



Mutuku v Fly Air Limited (Cause 1525 of 2018)
[2023] KEELRC 3128 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3128 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1525 OF 2018
DKN MARETE, J
NOVEMBER 22, 2023

BETWEEN

ROBIN MUTUKU CLAIMANT

AND

FLY AIR LIMITED RESPONDENT

JUDGMENT

1. This matter come about by way of a Memorandum of Claim dated 9th November, 2021. The issue in dispute is therein cited as;

Wrongful/unfair/unlawful/unconscionable termination of employment, breach of trust and confidentiality by the employer and non-payment of terminal benefits.
2. The Respondent in a statement of Defence/Response dated 26th November, 2018 denies the claim and prays that it be dismissed with costs.
3. The claimant's case is that at all material times to this cause, he was an employee of the Respondent as a Travel Consultant.
4. The Claimant's further case is that he was employed with effect from the 3rd January 2014. He served dedicatedly until the 16th June, 2018 when he was wrongfully, unfairly and unlawfully terminated from employment effective 9th June, 2018.
5. This was on ground that he had issued air tickets to unknown clients without collecting monies before ticketing.
6. The claimant's starting salary was Kshs. 77,000.00 but this gradually came to Kshs. 101,650.00 per month. He was not paid house allowances or housed by the Respondent which is contrary to the law. Again, he was not allowed to go on leave or even paid in lieu of leave despite his entitlement to twenty one (21) days annual leave.



7. The Claimant's other case and averment is that when he was wrongfully, unfairly and unlawfully terminated he was never given notice, invited for any disciplinary forum or at all given a chance to ventilate his side of the story. Again, he was not paid his salary for the 16 days worked in the month of June and also notice pay. The Respondent has refused and/or ignored to pay the claimant's terminal dues despite demand by the claimant and the claimant's counsel to do the same.

He claims thus;

- i. Salary for the 16 days worked in June 2018 Kshs.54,213.33;
- ii. Salary for the month of May 2018 Kshs.101,650.00;
- iii. One (1) month's salary in lieu of notice = Kshs.101,650.00
- iv. House allowance for the entire period of employment (15% of basic salary Kshs.101,650.00) x 53 months = Kshs. 808,117.50;
- v. Outstanding leave days for 4 years 5 months = Kshs.3,388.33 x 21 x 4.4167 years = Kshs. 101,650.00 x 12 months – Kshs. 1,219,800.00.
- vi. Punitive damages; punitive damages to act as punitive measures to curb employers from unilaterally and unfairly terminating employee without due regard of the employment/labour laws.
- vii. Interest on (a) above from the date the same became due until payment in full.
- viii. Costs of the suit.
- ix. Certificate of Service.
- x. Any other relief this Honourable Court may deem fit to award under the circumstances.

He prays as follows;

- a. The Respondent do pay the Claimant dues as tabulated below:
 - i. Salary for the 16 days worked in June 2018 Kshs.54,213.33;
 - ii. Salary for the month of May 2018 Kshs.101,650.00
 - iii. One (1) month's salary in lieu of notice = Kshs.101,650.00
 - iv. House allowance for the entire period of employment (15% of basic salary Kshs.101,650.00 x 53 months = Kshs.808,117.50;
 - v. Outstanding leave days for 4 years 5 months
Kshs.3,388.33 x 21 x 4.4167 years = Kshs.314,267.61
 - vi. Damages for wrongful dismissal and unfair termination as per section 49 and 50 of the [Employment Act](#), Kshs.101,650.00 x 12 months = Kshs.1,219,800.00
 - vii. Punitive damages; Punitive damages to act as punitive measures to curb employers from unilaterally and unfairly terminating employee without due regard of the Employment/Labour laws.
 - viii. Interest on (a) above from the date the same became due until payment in full.
 - ix. Costs of the suit.



- x. Certificate of Service.
- xi. Any other relief this Honourable Court may deem fit to award under the circumstances.

The Respondent's case is a denial of the claim.

8. It is her case that the performance of the claimant was not blemish free. He was terminated for gross misconduct by defrauding the company and acting indiligently. This was followed by absconding duty and therefore the termination of contract.

This is exemplified as follows;

- i. Between 26th April 2018 to 11th May 2018 without authority, he issued 25 air tickets to clients/passengers of one Alois Omita at a total cost of Kshs.276,690.00.
 - ii. Defied instructions not to issue air tickets to persons unknown to the Respondent Company.
 - iii. Colluding with the said Alois Omita in order to defraud the Respondent Company the said sum of Kshs.276,690.00.
 - iv. Failure to collect the said sum of Kshs.276,690.00 from the said Allis Omita.
 - v. Insubordination in that he failed to cancel the tickets as instructed.
 - vi. Absconding duty by leaving the office on 13th June 2018 not to report back.
9. The Respondent's evidence as adduced in the witness statement of Rose Kivaya is self-telling and comes out as follows;
 5. Between 26th April 2018 and 11th May 2018, the Claimant issued 24 tickets for passengers who were travelling from Nairobi to Kisumu at a total cost of Kshs.276,690/= . He told me that the person who had requested for tickets was known as Alois Omita and that he was known to him. I immediately informed him that he had acted and issued the said tickets without authority and that he should follow up on the payment for the said tickets. The tickets bear the name of the issuing officer as "Robin".
 6. Despite my said reprimand and warning to him in relation to issuing the tickets, on 31st May 2018 he issued another ticket to a relative to the said Alois Omita for London-Nairobi flight. Upon learning this, I cancelled the ticket.
 8. I directed him a keep on following on the payment of the said tickets and I told him that he should collect the funds within 2 weeks. On 6th June 2018 the Claimant left the office and stated that he was not continuing with the employment. He did not report to work from 9th June 2018 to 16th June 2018 when we wrote a letter terminating his employment. We later learned that on 13th June, 2018 he had withdrawn his membership at the Sacco and withdrew his funds.
 10. The Respondent's penultimate case is that the claimant was paid salary as per his employment contract and proceeded on leave or forfeited the same as appropriate when he could not take it. She claims and brings out a case of a fair and lawful termination of employment and denies the claim as presented and prosecuted.

The issues for determination therefore are;



1. Whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the claimant is entitled to the relief sought.
 3. Who bears the costs of the case.
11. The Claimant in his written submissions dated 22nd August, 2023 submits a case of unlawful termination of employment. It is his case and argument that his termination of employment was not procedural and did not meet the dictates of the substantive fairness accorded by sections 41 and 42(1) of the Employment Act as read with section 4 of Fair Administrative Action, 2015.
 12. The Claimant further submits on the authorities of Alphonse Maghanga Mwachanya vs Operation 680 Limited [2013] eKLR and Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR where the place of procedural and substantive fairness was highlighted.
 13. The Respondent's case and submission is that the termination letter dated 16th June 2018 issued to the Claimant is attached to the documents of both parties.
 14. The termination letter outlines the reason for termination including the back drop of events leading to termination.
 15. That the termination was because of a loss of Kshs.235,090/= is glaringly evident from any perspective one reads the letter. If the letter were any ambiguous as to the reason for termination, the Claimant himself admits to the issue of the loss of the money in his statement dated 9th November 2018.
 16. It is her further case and submission that the Claimant's own admission to the events leading up to his dismissal in his statement is crucial because his advocates submissions seem to give a different, more coloured state of events to bolster his case. Further, since the case was submitted to judgment without calling witnesses for cross examination, the admissions of the Claimant in his statement are a useful leads to the crux of the matter.
 17. The Respondent posits that dismissal of an employee on grounds of causing financial loss to an employer is valid and agrees with section 44(4)(g) of the Employment Act, 2007 that narrates a case of summary dismissal.
 18. The Respondent reiterates that the Claimant was given a termination letter. He does not dispute this. Being given a termination letter as opposed to a verbal dismissal is part of procedural justice. The other limb of procedural justice is to be given a hearing before dismissal. The same termination letter in the first paragraph reads thus;

“...when you were questioned by the Manager for the reasons for issuing the tickets before collecting the money, you said you knew them and they are coming before 1700 hrs to pay for the tickets. This questioning by the manager clearly evidences an opportunity to be heard being granted to the Claimant. His appeal letter dated 13th June 2018 which he addressed to the Directors of the company as opposed to the manager who dismissed him, is yet another opportunity he was granted to be heard.
 19. Again, all this is to be seen in light of the fact that the Claimant absconded from duty in the month of May 2018 when the payments were slow in coming from the observe client. He denies this in his pleadings and in his advocate's submissions. But look at his letter to his sacco, and it tells a different tale. The letter is attached to the Respondent's further list of documents dated 13th April 2023 at page 7 thereof.



20. A scrutiny of the respective cases of the parties tills this matter in favour of the Respondent. She has ably displayed the Claimant as a defaulter employee who was not able to perform his duties in accordance with his contract of engagement thereby leading to colossal loss of funds by the Respondent. The Claimant on the whole admits being causative to this loss but is bent on excusing the same.
19. Again, the Respondent brings out an unrepudiated case of absconding from duty by the Claimant at the heat of the allegations and investigations onto the irregular issue of air tickets to a stranger without authority. This is also not repudiated.
20. I therefore find a case of lawful termination of employment and hold as such. And this answer the 1st issue for determination.
21. The 2nd issued for determination is whether the claimant is entitled to relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.
22. I therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.

D. K. Njagi Marete

JUDGE

Appearances:

1. Mr. Kiarie Mungai instructed by Kiarie Mungai & Associate Advocate for the Claimant.
2. Mr. Kalii hold brief for Erick Mutua instructed by E.K Mutua & Company Advocate for the Respondent.

