



**Kashero v Five Forty Aviation Limited (Cause 2097 of 2017)
[2023] KEELRC 2368 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2368 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2097 OF 2017
JK GAKERI, J
OCTOBER 5, 2023**

BETWEEN

BRIAN NSHAU KASHERO CLAIMANT

AND

FIVE FORTY AVIATION LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 17th October, 2017 alleging unfair and unlawful summary dismissal by the Respondent.
2. The Claimant prays for;
 - a. A declaration that the termination of employment was unfair and unlawful.
 - b. Unconditional Reinstatement without loss of benefits or in the alternative;
 - c. Payment of benefits amounting to Kshs.4,079,499/= comprising;
 - i. One month's salary in lieu of notice.
 - ii. Outstanding salary for June, July and August.
 - iii. 81 accrued leave days.
 - iv. Refund of training fees.
 - d. Costs and interest.
 - e. Maximum compensation for unfair termination.



The Claimant's case is pleaded as follows;

3. The Claimant avers that he joined the Respondent on 23rd June, 2014 as a First Officer of the CJ Fleet and served diligently.
4. That on 14th June, 2017, he was summoned by the Chief Pilot, Mr. Kunal Patel for a meeting at the head office and present were Mr. Kunal Patel, Nixon Ooko and Mr. Mohamed Ahmed.
5. That he was asked about an alleged bribe given to the pilot, one George Okweyo to carry a passenger on Flight No. 5H724 from Juba International Airport to JKIA, Nairobi.
6. That he accompanied two Flying Squad Officers, Mr. Shiundu and Kenei to Integrity Centre where he recorded a statement and was released at 3.30 pm.
7. The Claimant avers that he fell ill on 15th June, 2017 and sought treatment at Sky Clinical Services on 16th June, 2017 and was diagnosed as medically unfit to fly and was given 2 weeks off-duty and was still unwell and was accorded another 10 days off-duty.
8. The Claimant further avers that he received a notice to show cause on 28th July, 2017 and responded, another letter on 3rd August, 2017 and responded and a further letter on 7th August, 2017.
9. That his employment was terminated on 14th August, 2017.

Respondent's case

10. The Respondent avers that the undated Employment Contract on record related to training as paragraph 1, line 2 attests and the sum of USD25,000 which the Claimant paid was his contribution for the training and was engaged as a First Officer on 10th September, 2015 on the CRJ Fleet on the terms stipulated in the agreement of even date and the previous contract had lapsed.
11. That the sum of USD25,000 was not a term of the new contract and the Claimant made no claim when he signed the new contract. In any case, the amount had served its purpose.
12. It is the Respondent's case that the Claimant's net salary was Kshs.327,501/=.
13. That the Claimant's salary for June and July was paid in accordance with Clause 11 of the Contract of Employment and the law.
14. It is the Respondent's case that it was concerned that the Claimant was taking alcohol while on official sick off unauthorised by doctors and Dr. Gatabaki confirmed the presence of alcohol in his blood system.
15. That the Kenya Civil Aviation Authority Act and Regulations requires the Respondent monitor its pilots to ensure safety of the public, staff and the aircraft.
16. The Respondent avers that the risk of retaining the Claimant in employment after confirming that he had taken alcohol while on sick-off was enormous and the decision was taken to terminate his employment.
17. It is the Respondent's case that the Claimant was accorded a fair hearing but could not defend himself satisfactorily.
18. The Respondent avers that the Claimant allegedly swindled the Respondent's money and took alcohol while on sick-off.



19. The Respondent denied that the Claimant had 81 outstanding days leave but does not indicate that he proceeded on leave at any point.

Evidence

20. The Claimant adopted the written statement dated 9th October, 2017 and produced the exhibits on record.
21. The Claimant testified that he joined the Respondent on 23rd June, 2014 as a First Officer on the CRJ Fleet and admitted that there were two contracts on record and leave days were reduced from 30 to 21 days per year and the salary rose from Kshs.275,000/= to Kshs.325,000/=.
22. The witness testified that he paid USD25,000 for the training on typing for the CRJ training which took 3 months and started flying in September 2014. That he trained in Spain.
23. The witness further testified that he was not invited for a disciplinary hearing or notified of the right to have a representative and no investigation was conducted.
24. That he was neither given notice nor paid in lieu of notice and was not paid his dues.
25. The hearing date was taken by consent on 13th August, 2021 but on 2nd December, 2021, the Respondent's counsel was not ready and the hearing was adjourned to 19th January, 2022 when the Respondent was absent and the Claimant was not ready and the hearing was postponed to 16th May, 2022 and took place and the Claimant's case was closed.
26. Subsequently, the Respondent applied for the re-opening of the Claimant's case. The court declined but allowed the Respondent to present its case but was not ready to proceed on 31st January, 2023 as well as on 12th April, 2023. After hearing submissions by counsel on the issue, the court closed the Respondent's case and directed parties to file submissions.
27. The Claimant's counsel requested for 14 days and the Respondent's counsel 21 days after service.
28. The Respondent was accorded 21 days but had not filed by 8th August, 2023 when the court retired to prepare this judgement even after being accorded another 14 days effective 25th May, 2023.

Claimant's submissions

29. Counsel isolated three issues for determination on the effect of the Respondent's failure to adduce evidence, whether termination of the Claimant's employment was unfair and entitlement to the reliefs prayed for.
30. On the Respondent's failure to call a witness, counsel submitted that the Respondent's evidence remained as mere allegations as held in *Edward Muriga Through Stanley Muriga V Nathaniel D Schuler Civil App. No. 23 of 1997*.
31. Reliance was also made on the provisions of Section 107 of the *Evidence Act* on the burden of proof and Section 43 of the *Employment Act*, 2007.
32. Counsel submitted that pleadings were not evidence.
33. As to whether termination of the Claimant's employment was unfair, counsel submitted that although the Claimant was terminated because he showed signs of intoxication, he was on sick-off on the date he was tested on 7th July, 2017 due to resume work at a later date.



34. Counsel submitted that for the offence of intoxication to be established, the employee must have been on duty.
35. Counsel invited the court to note that the Respondent directed the Claimant to report for a medical examination without approval of the Kenya Civil Aviation Authority.
36. That the alleged test report was flawed and amounted to substantive unfairness as the dates on the report were incorrect, was presumptive and inconclusive as the CDT test was not conducted.
37. That the Claimant did not provide false information about alcohol consumption.
38. On procedural aspects, reliance was made on the provisions of Section 41 of the *Employment Act*, 2007, Article 47 of *the Constitution* of Kenya, 2010 and Section 4 of the *Fair Administrative Action Act*, 2015 to urge that the Respondent did not accord the Claimant a hearing and he was not notified of the right of appeal.
39. Finally, as regards the reliefs sought, counsel submitted that the Claimant's basic salary was Kshs.457,378/= as per the copies of the payslips on record, that his outstanding salary was Kshs.1,372,134/=, 81 days leave and refund of training fees.

Findings and determination

40. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
41. Before delving into the foregoing issues, it is important to determine the effect of the Respondent's failure to avail a witness or cross-examine the Claimant as held in *Monica Kanini Mutua V Al- Arafat Shopping Centre and another* (2018) eKLR.
42. It is trite that in an undefended claim, the Claimant must show not only that he was an employee of the Respondent but also that termination of his/her employment was unfair.
43. In *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2018) eKLR, Abuodha J. expressed himself as follows;

“ This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings which are not backed by any evidence and expect the court to find in his or her favour.”
44. In a nutshell, the Claimant is still obligated to prove his or her case on a balance of probabilities.
45. Closely related to the foregoing and as correctly submitted by the Claimant's counsel and as the courts have held, pleadings are not evidence unless admitted by the other party. (See *Francis Otile V Uganda Motors Kampala HCCS No. 210 of 1989*, *Mohammed & another V Haidara* (1972) EA 166).
46. In *Edward Muriga V Nathaniel Schulter* (Supra), the court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed.
47. (See also *CMC Aviation Ltd V Cruisar Ltd* (No. 1)(1978) KLR, *Avtar Singh Bahra and another V Raju Govindji HCCC No. 548 of 1998* among others).



48. In the instant case, there is overwhelming evidence and admission by the Respondent that the Claimant was its employee.
49. As to whether termination of the Claimant's employment was unfair, the homeport are the relevant provisions of the [Employment Act, 2007](#) and judicial articulations on termination of employment.
50. In a nutshell, the provisions of Sections 35, 41, 43, 44, 45 and 47(5) of the [Employment Act, 2007](#) prescribe the bullwark on termination of employment.
51. A summary of the essential provisions was provided by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, as follows;

“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (Section 43); prove the reasons are valid and fair (Section 45); prove that the grounds are justified (Section 47(5)), among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination . . .”
52. For a termination of employment to pass the fairness test, it must be shown that there was substantive justification for the termination and it was conducted in accordance with a fair procedure, as elegantly captured by Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR.
53. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant suit.

Reasons for termination

54. The Claimant's counsel submitted that termination of the Claimant's employment was substantively unfair as the reason given was not proved nor had the Respondent been authorised by the Kenya Civil Aviation Authority (KCAA).
55. According to the letter of termination dated 14th August, 2017, the reason was that after a pre-notified company medical (examination), the Claimant's blood showed signs of alcohol intoxication and the Respondent had lost trust in entrusting the Claimant with its aircrafts, staff and passengers.
56. According to the Respondent, the Claimant had not explained the presence of alcohol in his blood satisfactorily.
57. It is not in dispute that on 14th June, 2017, the Claimant attended a meeting at the Respondent's head office and the issue of alleged corruption in a flight he was the First Officer was discussed and he later recorded a statement at the Integrity Centre.
58. It is also evident that on 16th June, 2017 the Claimant was attended to at the Sky Clinical Services. Strangely, the doctor's hand written note of even date had neither a diagnosis nor the treatment administered. It merely stated that the Claimant had been reviewed. It is unclear whether he had been there before as this was a review, and had been found medically unfit for flying duties and would be reviewed two weeks later.
59. In a more detailed letter dated 4th August, 2017, obtained at the instigation of the Respondent, the doctor stated that the Claimant complained of fatigue and was grounded to rest and recover.



60. The letter states that upon review on 30th June, 2017, the Claimant was still feeling unwell and fatigued and was referred for a physical evaluation and investigation and was attended to by a Dr. Mahmud on 1st July, 2017 at the Nairobi South Hospital and was given 10 days off-duty to recover, making a total of 24 days of sick leave.
61. The doctor indicated that the Claimant was placed on anti-biotics and anti-inflammatory.
62. Like in the earlier visitation, neither a diagnosis nor a prescription was provided.
63. As expected of a good employer, the Respondent was concerned by the extended sick-off by the Claimant and arranged for an examination by an independent medical doctor, Dr. Gatabaki who examined the Claimant on 6th July, 2017 and whose report revealed that the Claimant's blood had 7 mg/dl of alcohol.
64. This discovery appear to have alarmed the Respondent because at the time, the Claimant was on sick-off and on medication. More significantly, the examination was pre-arranged.
65. The Respondent's interpretation of this discovery was that there may have been another problem, alcohol dependency.
66. The Claimant did not deny that there was alcohol in his blood or explain the circumstances.
67. In the court's view, the retort that he was not on duty could not avail him as he was not only on sick leave but on medication as well.
68. Regrettably, none of the doctors who reviewed the Claimant previously provided a diagnosis or prescription including what he was supposed to do or not do.
69. The Claimant adduced no evidence to the effect that any of the doctors authorised him to take alcohol.
70. Dr. Gatabaki was however emphatic that no alcohol would have been detectable if the Claimant had not used it for 24 hours before the blood sample was collected on 6th July, 2017 at 12.51 pm.
71. The Doctor advised that a more specific marker over a period of time would have required a CDT which was more expensive and takes longer as the country had no capacity to do the same.
72. Contrary to the Claimant's counsel submission about the dates on Dr. Gatabaki's letter, the Claimant admitted that he visited the doctor on 6th July, 2017 and provided a blood sample.
73. In the court's view, an erroneous date would not invalidate an outcome which the Claimant never contested.
74. The foregoing culminated in the show cause letter dated 28th July, 2017 which demanded doctor's approval to consume alcohol.
75. In his response dated 31st July, 2017, the Claimant stated that the unidentified drugs prescribed by the doctors had no restriction on alcohol consumption.
76. Clearly, the Claimant ignored the notice to show which requested for doctor's approval or non-restriction and no authorization had been provided by 7th August, 2017 according to the Respondent's letter of even date responding to the medical reports from the doctors. The letter insisted on confirmation by the doctors, which the Claimant did not avail and termination of employment followed on 14th August, 2017.



77. A second notice to show cause dated 3rd August, 2017 requested the Claimant to avail evidence of the illness and treatment which occasioned the 24 days sick leave in June and July 2017.
78. The Claimant forwarded the medical reports as evidence of the illness and treatment.
79. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by Section 43(2) of the *Employment Act*, 2007 which provides that;
- “The reason or reason 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.”
80. The court is further guided by the holding of the Court of Appeal in *Kenya Revenue Authority V Reuwel Withaka Gitahi & 2 others* (2019) eKLR as follows;
- “The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons it genuinely believed to exist causing to terminate the employee's services. That is partly a subjective test.”
81. The foregoing would appear to suggest that to the extent that the employer genuinely believed that a given state of affairs existed and can reasonably demonstrate the same, the requirement of a substantive justification or reason for termination of employment is satisfied.
82. The foregoing reasoning finds support in the sentiments of the court in *Galgalo Jarso Jilo V Agricultural Finance Corporation* (2021) eKLR where the court addressed the essence of substantive justification as follows;
- “All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exist even if it later turns out that it, in fact did not.”
83. The foregoing reason has its justification under the so called “Range of reasonable Response test” extracted from Halsbury's Laws of England, which has its focus as the reasonable employer.
84. Guided by the foregoing authorities and evidence on record, including the Claimant's responses to the notices to show cause and the documentation availed in support, it is the finding of the court that the Claimant has failed to demonstrate that termination of his employment by the Respondent was substantively unfair.
85. Documents on record reveal that the Respondent was concerned about the Claimant's absence from the work place for 24 days with an undisclosed illness until it demanded information which the Claimant ought to have availed without prompting.
86. To the Respondent, it is decipherable, the 7 mg/dl of alcohol in the Claimant's blood was a smoking gun in light of the circumstances the Claimant was in.

Procedure

87. On procedural fairness, the Claimant testified that he was not accorded a fair hearing nor was he notified of his rights.
88. Section 41 of the *Employment Act*, 2007 provides the procedural requirements to be complied with for a termination of employment to pass muster. Courts have endeavoured to isolate the specific requirements such as notification of the reasons why termination of employment was being considered



- and in a language understood by the employee, and in the presence of another employee or shop floor representative, entitlement of the employee to the presence of a witness and finally hearing and considering the representations made by the employee or his/her colleague or both.
89. The foregoing was aptly captured by the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR.
90. As adverted to elsewhere in this judgement, the requirements of Section 41 of the [Employment Act, 2007](#) are mandatory and a termination of employment conducted otherwise is unfair.
91. In the instant suit, although the Respondent issued two notices to show cause and the Claimant responded, it did not invite him for a disciplinary hearing as neither the notice of invitation nor minutes of the proceedings were availed and no notice of termination of employment was given.
92. For the above-stated reasons, it is the finding of the court that the Claimant has proved on a balance of probabilities that termination of his employment by the Respondent was unfair for want of procedural propriety.
93. On entitlement to the reliefs prayed for, the court proceeds as follows;
- a. Declaration
94. Having found that termination of the Claimant's employment by the Respondent was unfair for non-compliance with the provisions of Section 41 of the [Employment Act, 2007](#), a declaration to that effect is merited.
- b. Reinstatement
95. This remedy is unavailable by virtue of the provisions of Section 12(3)(vii) of the [Employment and Labour Relations Court Act, 2011](#) which restricts its availability to 3 years from the date of dismissal. Since the Claimant's employment was terminated in August 2017, reinstatement is unavailable.
- The remedy is declined.
- c. One month's salary in lieu of notice
96. The Respondent tendered no evidence to show that it accorded the Claimant the requisite notice as provide by the contract(s) on record or pay in lieu of notice.
- The prayer for one month's salary in lieu of notice is sustained.
- d. Balance of outstanding salary for June, July and August 2017
97. The Claimant tendered no shred of any outstanding salary and how much it was. Neither the written witness statement dated 9th October, 2017 nor the oral testimony makes reference to any outstanding salary for June, July and August, 2017.
98. Copies of the payslips on record which the Claimant's counsel referred to show that the salaries for June and July 2017 was paid. However, the Claimant testified that he was not paid anything after his employment was terminated on 14th August, 2017 and is accordingly awarded any outstanding salary for the days worked in August 2017.
- e. Accrued leave 81 days
99. The Claimant's written statement makes no reference to any pending leave days and when they accrued. Similarly, the oral testimony makes no reference to the untaken leave. However, a document



provided by the Respondent show that he took leave and had 42 outstanding leave days and is awarded payment for the 42 days.

f. Refund of training fees

100. The Claimant admitted that he signed two employment contracts. The first is undated while the second is dated 10th September, 2015 though signed on 2nd October, 2015. Whereas the first contract had a probationary period of 3 months, the second did not. The Claimant signed both contracts. It is unclear as to when the first contract was entered into or signed.

101. Clause 1 of the 1st Contract provides that;

“The company shall employ the Pilot (the Claimant) on a full-time basis from completion of his line training on the CRJ on the terms and conditions which follows.”

102. Clause 6 on “facilities to be provided by the company” stated as follows;

“The pilot will provide the company with USD25,000 (twenty five thousand) before training commences. The company will provide a ground school and initial type rating on the CRJ 100/200 air craft. The travel and accommodation will be paid by the pilot . . .”

103. The Claimant testified that he completed training and started flying the CRJ air craft in September 2014 and in the absence of controverting evidence, it is taken as date he started working for the Respondent.

104. The Claimant further admits that he was trained and even proceeded to Madrid Spain for training on type rating.

105. From the documents on record, it is unclear on what basis the Claimant was claiming a refund of USD25,000 which he paid to the Respondent willingly as his contribution to the training. The Claimant has not cited any contractual clause or provision of law which entitles to the fund prayed for.

106. The written statement is reticent on this prayer and it is accordingly dismissed.

g. 12 months compensation

107. Having found that termination of the Claimant’s employment was procedurally unfair, the Claimant is eligible for the relief provided under Section 49(1)(c) of the [Employment Act](#), 2007.

108. The court has taken into consideration the fact that;

i. The Claimant wished to continue in the Respondent’s employment as exemplified by the prayer for reinstatement.

ii. The Claimant was an employee of the Respondent for about 3 years.

iii. The Claimant had no recorded incidences of misconduct or disciplinary.

iv. The Claimant did not appeal the decision of the Respondent.

v. The Claimant substantially contributed to the termination of employment.

109. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair.

110. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows;

a. Declaration that termination of the Claimant’s employment was unfair.



- b. One month's salary in lieu of notice Kshs.457,378.00.
- c. 42 accrued leave days.
- d. Equivalent of 3 months salary.
- e. Costs of this suit.
- f. Interest at court rates from the date of judgment till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023

DR. JACOB GAKERI

JUDGE

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 *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.

DR. JACOB GAKERI

JUDGE

