hearing scheduled for 18th September 2017.
7. The Claimant attended the disciplinary hearing, where she reiterated her innocence. She states that she was not given a copy of the investigation report implicating her in the attempted theft. On 22nd September 2017, the Claimant was summarily dismissed.
8. The Claimant's case is that her dismissal was wrongful and unfair, as the reasons were not substantiated and she was not allowed adequate opportunity to respond the allegations levelled against her. She therefore claims the following:
 - a. 12 months' salary in compensation.....Kshs. 500,316
 - b. 1 month's salary in lieu of notice.....41,693
 - c. Severance pay for 17 years @ 15 days' pay.....354,390
 - d. General damages
 - e. Certificate of service
 - f. Costs of the suit

Findings and Determination

9. There are two (2) issues for determination in this case:
 - a. Whether Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

10. The Claimant's dismissal was communicated by letter dated 22nd September 2017 stating as follows:

“Dear Ms. Anyona,

RE: Summary Dismissal

We refer to your letter dated 21st August 2017 in response to our letter dated 4th May 2017 and your defense before the disciplinary hearing on 18th September 2017.

As you are aware on 15th April 2017 you were intercepted at the terminal 2 gate with two laptops, chargers and jeweleries which were stolen from fly 540, a consignment entrusted to Kenya Aerotech and were to be transported to Jubba. You were trying to get the above items to the landside to Mr Movin Amboka who [was] waiting for you. According to you Mr Amboka brought the bag containing the above items and requested you to pass them through terminal 2 gate as he did not have the necessary pass to use that gate.

Having worked at the Airport for a period of sixteen (16) years you are well aware of the Airport procedures deployed by the company and the Airport on transit of items from the airside to the landside. Your actions on the above indicate a strong collaboration between you and the main culprit (Mr Movin Amboka). You are therefore found culpable for the offense of being in possession of stolen items and trying to exit the items from the airport.



Please note that being found with stolen goods is a gross misconduct. It is in breach of the *Employment Act*, 2007 Section 44 which states that:- ‘Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause if; (g) An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offense against or to the detriment of his employer or his employer’s property.

In view of the above a decision has been arrived at to summarily dismiss you from service with effect from Monday 25th September 2017.

You are therefore required to clear with the company including returning your airport security pass and any other company property you are holding to the Human Resource Office to enable us process your final dues.

You may appeal against the above decision within 14 days from the date of this letter. In your appeal state clearly the reasons for the appeal or provide a statement of dissent attached to your appeal letter addressed through the Managing Director.

Yours faithfully,

Kenya Aerotech Limited

(signed)

Caroline Karanja

Human Resource Manager”

11. This letter accuses the Claimant of being in possession of stolen items and trying to exit them from the Airport. In her testimony before the Court, the Claimant admitted having assisted a colleague to pass a bag through a scanner at her work station. The Claimant further admitted that her action was not within normal procedure.
12. The Claimant complains that there was no valid reason for her dismissal, as contemplated under Section 43 of the *Employment Act*. This provision states as follows:
 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. 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.
13. The test set by Section 43 is commonly referred to as ‘the reasonable responses test’ where the decision of the Court is guided by what a reasonable employer would have done in the circumstances of the particular case. The Court must therefore avoid the temptation to supplant the employer’s decision with its own.
14. The beacons of the ‘reasonable responses test’ were established by Lord Denning in the well-known decision in *British Leyland v Swift* (1981) IRLR 91 in the following terms:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in



all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”

15. In light of the Claimant’s admission that her action of assisting a colleague to pass a bag through a scanner at her work station, was outside normal operations, I have no difficulty in reaching the conclusion that the Claimant breached a well-established security protocol. For this reason, I find and hold that the Respondent had a valid reason for dismissing the Claimant.
16. Regarding the procedure used to effect the dismissal, there is evidence that the Claimant was issued with a show cause letter to which she duly responded. In addition, the Claimant was invited to a disciplinary hearing which she attended. I am therefore satisfied that the procedural fairness requirements of Section 41 of the [Employment Act](#) were satisfied.
17. On the whole, I find and hold that the Claimant’s dismissal was lawful and fair. Her claims for compensation and notice pay are therefore without basis and are dismissed.
18. No basis was established for the claims for severance pay and general damages. These claims therefore also fail and are disallowed.
19. Finally, the Claimant’s entire claim fails and is dismissed with no order for costs.
20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF NOVEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Maloba for the Claimant

No appearance for the Respondent

