



REPUBLIC OF KENYA



KENYA LAW
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**Diang'a & another v Dac Aviation [E.A.] Limited (Cause E554 of 2021)
[2023] KEELRC 504 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 504 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E554 OF 2021
J RIKA, J
FEBRUARY 28, 2023**

BETWEEN

DEREK PLACIDIUS DIANG'A 1ST CLAIMANT

PATRICK MWOLOLO MUIA 2ND CLAIMANT

AND

DAC AVIATION [E.A.] LIMITED RESPONDENT

JUDGMENT

1. The claimants filed their statement of claim on July 8, 2021.
2. They state that they were employed by the respondent aviation company as cabin crew. The 1st claimant was employed for 1 year, commencing April 1, 2019; the 2nd claimant for 1 year commencing March 11, 2019.
3. Their contracts were terminated on May 8, 2020, on account of redundancy. They each earned monthly gross salary of Kshs 55,000 by the time of termination.
4. They were issued termination notices dated April 9, 2020. Effective date was May 8, 2020. They were informed that termination was occasioned by redundancy.
5. They fault redundancy decision and procedure. They state that fair selection standard was not applied; and seniority, rank, skill, ability and reliability were disregarded. They were denied benefits including severance pay. They were never consulted. They state that termination contravened sections 40, 41, 43 and 45 of the *Employment Act*, 2007.
6. They pray for judgment against the respondent for: -
 - a. Salaries for February, March and April 2020 at Kshs 165,000 each.
 - b. Salary for days worked in May 2020.



- c. 1- month salary in lieu of notice.
 - d. Unpaid annual leave.
 - e. Severance pay.
 - f. Service pay.
 - g. Compensation for unfair termination.
 - h. Caution money refund.
 - i. Unremitted NSSF and NHIF deductions.
 - j. Any other suitable orders.
 - k. Costs.
 - l. Interest.
7. The respondent filed its statement of response dated July 15, 2022. It is not denied that the claimants were employed by the respondent. They were issued redundancy notices, as was the relevant Labour Office. The respondent was compelled to declare redundancies due to loss of business occasioned by Covid-19 pandemic. section 40 of the *Employment Act* was observed fully. Skills in terms of work ethic, performance and reliability were taken into account. The respondent prays for dismissal of the claim with costs.
8. The claimants, and the respondent's country manager Peter Muga, gave evidence on November 11, 2022, closing the hearing.
9. The 1st claimant relied on his witness statement and documents on record. He restated his employment history and the terms and conditions of employment. He was not granted annual leave; he was not paid monthly salary on time; he was denied terminal dues; the notice of redundancy issued on April 9, 2020; and he was not offered alternative job. Cross-examined, he told the court that termination was on account of redundancy. Procedure was unfair. The 2nd claimant's evidence took similar vein as that of his colleague.
10. The country manager Muga, adopted pleadings, documents and witness statement filed by the respondent. He confirmed that the claimants were employed by the respondent. The respondent lost commercial contracts and was unable to sustain the claimants in employment. The claimant and labour office, were issued notices of redundancy. On cross-examination, Muga confirmed that the claimants were resourceful employees. They did not have warnings. There was no notice to any trade union. The claimants were not in any trade union. The respondent did not conduct a cost-benefit analyses leading to termination. Severance was not paid. The claimants declined their certificates of service. They were paid salaries for January 2020. They were not paid for February, March, April and part of May 2020. They have not been paid to-date. Muga conceded that withholding of monthly salary is illegal. NSSF and NHIF deductions were remitted. Redirected, Muga told the court that the respondent applied the principle of LIFO. The claimants were advised to collect their terminal dues and certificates of service. They did not do so.
11. The issues are whether termination was based on fair procedure; whether it was based on valid reason; and whether the claimants merit the remedies sought.



The Court Finds:

12. The claimants were employed by the respondent as cabin crew, on April 1, 2019, and March 11, 2019 respectively. They earned monthly gross salaries of Kshs 55,000 each. They were both on 1- year contracts.
13. There is no evidence provided by the claimants that their respective contracts were renewed, after 1 year. The 1st claimant's contract expired on March 31, 2020, and the 2nd claimant's on March 10, 2020. The contracts stipulate that the terms will be automatically extended by 1 additional year, without further action by either party.
14. By the time the claimants received notices of redundancy, they were at the outset of their automatically renewed, 1 additional year.
15. Procedure: The respondent issued what is titled, 'Notice of Intention to terminate Employment on Account of Redundancy,' on April 9, 2020. The claimants were informed that it was necessary to restructure, in order for the respondent, to streamline operations. They were told that consequently, the respondent intended to terminate their contracts, on account of redundancy.
16. They were advised that they would be paid full salary up to May 8, 2020; notice of 1 month; severance pay at 15 days' salary for each complete year of service; and payment of accrued leave.
17. The notice of intended redundancy did not advise the claimants why only they, were selected for redundancy. They were not taken through an assessment of skill, ability and reliability. Their comparators, who remained in employment were not disclosed. They were not taken through consultations, with the engagement of the labour office. The notice of intended redundancy is meant to open way for consultations, and is not a notice of termination. Redundancy at the point the notice of intention is given, remains an intended redundancy. No decision has been made, just the expression of an intention, which must be followed by consultations, leading to a decision and notice of termination.
18. The respondent was aware of the distinction between the 2 notices, and the objectives they are intended to serve. It would not have issued notice and offered to pay 1-month salary in lieu of notice, if it was not aware of the distinction, and the fact that it had only communicated its intention to declare the claimants' position redundant.
19. Other yawning defaults, included non-payment of redundancy packages, promised in the notices of intended redundancy. Section 40 [1] of the *Employment Act* states that an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the conditions listed under section 40, which include payment of various redundancy benefits.
20. The respondent terminated the claimants' contracts, before paying any of those benefits. It gave a promise to pay certain benefits which were never paid then, or in the future.
21. Muga told the court that the respondent did not pay severance. Not only was severance unpaid, but the claimants left employment without their salaries for February, March, and April 2020, and salaries for 8 days worked in May 2020. Section 40 requires an employer not to terminate an employee's contract of employment, without payment of redundancy benefits.
22. Procedure was not fair and lawful.
23. Validity of redundancy: It is always difficult for the court to accept explanations of an economic nature, as justification for declaration of redundancy, without the support of financial records. The respondent states that it was necessary to restructure, in order to remain a going-concern, in a harsh economic



environment. These are just words. There are no figures, to enable the court have a clear picture, of the economic nature of the problem sought to be redressed by the respondent, by termination of the contracts of employment of the 2 cabin crew. There is no financial report from the previous year, and projections for the coming years, to establish that the respondent was faced with a redundancy situation. The respondent's witness, Muga, did not substantiate this generalized claim, that there were harsh economic times, compelling the respondent to select the 2 claimants for redundancy.

24. How would the retention of the claimants or their exit at work, impact the respondent's financial position? The respondent needed to adduce evidence on this, to persuade the court that there was a genuine redundancy situation.
25. The court is convinced that redundancy was unfair, both on procedure and justification.
26. Remedies: It is easier to begin with remedies which have been conceded by the respondent.
27. The respondent concedes that the claimants were not paid salaries for February, March and April 2020. These are granted as prayed, at Kshs 165,000 each.
28. Salary for 8 days worked in May 2020, is granted at Kshs 16, 923 each.
29. The claimants are granted severance pay at the rate of 15 days' salary for 1 year completed in service, at Kshs 31,730 each.
30. They were entitled under contract, to 21 days of annual leave with full pay, on completion of 12 consecutive months of service. They completed 12 consecutive months. They were promised payment of accrued annual leave in the notices of intention to declare redundancy, but no payment was made. They are granted 21 days of annual leave, at Kshs 44,423 each.
31. The respondent exhibited adequate NSSF records, to discount the prayer for service pay. There is no evidence to support the prayers for caution money refund, and refund of NSSF and NHIF deductions.
32. The claimants merit compensation for unfair termination. They had worked for 1 year each, and were on 1 additional year of service, at the time of termination. Termination was not at their fault. They are granted equivalent of 2 months' gross salary each at Kshs 110,000 in compensation for unfair termination.
33. Costs to the claimants.
34. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

It Is Ordered: -

- a. It is declared that termination was unfair.
- b. The respondent shall pay to each claimant: salary arrears at Kshs 165,000 each; salaries for 8 days worked in May 2020 at Kshs 16,923 each; severance at Kshs 31,730 each; and compensation for unfair termination at Kshs 110,000 each- total Kshs 323,653 each.
- c. Costs to the claimants.
- d. Interest allowed at court rate from the date of Judgment, till payment is made in full.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary, Covid-19 Guidelines, this 28th day of February 2023.

James Rika



Judge

