



**Macharia v Reliance Air Charter (Cause 85 of 2019)
[2023] KEELRC 1758 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 85 OF 2019**

**SC RUTTO, J
JULY 14, 2023**

BETWEEN

PAUL MAINA MACHARIA CLAIMANT

AND

RELIANCE AIR CHARTER RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent with effect from January 1, 2014 as the Director of Safety and Line Pilot until October 31, 2017 when he was unfairly and wrongfully terminated. He further avers that from the month of July, 2017 to October, 2017, the respondent unreasonably and without reasonable explanation wholly withheld his salary and the same had not been remitted to him upto the time of filing this Claim. It is on account of the foregoing that the claimant seeks against the respondent the sum of Kshs 7,565,345.00 being damages for wrongful and unfair termination, notice pay, withheld salary from July to October, 2017 and prorata leave pay.
2. Opposing the Claim, the respondent avers that the claimant having attached a resignation letter addressed to a third party, cannot claim to have been its employee nor to have been terminated by the respondent. To this end, it put the claimant to strict proof. The respondent further denies owing the claimant any monies. In addition, the respondent counterclaimed against the claimant: -
 - a. The sum of Kshs 7,350,000.00 being training costs for 21 hours he was trained for Embraer 120.
 - b. The sum of Kshs 420,000.00 being the costs of his instrument rating renewal conducted on the Embraer 120 aircraft.
 - c. The sum of Kshs 900,000.00 being costs incurred in engaging a freelance pilot during the claimant's period of absenteeism.



3. The claimant filed a Reply to the Memorandum of Response and counterclaim through which it has denied the respondent's averments and reiterated the contents of his Statement of Claim. In response to the counterclaim, the claimant avers that he started flying as early as the year 2008 and on May 16, 2010, he was in possession of a United States Licence Certificate No 3386227. That therefore, at the time of his employment, he was not a trainee pilot. That he was only a trainee for purposes of flying Embraer 120 and he paid the costs of the training to the tune of Kshs 973,000.00, directly to the respondent vide an inhouse cheque No 000017 on March 27, 2017. Consequently, the claimant asked the Court to dismiss the respondent's defence and counterclaim.
4. During the trial which proceeded on November 22, 2022 and March 6, 2023, both sides called oral evidence.

Claimant's Case

5. The claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He also produced the documents filed on his behalf as exhibits before Court.
6. In his evidence, the claimant stated that he was not given a written contract to sign but was issued with a staff ID and badges for identification of employees among other things. Prior to his appointment as a Director of Safety in January, 2014, the respondent had already forwarded his name to the Kenya Civil Authority on July 18, 2013 where he was amongst the proposed management personnel. That negotiations were still ongoing between him and the respondent. On this issue, he referred to emails from the respondent's CEO, Captain Chris Mutuku where he had started engaging him to familiarize himself with Regulation 56 of the [Civil Aviation \(Air Operator Certification and Administration\) Regulations](#) as at December 30, 2013.
7. He stated that on the day he was terminated, he was in absentia working in Mogadishu. That the termination was verbal.
8. The termination was confirmed by the respondent's CEO on November 22, 2017 via email when he promised that he would be paying him salary up until September 30, 2017 when he ceased being an employee. This was incorrect given the fact that he worked for the respondent until October 30, 2017. Since then, he has only received payment once in the month of December 2017, which payment was for the month of June 2017. Since then the respondent is yet to make further payments. The respondent always had an issue with payment of salaries and there were delays with payment of the same.
9. From July 2017 to October 2017, he never received his salary. The respondent never gave him any reasonable explanation as to why there had been delay in paying the same.
10. It was his further evidence that in December, 2017 he was forced to write to the Kenya Civil Aviation Authority that he was no longer representing the respondent as the Director of Safety so that he is not held culpable for any acts with the Company in that position.
11. Sometime in April 2018, he reported to the Ministry of Labour & Social Protection, at the sub-county labour office in Industrial Area, asking for assistance in helping him get remedies against the respondent. The labour office tried following up to no avail.
12. The claimant further averred that time and again, the respondent through its advocates have been adamant that he is a stranger to the said Company and that he was simply a busy body despite the years of hard work he put in the Organization.



Respondent's case

13. The respondent called oral evidence through its Head of Operations and Director, Mr. Chris Mutuku, who testified as RW1. At the outset, he also adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
14. RW1 stated in evidence that the claimant was engaged by the respondent as a trainee pilot and it is on this basis and on the need by the respondent to comply with the Kenya Civil Aviation Regulations - Air Operator Certification and Administration Regulations that he was designated as the respondent's Safety Officer. The designation was never meant to be and did not serve as a formal employment of the claimant as a Pilot.
15. It was his further evidence that at the time the claimant joined the respondent as a trainee, he did not hold the requisite professional qualifications nor certifications to fly any of the Aircrafts operated by the respondent and could not therefore be employed as a pilot with the respondent as alleged.
16. That the claimant was to undertake training for purposes of acquiring Embraer 120 Aircraft experience as required by the Kenya Civil Aviation Authority before the KCAA could endorse this type of aircraft on the claimant's license which would by law allow him to fly it.
17. RW1 further stated that between February and June 2017, the claimant at his own cost went to Brazil for Simulator Training on the Embraer 120 Aircraft. That on diverse dates between the June 12, 2017 to the June 20, 2017 the claimant was further trained by the respondent at its own cost. The claimant spent a total of 21 hours training on the respondent's Embraer 120 Aircraft at the Standard Market cost US\$ 3,500 per hour amounting to a total of US\$ 73,500 (Kshs 7,350,000.00) paid for by the respondent.
18. It was his further evidence that the claimant spent a total of 13 hours renewing his instrument rating on the respondent's Embraer 120 Aircraft at the Standard Market cost US \$ 3,500 per hour amounting to a total of US\$ 4,200.00 (Kshs 420,000.00) paid for by the respondent. That indeed, it was only in July, 2017 that the claimant was certified by the Kenya Civil Aviation Authority to fly the Embraer 120 Aircraft operated by respondent upon completion of the said Training.
19. RW1 further stated that the claimant at the time of joining the respondent was certified to fly only the Cessna 208 Aircraft, which the respondent does not own or operate.
20. He further stated that the respondent renewed the claimant's Instrument Rating for the year 2017-2018 at its cost. The agreement between the parties being that both the cost incurred in the training on the Embraer 120 aircraft and in the renewal of the claimant's instrument rating would be recouped incrementally via work hours he would be assigned by the respondent.
21. He further stated that prior to certification to fly the Embraer 120 Aircraft, the claimant would work as a freelance pilot on a Cessna Caravan Aircraft (Registered as 5Y-LIM) operated by Timbis Airlines and managed by the respondent on a need basis and would be paid per hour as a freelance pilot. The claimant was paid fully for all hours spent on this aircraft save for the sum of US\$ 907.05.
22. It was his evidence that immediately upon receiving his certification for the Embraer 120, the claimant absented himself without justifiable cause between August and October 2017 forcing the respondent to engage a freelance pilot for at a total cost of US\$ 9,000.00 (Kshs 900,000.00) for 3 months.
23. The respondent was shocked when in December, 2017 it received notification from the regulator, the Kenya Civil Aviation Authority that the claimant had resigned his position as the respondent's designated Safety Officer. It was his testimony that the claimant had at no time indicated his intention



to leave the Company. He contended that the same was timed to correspond with the Inspection Audit to be conducted by the Regulator KCAA for the renewal of the respondent's Air Operator Certification for 2018.

24. In RW1's view, the claimant has all along proceeded with bad faith and malice in attempts to arm twist the respondent into paying him monies not owed to him.

Submissions

25. The claimant submitted that from 1st January 2014 to October 31, 2017, he was wearing two hats, that of a Director of Safety and a Line Pilot for the respondent. It was his further submission that the rules of natural justice dictate that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. In support of this argument, the claimant placed reliance on the case of *Elizabeth Kioko vs Beyene Haire Warde & another* (2018) eKLR.
26. The claimant stated in further submission that his termination did not pass the fairness test as there was neither substantive justification nor procedural fairness.
27. On the other hand, the respondent submitted that from the time, the claimant purports to have been employed as a pilot, he did not have the qualifications or the type ratings and approvals to fly either as a Co-pilot or as a Pilot in Command (captain) of any of the Aircrafts in its fleets which included a Cessna Citation C650, Beechcraft 1900C. That it was not until July 4, 2017 when he received the type rating endorsement and approval from the Kenya Civil Aviation Authority to fly the Embraer 120 aircraft on its fleet as a co-pilot under supervision pending approval by its insurance to fly as a co-pilot without supervision.
28. It was further submitted that up until the time he absented himself in September 2017, the claimant had not entered into an employment contract with the respondent as he was a pilot trainee on the Embraer 120 and had not been approved by its insurance to fly as a co-pilot without the requirement of a safety pilot. As such, the respondent submitted that the relationship between with the claimant does not meet the one envisaged under Section 2 of the *Employment Act* and it urged the Court to so find.
29. The respondent also argued that since there existed no employer-employee relationship between itself and the claimant there would be no unfair or unlawful termination.
30. It was the respondent's further submission that after the claimant's training on the Embraer 120 aircraft and certification by the Kenya Civil Aviation Authority, the claimant became a no show at its offices sometime in September 2017 and only reached out via email in October to follow up on the delayed payment arrears. That no evidence whatsoever has been tendered by him to show when and how it was effected.
31. The respondent further argued that the claimant having failed to adduce evidence in support of termination, has failed to satiate the burden of proof of unlawful termination of employment as provided under Section 47 (5) of the *Employment Act* and his claim should be dismissed.

Analysis and determination

32. Flowing from the pleadings on record, the evidentiary material before me as well as the opposing submissions, it is clear that the Court is being called to resolve the following questions: -
- i. Whether there was an employment relationship between the parties;



- ii. If the answer to (i) is in the affirmative, whether there was a justifiable reason to terminate the employment of the claimant;
- iii. Whether the claimant was afforded procedural fairness prior to termination;
- iv. Is the counterclaim justified?
- v. Is the claimant entitled to the reliefs sought?

Employment relationship?

33. The position taken by the respondent in this matter is that it had no employment relationship with the claimant. It was the respondent's case that it only engaged the claimant as a trainee pilot. On the other hand, the claimant maintains that he was an employee of the respondent and that he was never issued with a written employment contract.
34. An employment relationship is the legal link that exists between an employer and an employee and gives rise to certain rights and obligations. Ordinarily, a contract of service is what signifies the existence of an employment relationship. Be that as it may, the *Employment Act* makes provision for oral contracts of employment where the employment period does not exceed three months. In such a case, existence of the employment relationship can be discerned from the conduct of the parties.
35. Pursuant to Section 2 of the *Employment Act* an "employee" is defined to mean a person employed for wages or a salary and includes an apprentice and indentured learner. While an "employer" is defined to mean

"any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company."
36. On the other hand, a "contract of service" is defined to mean

"an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies".
37. Applying the above statutory definitions to the instant case, the record reveals the existence of an employment relationship between the claimant and the respondent. I say so for several reasons. First, the claimant exhibited an email dated 22nd November, 2017 from RW1 which reads as follows:

"Good afternoon Paul,

Following your email below, we hereby inform you that we shall be paying your salary arrears upto 30th September, when you ceased being an employee of Reliance Air Charters. I trust you have received our other email on the remuneration.

We wish you all the best in your future endeavours.

Best regards."
38. Noting the contents of the email reproduced above, I cannot help but question why RW1 would refer to the claimant as an "employee" if he was not one and further, why would he be referring to payment of "salary arrears" in absence of an employment relationship?



39. Second, the claimant exhibited copies of minutes of what seemed to be a staff meeting held on August 31, 2017. What is notable from the said minutes is that the items on the Agenda included salaries and job contracts. What's more, the claimant who was one of the attendees in the meeting was designated as a Director of Safety. This is a further confirmation of the existence of an employment relationship between the claimant and the respondent. The respondent's assertion that the claimant was designated as a Director of Safety for purposes of complying with the Kenya Civil Aviation Regulations does not hold water. I say so because the respondent did not provide a plausible explanation as to why the claimant attended a meeting where matters relating to salaries and job contracts were up for discussion.
40. Third, the claimant exhibited copies of his payslips and salary statements. Notably, the salary transfer is from the respondent and is in favour of the claimant. Again, I question why the respondent would be paying salary to a person who is not its employee?
41. What can be deduced from the foregoing is that the relationship that existed between the parties was that of employer employee within the context of the *Employment Act*. Regardless of the fact that the relationship was not reduced into a formal contract of employment, the bottom line is that the parties herein conducted themselves in the manner an employer and employee would ordinarily conducted themselves. I have no reason to believe otherwise.
42. That said, I now move to determine whether there was a justifiable reason to terminate the claimant's employment.

Justifiable reason for termination?

43. Section 43(1) of the *Employment Act* requires an employer to prove the reasons for termination and failure to do so, 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; ...
44. The significance of Section 45 (2) (a) and (b) is that the reason for termination must pass the "fairness and "validity" test. Accordingly, beyond proving existence of reasons to justify termination, an employer is required to prove that the said reasons were fair, valid and related to the employee's conduct, capacity or compatibility.
45. Turning to the instant case, the claimant avers that he was verbally terminated in absentia while the respondent avers that the claimant absented himself without justifiable cause from August to October, 2017 following his training on the Embraer 120 aircraft. On his part, the claimant stated that at the time, he was in Mogadishu for work.
46. In support of his case, the claimant exhibited copies of Aircraft Technical Logbook and Maintenance Records in respect of Aircraft Registration No 5Y-RAC from 1st, 3rd, 4th, 5th, 6th, 7th and 14th August, 2017. From the record, the said Aircraft was being operated by the respondent. It is notable that the respondent did not discount the said aircraft logs. Further, the respondent did not satisfy its evidential burden by proving that indeed, the claimant was absent from work as alleged.
47. As has been held severally by this Court, it is not enough for an employer to state that an employee has absented himself from work without lawful authority. The onus is on the employer to demonstrate



the action it took upon ascertaining the employee' absence from work. In this case, for instance, there is no evidence that the respondent attempted to contact the claimant to establish his whereabouts and explain his absence from work. It is apparent that the parties herein largely used electronic mail to correspond. Why didn't the respondent reach out to the claimant through email to enquire his whereabouts or put him on notice that it was contemplating terminating his services on account of his absence from work?

48. As was held in the case of [*Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme*](#) [2015] eKLR: -

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”

49. I reiterate the finding in the above case and apply the same herein. Accordingly, I am led to conclude that the respondent has not proved to the requisite standard that the claimant absented himself from work, thus availing it a reason to terminate his employment.

Fair process?

50. Section 45 (2) (c) of the [*Act*](#), requires an employer to comply with the requirements of a fair process and prove that it accorded an employee a fair hearing prior to termination from employment. The specific requirements of a fair hearing are provided for under Section 41 of the [*Act*](#) 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.”

51. From the record, there is no evidence that the claimant was subjected to the process contemplated under Section 41 of the Act. I say so because there is no evidence in the form of a notice requiring the claimant to respond to the allegations of absence and to appear in a forum where he would have been given an opportunity to defend himself appropriately.

52. It is instructive to note 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 vs Andrew K. Tanui*](#) [2019] eKLR)

53. In the circumstances, I arrive at the inescapable conclusion that the claimant's termination was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the Act.



54. The total sum of my consideration is that the claimant's termination was neither fair nor lawful hence was unjustified.

Counterclaim

55. The respondent has made three claims against the claimant. The first claim is in respect of a sum of Kshs 7,350,000.00 being training costs for 21 hours he was trained for Embraer 120. Defending the counterclaim, the claimant stated that he paid for the simulator training in Brazil from his own pocket. To this end, he exhibited a copy of an email from RW1 stating as follows: -

“We shall train as a group but each of us shall however be required to pay for their own training as well as airfare, hotel accommodation and living expenses.”

56. He further exhibited bank statements showing that he transferred a sum of Kshs 973,750.00 to the respondent company. RW1 confirmed as much in his testimony hence I take it that there's no dispute as to the costs of the simulator training in Brazil.
57. With regards to the training costs the respondent claims it incurred in June, 2017, on behalf of the claimant, it is also noteworthy that it failed to adduce evidence to confirm that indeed, it made any payments to that effect. Indeed, there was no evidence of any payment made by the respondent to the tune of Kshs 7,350,000.00 for purposes of the claimant's training as claimed. For this reason, I cannot help but find that the respondent failed to prove its claim to this extent.
58. The respondent has further claimed against the claimant the sum of Kshs 420,000.00 being the costs of his instrument rating renewal. Again, the respondent failed to prove that it incurred the said amount as claimed. On this account, the respondent's claim to this extent falls.
59. With regards to the claim for Kshs 900,000.00 alleged to have been spent by the respondent in engaging a freelance pilot during the claimant's absence, it is notable that despite the respondent exhibiting an invoice from one Stephen Tumkou, it did not attach the attendant contract to confirm the engagement. This is moreso noting that the invoice is dated 1st February, 2018 whereas by then, it is common ground that the claimant had left the respondent's employment. This gap raises doubt as to whether the invoice is in respect of a service rendered to the respondent during the time the claimant was alleged to have deserted duty. It may very well have been for a service rendered way after the claimant had exited service. On this account, it is my finding that this claim has not been satisfactorily proved to the requisite standard.
60. In total sum, the counterclaim collapses for want of proof.

Reliefs?

61. As the Court has found that the respondent has failed to prove that it had justified reason to terminate the claimant's employment and that it subjected him to a fair process, the Court awards the claimant one (1) month's salary in lieu of notice and compensatory damages equivalent to four (4) months of his 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.
62. The claimant is further awarded withheld salary for the months of July to September, 2017 as there is no evidence that the respondent paid the same or that the claimant was not at work during the period in question. From the claimant's email of December 29, 2017, the salary pending at the time, was US \$ 7,858.96. I will go by this figure.



63. The claim for prorated leave pay succeeds as the respondent has failed to avail the claimant's leave records in accordance with its obligations under Section 74(1) (f) of the Act.

Orders

64. Against this background, I enter Judgment in favour of the claimant against the respondent and he is awarded: -
- a. One (1) month's salary in lieu of notice being Kshs 424,225.00.
 - b. Compensatory damages in the sum of Kshs 1,696,900.00 being equivalent to four (4) months of his gross salary.
 - c. Outstanding salary arrears being Kshs 817,331.84.
 - d. Prorated leave pay for 2017 being Kshs 247,464.58.
 - e. The total award is Kshs 3,185,921.42.**
 - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The counterclaim is dismissed.
 - h. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Orende

For the Respondent Mr. Ngira

Court Assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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

