



**Mwangemi v Etihad Airways PJSC (Cause 267 of 2019)
[2023] KEELRC 3317 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3317 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 267 OF 2019
B ONGAYA, J
DECEMBER 20, 2023**

BETWEEN

MIKE ANTHONY MWANGEMI CLAIMANT

AND

ETIHAD AIRWAYS PJSC RESPONDENT

JUDGMENT

1. The claimant filed the Statement of claim dated 23.04.2019 and filed in Court on the same date through M/S MMA Advocates, LLP. The claimant's case is pleaded as follows. He was employed by the respondent effective 16.04.2014 in the position of a Duty Manager Operations (Level MI) earning an initial basic monthly salary of Kshs.168,000/- plus other benefits including medical allowance, personal accident and life insurance, transport allowance, annual flight ticket for himself and his family. He further states that he was deployed to work at the Jomo Kenyatta Airport effective 01.05.2014. The Claimant states that his salary was reviewed upwards to Kshs.237,800/- plus benefits as indicated herein at the time of his separation with the respondent.
2. The Claimant avers that he performed his duties diligently and to the respondent's satisfaction until August 2017 when the respondent's Head of Area Manager, Mr. Ghalib Alsharji and the Human Resource Manager Africa, Pam Katsuri verbally communicated the respondent's commercial restructuring and staff realignment where the claimant's position of Duty Manager was to be done away with and his title was to be changed to Duty Supervisor. The Claimant averred that the changes were to be done without affecting or interfering with his salary and benefits.
3. That the Claimant was informed on 29.10.2017 in a tele – conference call of the respondent's decision to terminate his employment for reasons that the respondent's new structure did not include the position held by the Claimant. He was further informed that he would receive a severance package later.



4. The Claimant contends that the purported decision by the respondent to terminate his services on purported ground of redundancy was unlawful and unfair as it was done without prior warning or notice and was contrary to the mandatory provisions of sections 40 and 45 of the *Employment Act, 2007* as read with provisions of *the Constitution* of Kenya, 2010 on fair labour practices.
5. Further, that the Claimant did not receive any severance package from the Respondent as promised and instead the respondent made attempts of connecting the Claimant to an incident that occurred on 19.10.2017 when he was lawfully away from duty with an aim of linking the incident to his termination.
6. The claimant denied any wrongdoing and contended that the respondent's actions were part of a wider scheme to maliciously, unlawfully and un-procedurally terminate him from employment without any benefits.
7. The claimant pleaded that on 05.12.2017 as the claimant was coming from a holiday in Abu Dhabi with his family, he was accosted by airport security officers, whom he maintained were acting under instructions from the respondent's airport manager, who gave information that he (the claimant) was on board his flight contrary to the IATA Passenger Data Protection Act.
8. The claimant's further case was that the officers required a written statement from the claimant on the alleged incident. He maintained that the respondent's action of dissemination of passenger information to third parties not only violated his rights as a passenger but also caused undue emotional distress to the claimant and his young family.
9. The claimant avers that on 12.03.2019, the respondent proceeded to advertise for the position of Duty Supervisor, a position previously held by the Claimant herein despite the fact that it had intimated that the position had been rendered redundant in the company structure.
10. The claimant states that following his unlawful, unfair and un-procedural termination of his employment, his loan repayments were rendered overdue and as a result was listed by the CRB. Further, that he has been unable to secure any alternative employment following failure by the respondent to issue him with a certificate of service and issue him with an official retrenchment letter.
11. Aggrieved by the respondent's decision to unlawfully, unfairly and un-procedurally terminate his employment, the claimant filed the instant claim seeking the following reliefs:
 - a. A declaration and finding that the Claimant's employment was wrongfully and unfairly terminated and that the said termination of employment is null and void for all intents and purposes.
 - b. An order directing the respondent to pay the claimant all his outstanding dues as pleaded below:
 - i. Two-months' salary in lieu of notice Kshs.475,600/-
 - ii. Redundancy or severance pay (15/30 Days x 3.51 years x Kshs.237,800) Kshs.417,339/-
 - iii. One-month's salary in lieu of Redundancy Kshs.237,800/-
 - iv. Compensation for each remaining Year till retirement (21 years x 12 months x Kshs.237,800/-) Kshs.59,925,600/-
 - v. 12 months' salary for unfair termination (12 x 237,800) Kshs. 2,853,600/-



TotalKshs. 63,909,939/-

- c. An order that the respondent does issue the claimant with a Certificate of Service.
 - d. A declaration be and is hereby made that the harassment, intimidation, discriminatory treatment and unlawful termination from employment of the claimant by the respondent is unconstitutional, unlawful and a violation of the fundamental rights of the claimant as enshrined in Articles 22 (1), 23 (1), 29 (d), 41 (2) (b) and 47 of *the Constitution* of Kenya, 2010.
 - e. A declaration that the Claimant is entitled to compensation for economic loss and hardships unreasonably, unconstitutionally and illegally visited upon him by the respondent.
 - f. An order that the respondent be and is hereby compelled to compensate the claimant damages and loss arising from the violation of his Constitutional rights.
 - g. Costs and interest at Court rates from date of filing this claim until payment in full.
 - h. Any other further or better reliefs that this Honourable Court may deem fit.
12. In response to the statement of claim, the respondent filed its statement of response dated and filed in Court on 07.08.2019 in which the respondent admits having engaged the claimant as stated in the statement of claim. It however maintains that the claimant's employment was terminated on account of redundancy and that due procedure was followed. The respondent further states that the claimant was paid all his dues at the time of his separation with the respondent and that he duly signed a settlement agreement and general release form signifying payment of the said sums.
 13. Further that the respondent confirmed an incident that occurred on 13.11.2017 whereby two rush bags containing khat were discovered on board the respondent's flight EY 642 from Nairobi to Heathrow. That upon investigations it was revealed that the claimant, who was still under the respondent's employment, had instructed a colleague to facilitate the transportation of the said bags. The respondent denied the allegation of sharing the claimant's personal details with KAA insisting that it only wrote to the claimant seeking his explanation to the events of 13.11.2017
 14. The respondent further states that the claimant's certificate of service is ready and available for collection at its offices.
 15. The respondent denied any violation of rights as claimed by the claimant herein insisting that the redundancy was lawful and procedural. Further that the claimant was fully aware of the financial distress the respondent was in and in fact agreed to the separation.
 16. In conclusion the respondent argued that the claim as filed lacked merit and therefore urged the Honourable Court to dismiss it in its entirety with costs to the respondent.
 17. The matter proceeded for hearing on 15.11.2023 with the claimant testifying on her own behalf as CW1 and the respondent calling one (1) witness (RW), Alyia Jamal AlMatrooshi, to testify on its behalf. Both witnesses relied on their witness statements filed in court that reiterated the averments made in the statement of claim and the statement of response respectively. The witnesses also relied on list and bundle of documents filed on behalf of the claimant and respondent respectively.
 18. Parties thereafter filed their respective submissions to the claim which this Honourable Court has duly considered and finds as follows.
 19. To answer the 1st issue, the parties were in a contract of service as pleaded for the claimant and admitted for the respondent.



20. To answer the 2nd issue, the Court finds that the contract of service was terminated by the employment settlement agreement and general release signed for the respondent on 08.12.2017 and by the claimant on 07.11.2017. The agreement stated that the claimant had worked for the respondent from 01.05.2014 to 31.10.2017, the termination date. The agreement stated that the termination was on account of redundancy and the claimant had agreed to release the respondent accordingly.
21. To answer the 3rd issue the Court returns that the termination was not unfair. While the claimant alleged that he was forced to sign the agreement, he did not plead particulars of such force and did not provide the evidence in that regard. Consequential to the agreement the respondent was to pay the claimant full and final settlement as follows:
- a. 15 days basic wage per year of completed service Kshs.290, 540.06.
 - b. 2-months per contract notice Kshs.475, 600.00.
 - c. Travel allowance Kshs.8,750.00.
 - d. Less deductions Kshs.38,649.07.
 - e. Net paid to the claimant Kshs.736, 241.00.
22. The claimant testified that he was not paid the agreed final dues. Further, he was not given termination notice but that on 29.10.2017 he was verbally told that his last day at work would be on 30.10.2017.
23. To answer the 3rd issue the Court returns that the termination was unfair in procedure. While parties agreed to separate by way of redundancy, the claimant's case is that the respondent failed to promptly pay the agreed separation dues as envisaged in section 40 of the *Employment Act*, 2007. It is therefore undisputed that the claimant was not prepared for the looming redundancy by way of the 30-days' notice to the area labour officer and the claimant per section 40 of the Act. It is true that as per the email of 27.07.2017 all staff including the claimant had been notified of the turbulent times with more changes ahead as the respondent would continue to reduce costs further through a leaner and more efficient organisation and business processes. The claimant testified that he had received that email and meetings had been held in August 2017, on 12.10.2017 and the last one on 29.10.2017. It therefore appears that while formal notices were not served per section 40 of the *Employment Act*, the claimant knew about the respondent's difficult times and the justification for the redundancy. The Court finds that the reason for the termination was valid per section 43 of the Act and the reason was fair per section 45 of the Act. While the position of Duty Supervisor that the claimant held was advertised on 12.03.2019, that by itself may not defeat the position by the respondent and as agreed upon by the claimant in the separation agreement that redundancy was the reason for the termination at the material time. The Court further returns that the respondent failed to inform the area labour officer and to pay the claimant's redundancy and final dues promptly as per section 40 of the Act. Thus, it is returned that the procedure for the termination was unfair. While RW did not exhibit record on the selection criteria and other employees allegedly affected in the redundancy process, it was not clear whether the respondent employed persons holding similar position of Duty Supervisor and in absence of that evidence, it is impossible to tell if the claimant had been unfairly selected. The Court finds that on a balance of probability and material on record only the claimant held the office of Duty Supervisor and the issue of selection criteria did not hold in the instant case.
24. To answer the 4th issue on remedies the Court returns as follows:
- a. The Court has considered the factors for award of compensation in section 49 of the Act. RW confirmed that the claimant had a clean record of service free from warnings. The Court has considered failure by the respondent to serve the statutory notices under section 40 of the



Act. The Court has considered the mitigating factors in favour of the respondent that first, the claimant signed to separate and second, the respondent took the claimant through the preparatory meetings prior to signing the separation agreement. The aggravating factor against the respondent is that the respondent failed to honour the prompt payment of the separation or redundancy dues which were not shown to have been paid as at the time of hearing the suit. In that regard, the Court awards the claimant 4-months' salaries in compensation making Kshs.237, 800 x 4 = Kshs.951,200.00.

- b. Two months' salary in lieu of contractual termination notice as per separation agreement is awarded at Kshs.475,600.00.
- c. Severance pay at half month salary for each completed 3 years of service is awarded at Kshs.356,700.00.
- d. One-month salary in lieu of redundancy statutory notice is declined as already considered and compensated for in the finding of unfair procedure in terminating the claimant.
- e. Compensation for 21 years of unexpired tenure of service has not been established at all. The claimant has not shown anything attributable to the respondent that diminished the claimant's gainful engagement thereafter. The delay in granting the certificate of service thereby affecting the claimant's access to the airport as was alleged was devoid of due evidence showing the claimant's allegation that his airport pass had thereby been adversely affected. The claim is therefore found unjustified especially that RW confirmed that the claimant had a clean record of service and the separation was purely upon redundancy grounds as opposed to disciplinary considerations.
- f. The delivery of the certificate of service is not in dispute.
- g. As submitted for the respondent the allegations of constitutional violations are uncorroborated. As submitted, particulars of discrimination were not pleaded and established by evidence. The declaration and damages in that regard are declined as not established at all.
- h. It was submitted for the respondent that the tabulated full and final settlement were paid. RW testified thus, "Agreement says he was fully paid. He could not have signed settlement agreement confirming receipt of the money." On his part the claimant testified thus, I see settlement agreement Document R3 of respondent's bundle. I see the agreement on settlement terms and final dues. Specific amounts not stated. I see clause 3 referring to annex 1. I signed the document on all pages. I initialled and signed last page. Clause 3 – any disagreements were waived or settled upon payment. My terminal dues were not paid. Not even a shilling (the appendix not given). Agreed final dues are in my bundle. I received none of that amount. See my page C45." Now, the respondent has failed to plead the specific final amounts paid, the mode of payment, and the Court returns that while parties agreed on final dues, the same, on a balance of probability were not paid at all. Thus, the awards made in the instant judgment.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the contract of employment herein was procedurally unfair.
2. The respondent to pay the claimant Kshs.1, 783, 500.00 less PAYE payable by 01.02.2024 and failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
3. The respondent to deliver the certificate of service by 01.02.2024.



4. The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
WEDNESDAY 20TH DECEMBER, 2023.**

BYRAM ONGAYA, PRINCIPAL JUDGE

