



**Parmar v African Express Airways (Cause 1434 of 2017)
[2023] KEELRC 1028 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1028 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1434 OF 2017
K OCHARO, J
APRIL 27, 2023**

BETWEEN
JAMEEL ASHVINKUMAR PARMAR CLAIMANT
AND
AFRICAN EXPRESS AIRWAYS RESPONDENT

JUDGMENT

Introduction

1. Through a statement of claim dated the 19th July 2017, the Claimant instituted a claim against the Respondents seeking the following reliefs;
 - a. A declaration that the respondent infringed and violated the claimant’s constitutional rights and freedoms
 - b. A declaration that the respondent breached the principles of justice in the process of terminating the claimant.
 - c. A declaration that the summary dismissal of the claimant by the respondent was unfair and unlawful
 - d. Compensation for the unpaid dues of USD 41,165 being;
 - i. Salary for the month of June 2016 of USD 4,500
 - ii. One-month salary of USD 4,500 in lieu of notice
 - iii. Extra office duties allowances of USD 6,000
 - iv. Outstanding leave days (34) of USD 5,100
 - v. Unpaid Medical cover of USD 2,090



- vi. Unpaid House allowance of USD 14,850
 - vii. Gratuity pay of USD 4,125
 - e. General damages for unlawful and unfair termination and infringement and violation of constitutional rights.
 - f. Interest on (d) (e) and (f) above at court rates from the date of filing the suit until payment in full.
 - g. Issuance of a certificate of service
 - h. Any other relief this Honourable court may deem fit to grant in the circumstance.
2. The statement of claim was filed contemporaneously with the claimant's witness statement and documents under a list dated the 19th July 2017, documents that the claimant intended to place reliance on, as his documentary evidence.
 3. The Respondents entered appearance on the 2nd August 2017. In response to the statement of claim the Respondent filed their Defense dated 14th August 2017. In the defence, the Claimant's claim was denied in toto, his entitlement to the reliefs sought too.
 4. Pursuant to the Procedure Rules, the Claimant did file a reply to defence dated 7th September 2017.
 5. When the matter came up for hearing, the Claimant opted to rely on his witness statement as his evidence in chief and the filed documents as his documentary evidence.
 6. On the 16th March 2022, the matter was adjourned at the instance of the Respondent, however, it was put on a last adjournment. The matter was consequently fixed for defence hearing for the 5th May 2022. On this day, the court refused to adjourn the matter again on an application by the Respondent. As a result, the Respondent closed its case, without presenting a witness to testify.

The Claimant's Case.

7. The Claimant stated that he first came into the employment of the Respondent in July 2014, as a first Officer on the CRJ series aircraft on a per hour basis. Subsequently, in September 2014, he got employed on a permanent and full-time basis as a First Officer on the same aircraft, at a monthly salary of USD 4500. He further stated that under the terms of the contract, he was entitled to Medical cover, House allowance, and annual Leave. His employment was terminable by a one month's notice or salary in lieu thereof.
8. He asserted that he was never issued with a written contract of employment by the Respondent despite repeated requests for the Respondent to do so. Nevertheless, the Respondent did confirm on various occasions that he was a permanent and full-time employee.
9. He stated further that sometimes during the course of his employment in the year 2015, he was assigned extra office duties of a Safety Officer in the Respondent's Safety Department with an additional monthly pay of USD 500.
10. That on the 13th June 2016 without any proper reason the Respondent unlawfully summarily dismissed him from employment contrary to the provisions of the law.
11. The claimant states that he was not granted a hearing or an opportunity to make representations before the dismissal. Further that the Respondent didn't give issue him with a termination notice as per the



contractual terms or pay him salary in lieu of the notice. The Respondent neglected to pay him salary for the days he worked in the month of June 2016.

12. The Claimant contended further that the Respondent failed to pay him for 34 unutilized leave days, and twelve months' pay for the extra duties as a Safety Officer.

The Claimant's Submissions

13. The Claimant's counsel filed his submissions identified three issues for determination:
 - i. Whether the claimant was employed on a permanent full-time basis by the Respondent.
 - ii. Whether the termination of the claimant was unfair, unlawful and wrongful
 - iii. Whether the remedies prayed for ought to be awarded.
14. On the first issue the claimant submits that there is sufficient evidence on record from which it can be deduced that he was in the employment of the Respondent on a permanent and full-time basis. The letter dated 11th February 2015 by the Respondent to I&M Bank clearly stated that the claimant was employed since September 2014 under permanent full-time employment. The same was also stated in its letter dated 28th January 2016 addressed to the High Commission of India.
15. It is further submitted that true as asserted, the claimant was assigned extra duties, those of a Safety Officer, and this can be discerned from his identification his staff identification card issued on the 1st of August 2015, and a Safety Management System Report he prepared regarding an incident that took place on the 23rd February 2015.
16. On the second issue that claimant submits that, it is now trite, that Sections 41,43,45 and 47[5] of the *Employment Act* provide the basic infrastructure on termination of employment. The provisions of the law provide what must be done in order for the termination to pass as lawful and fair.
17. The Claimant argues that his employment was unfairly terminated on the 13th June 2016. He was never issued with any warning letter, taken through any disciplinary hearing or issued with a notice setting forth the grounds upon which the employment was terminated. The Respondent breached the provisions of the law, above mentioned. To buttress this submission, the Claimant cites the holding in *Joseph Sohelo Mariko & Another vs Padya Mukesh t/a Relish Restaurant 2013* the court held that:

“Hearing before termination is mandatory pursuant to the provisions of section 41 of the *Employment Act*. The duty is upon the employer to hear the employee whatever misconduct has taken place. Even on the case of gross misconduct, an employee must be given a hearing unless such is not possible in the circumstances but such exceptional circumstances must be demonstrated by the employer. At the hearing, there are set safeguards that the employer must comply with.”
18. The claimant also relies on the holding in *CMC Aviation Limited vs Mohamed Noor* (2013) eKLR where the court stated that termination must meet the threshold for substantive justification and procedural fairness otherwise it will be unfair.
19. The claimant urges the court to allow the claim as prayed.

Respondents Submissions

20. The respondent highlights two issues for determination;



- i. Whether the Respondent had a valid reason for terminating the claimants Employment
 - ii. Whether the claimant is entitled to the reliefs sought.
21. On the first issue the Respondent submits that an employee who makes a claim for unfair termination or wrongful dismissal has a duty to discharge under section 47(5) of the *employment Act*, to prove that an unfair or wrongful dismissal occurred.
22. The Respondent submits that the Claimant was paid on hours done per flight, and how much, depended on the assignment given owing to the nature of the aviation industry. The Claimant’s employment was brought to an end pursuant to the terms of the employment contract, and therefore lawful and justified.
23. On the reliefs sought by the Claimant, the Respondent submits that he is not entitled to any as all that he did was to through figures to court without placing forth any evidence in support. Reliance is placed on the holding by this Court In *James Orwaru Nyaundi vs Kilgoris Klassic Sacco Limited*, (2022)eKLR that;

“It is not enough for the claimant to just give figures to court asserting that he or she is entitled to them, crossing their fingers and hoping that the respondent does not place before court documents and a consequence of the failure say....’Behold the claim is proved the employer has not tendered in any evidence any documents.’ The claimant must if he or she has to succeed in the claim, be specific on the days when he worked overtime, the specific public holidays, when he worked and wasn’t paid for.”

Analysis and Determination.

23. After careful consideration of the pleadings, evidence on record and the submissions the issues for determination are;
- i. Whether the claimant was employed by the Respondent on a permanent basis?
 - ii. Whether termination of the Claimant’s employment by the Respondent was unfair?
 - iii. Whether the Claimant is entitled to the prayers sought?

Whether the Claimant was employed by the Respondent on a permanent basis.

24. It was the Claimant’s case that he was initially contracted by the Respondent, Africa Express Airways, as a First Officer on the CRJ series aircraft on a per hour basis in July 2014. That subsequently, the terms of his employment changed to permanent and full time. The Claimant asserted that despite several requests, the Respondent did not reduce his contract of service into writing. Section 9 of the *Employment Act* provides;
- 1. A Contract of service –
 - (a) For a period or number of working days which amount in the aggregate to the equivalent, of three months or more; or
 - (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months shall be in writing.



2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by employee in accordance with subsection [3]
25. No doubt, the contract of service of the Claimant was one that the Respondent was by law required to reduce into writing for necessary execution. The Respondent didn't place before this court evidence justifying why it didn't adhere to the provision of the law, or rebut the Claimant's evidence that despite several requests, it did not do that which the law expected of it. By reason of this, coupled with other factors as will emerge hereunder, I will agree with the Claimant's evidence.
26. To demonstrate to Court the exact nature of his employment as at the material time, the Claimant tendered before this Court a letter by the Respondent's Director of Flight Operations addressed to the Manager I & M Bank Limited which read in part;

“RE: Jameel Parmar – Appointment

“We hereby wish to confirm Mr. Jameel Parmar having been employed with African Express Airways [k] Ltd since September 2014 under Terms of Contract as below;
First Officer on CRJ type aircraft Permanent full-time employment from the 3 above mentioned date
Monthly Gross remuneration paid in USD as mutually agreed.
Medical cover during the tenure of his employment.
In the event of termination/resignation, to serve One Month's termination notice.
Additional monetary allowance as per company policy [where applicable.

In view of the above, we will highly appreciate all the assistance provided to our employee.

Thanking you in advance.”

27. For the purpose forestated, the Claimant tendered as evidenced a letter by the said director addressed to the High Commission of India, letter dated 28th January 2016. It read;

Re; Tourist Visa Application Assistance for Jameel Ashvinkumar Parmar-xxxx

I hereby wish to confirm that Jameel Ashvinkumar Parmar of passport No. xxxx has been a full-time employee at Africa Express Airways since September 2014 to date. He has been employed as a First Officer on the CRJ under the Flight Operation Department remunerated monthly as agreed by both parties.

I would like to request the High Commission in providing whatever assistance necessary for application to obtain a visa for his travel.....”

28. Flowing from this unchallenged evidence of the Claimant, I am persuaded by the Claimant that his employment was on a permanent and full-time basis.

29. Section 10[1] of the Act stipulates particulars that must be incorporated in a contract of employment contemplated under section 9. Section 10[7] provides;

“If in any legal proceedings an employer fails to produce a written contract or particulars prescribed in subsection [1] the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

The legal burden embodied in this provision, burden which it was duty for the Respondent to discharge, was not discharged in the circumstances of this matter. A legal burden is



discharged by the person bound to, by adduction of evidence. The Respondent adduced none.

30. The Respondent's counsel submitted that the Claimant would only be engaged as and when there was an assignment. This submission finds no support in evidence as the Respondent didn't adduce any. I disregard the submissions.

Whether the termination of the Claimant's Employment was fair.

31. Whenever a court is invited to interrogate fairness in an employee's dismissal or termination of an employee's employment, the court has to consider procedural and substantive fairness. The two constitute the total unit of fairness, in matters termination of employment. Absence of both or any one of them, deprives of the termination the character of fairness, and the ability to pass the fairness test. As submitted by counsel for the Claimant, both the substantive and procedural fairness requirements are statutory. Section 41 and 45[2], of the Act, speak to procedural fairness, whilst Sections 43, 45[2], 45[5] and 47[5] speak to substantive fairness.
32. Section 41 of the Act provides for a mandatory procedure that must be followed by any employer intending to terminate an employee's employment, or summarily dismiss an employee. The fair procedure contemplated under the section has four components, the notification component- the employer must notify the employee of his or her intention, and the grounds arousing the intention, second, the hearing component- the employer has to give the employee an adequate opportunity to prepare and defend himself against the grounds, third, right of accompaniment- the employee shall be allowed to be accompanied to the hearing with a colleague[if the employee is not a member of a trade union] or a union representative [if the employee is a member of a trade union]. Lastly, the consideration component-the employer has to consider the representation[s] by the employee and or the accompanying person, before making a decision.
33. It was the Claimant's testimony that the Respondent didn't adhere to the provisions of section 41. His evidence on the non-adherence was not rebutted. Further, the duty to prove that the fair procedure obtained in the decision to terminate or summarily dismiss. No doubt, by reason of absence of any evidence from the Respondent, the burden was not discharged.
34. By reason of the premises, I conclude that the termination of the Claimant's employment was procedurally unfair.
35. Section 43 of the Act places a duty on the employer to prove the reasons for the termination of an employee's employment in a dispute as is herein. Section 45 of the Act imposes a further burden on the employer, to prove that the reason[s] for the termination was fair and valid. In the circumstances of this matter as hereinabove set forth, I hesitate not to conclude that the burdens were not discharged and consequently the termination was without substantive justification.
36. Considering the Claimant's pleadings, and evidence on the procedural and substantive fairness of the termination, I am convinced that prima facie he has demonstrated that the termination lacked fairness. He discharged the burden of proof under section 47[5] of the Act.

Whether the Claimant is entitled to the reliefs sought.

37. The Claimant sought for a declaration that the Respondent infringed and violated his rights and freedoms. It is trite law now that any person asserting that his or her constitutional rights and or freedoms have been infringed upon, must plead with particularity what rights and or freedoms and the manner how. I have carefully considered the pleadings by the Claimant, they suffer destituteness



in, particularizing the rights and freedoms infringed upon, and content on how. Consequently, this court declines to make this declaration sought.

38. The Claimant further claimed that the Respondent failed to pay him salary for the month of June 2016 and sought to be awarded USD, 4,500. The Court notes that in his pleadings and testimony, the Claimant asserted that his employment was terminated on the 13th June 2016. I am consequently unable to decipher what informs his quest to be paid for the entire month of June. I can only order a prorated payment under this head, therefore USD, 1,950, otherwise the Claimant shall have been allowed to make a lottery out of the court process.
39. Having found as I did hereinabove that the Claimant was in an employment that was in nature permanent and full time, it is one that was terminable by a one month's notice or payment on a month's salary in lieu of the notice, pursuant to the provisions of section 35 as read with section 36 of the Act. Upon basis of the evidence by the Claimant, I hold that the notice wasn't issued. Consequently, the Claimant is awarded one month's salary in lieu of notice, USD, 4,500.
40. The Claimant's evidence that he was assigned extra duties at a monthly pay of USD 500, and that for a period of 12 months he was not paid for the extra duties in the position of Safety Officer, was not challenged. I am persuaded to award him the sums claimed under this head, USD, 6000.
41. Equally, his evidence on the claim that at the time of termination he had 34 unused leave days was not controverted, this court awards him compensation for the days, KShs. 5,100.
42. In my view the Claim for Medical cover,2,090 is one that must fall. In its nature, Medical cover is an employment benefit that is never paid directly to an employee, not unless specifically provided for in an employment contract or where for one reason or the other, the employee has out of his own funds settled a medical bill, and the employer reimburses him or her. It is normally paid directly to the medical service provider when the provider offers the service.
43. The Claim for house allowance was just thrown to this court, no evidence was led to establish the Claimant's entitlement to the same. Courts grant only proved reliefs. The Court declines to make the award for the figures sought for house allowance.
45. Gratuity just like the name suggests is a benefit paid to an employee by the employer in gratitude for the services rendered. It is not a statutory benefit. It is a contractual benefit, which can only be granted by court if it is demonstrated, that it was provided for in the employment contract. In this matter, the Claimant did not place any evidence before me to prove that gratuity was a contractual entitlement to him.
46. The Claimant sought for a compensatory relief for unfair termination. Section 49[1][c] of the Employment Act bestows authority on this court to grant the relief sought. Exercise of the authority is discretionary. The grant and extent of the same is dependent on the circumstances of each case. I have considered that, the termination of the Claimant's employment was without adherence to the statutory requirements on procedural and substantive fairness, it has not been demonstrated that the Claimant contributed in any manner to the termination, the industry in which he was serving, the fact that he has not obtained another job, and hold that he is entitled to the relief and to an extent of 6 months gross salary, Kshs. USD, 2700.
47. In the upshot, judgement is hereby entered in favour of the Claimant in the following terms;
 - A]. A declaration that the termination of his employment was procedurally and substantively unfair.



- B]. Salary for the days worked in June 2016..... USD. 1,950.
- C]. One month's salary in lieu of notice..... USD. 4,500.
- D]. Compensation for unused leave day.....USD 5,100
- E]. Compensation pursuant to section 49[1][c] of the *Employment Act* UD 2,700.
- F]. Costs of this suit.
- G] Interest on the sums awarded above at court rates from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023.

OCHARO KEBIRA

JUDGE

In Presence of

Ms. Wanyui for the Claimant.

Mr. Omwenga for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

