



**Manga v Kenya Airways PLC (Cause 358 (E334) of 2020)
[2023] KEELRC 3214 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3214 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 358 (E334) OF 2020
B ONGAYA, J
DECEMBER 7, 2023**

BETWEEN

MARYANN KASWIL MANGA CLAIMANT

AND

KENYA AIRWAYS PLC RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on 24.07.2020 through KBN Associates Advocates. The claimant prayed for judgment against the respondent for:
 - a. Salary for the months of October, November, December up to 16.12.2019 of Kshs.334,266.74/=.
 - b. Two month's salary in lieu of notice Kshs.263,894.74/=.
 - c. Nine months and 14 days salary of Kshs.2,756,540.56/=.
 - d. Accrued allowances Kshs.273,785.68/=
 - e. Annual accrued 30 leave days as at 16.12.2019 of Kshs.131,947.37
 - f. Certificate of service
 - g. General damages
 - h. Cost of this suit
 - i. Interest on (a), (b), (c), (d), (e) above court rates
2. The response to claim dated 18.09.2020 was filed through Gikera & Vadgama Advocates. The respondent prayed that the suit be dismissed with costs.



3. The claimant's case was that she was on or about 07.08.2018 employed as an inflight attendant on a contractual basis, for a period of two years effective 01.09.2018. The two years were lapsing on 01.09.2020.
4. That on 16.12.2019 she received a termination of employment letter, which the claimant considers unlawfully and unfairly terminated her employment contract before the lapse of 2 years.
5. The respondent extended the claimants probation period of three months on multiple occasions, up to a period of 1 year.
6. On or about 27.10.2019 the claimant while off duty turned up at her work place fully dressed in uniform to enable her access the crew centre to obtain her booking PNR to help her travel on a rebate ticket to Lagos, which she had failed to access due to system failure on i-safari externally.
7. While on her way to the airport, the system normalized and she accessed the PNR booking and due to time constraints, she checked in like other passengers and proceeded to the washrooms at gate 20 and removed the staff uniform and changed to her common clothes and proceeded to board the aircraft.
8. Together with other passengers, she was offloaded from the flight due to the Nigerian visa requirements which had changed a week earlier, unknown to her.
9. She proceeded to the washrooms and changed her clothes and put on her uniform and proceeded to the immigration desk where she was signed out and she went home.
10. Subsequently, she was removed from the duty roster each 20 minutes to each time she was supposed to travel for work for a period of one month and 15 days without any explanation until such a time when the Kenya Aviation Workers Union raised a concern.
11. The claimant was then issued with a notice to show cause dated 18.11.2019. The claimant responded to the notice to show cause and was invited for disciplinary hearing, to which she states she was denied the opportunity to attend in the company of a witness. That her contract was thereafter terminated before expiry of 9 months and 14 days.
12. On the part of the respondents, it is stated that claimant's probation period was not without incidence. She was issued her first warning letter on 11.09.2018 on account of performing her duties in a negligent manner by failing to guide a cabin crew trainee on the correct procedures as well as occupying passenger seats during taxi phase, take-off, and landing.
13. As the claimant's probation period was scheduled to end on 30.11.2021 the parties held a meeting on 26.11.2018 to review her performance for purposes of determining whether her employment would be confirmed.
14. At the meeting it was determined that the claimant's performance during her probation period had not met the required standards. Instead of terminating her employment it was decided that she be allowed another opportunity to prove herself. Her probation period was then extended for a further 3 months as provided for in the human resources manual.
15. On 08.02.2019 the claimant was issued with a second warning letter on account of conducting herself in a manner that brought the company name in disrepute and failing to safeguard the interest of the company. The claimant had fuelled her car with fuel worth Kshs.3,000 at the airport Total petrol station along Mombasa Road and had driven off without paying.



16. On 26.02.2019 the respondent's human resource partner and the claimant held another meeting to review the claimant's performance. It was noted that the claimant's performance had not met the required standards. The claimant asked to be given another opportunity to improve her performance.
17. On 27.10.2019 the claimant arrived at the Jomo Kenyatta International Airport Terminal 1A dressed in full uniform and proceeded to check in for a flight destined to Lagos, Nigeria. She presented herself as being on official duty and rostered to work on the said flight.
18. Following the check in, the claimant proceeded to the immigration counter and again presented herself as being cabin crew on duty. She got her passport stamped for exit and proceeded to get clearance at the central screening.
19. The claimant then went into one of the airport washrooms where she changes into civilian clothes and then proceeded to boarding gate no 20A where she was asked to show her travel documents and that is when she admitted that she did not have a visa allowing her to travel to Lagos, Nigeria.
20. Her explanation was that she thought she could apply for one on arrival, a contradiction to the explanation she had given at the check-in counter where she had indicated that she did not require a visa as she was a cabin crew member on duty.
21. The claimant could not be allowed to travel without the requisite visa for the republic of Nigeria and was thus offloaded from the flight. She then proceeded to the washrooms where she changed into the respondent's cabin crew uniform to avoid raising any suspicion as she exited the airport.
22. Following this incident, the respondent initiated an investigation into the matter. To avoid interference with the process the claimant was put on suspension and removed from the roster with effect from 28.10.2019, but was on full salary.
23. Following the findings of the investigation, the claimant was issued with a notice to show cause, to which the claimant responded. The explanations given by the claimant were duly considered and found to be insufficient. She was thus invited for a disciplinary hearing which was scheduled for 05.12.2019.
24. A panel was constituted in compliance with the respondent's human resource manual to hear and determine the allegations against the claimant and she was notified of the date of the hearing. She was reminded of her right to be accompanied by a fellow employee or a union representative.
25. Two meetings were held, on 05.12.2019 and 11.12.2019 where the claimant attended in the company of four representatives from the Kenya aviation workers union.
26. The claimant as well as the union representative presented her defence against the allegation and these were considered.
27. Subsequent to the hearing, and after careful consideration of the investigation report and the claimant's representations, a decision was arrived at to terminate the services of the claimant failing to adhere to the respondent's policies and procedures.
28. The claimant was informed of the decision of the panel and issued with a termination letter dated 16.12.2019.
29. Through a letter dated 19.12.2019 the Kenya Aviation Workers Union on behalf of the claimant appealed the decision by the disciplinary panel. The claimant's grounds of appeal were considered by the respondent's group human resource manager as per the respondent's human resource manual and the decision to dismiss the claimant was upheld. The decision was communicated to the claimant and her contact was on that basis terminated.



30. The respondent maintains that the termination of the claimant's contract of employment was based on fair reasons.
31. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
32. The evidence confirmed the respondent's pleaded case. The claimant pretended to be on duty on the material day. She was in full respondent's crew uniform. She was discovered not to be on duty a few minutes to boarding for Lagos, Nigeria. She was the author of her own predicament. The Court finds that the procedure complied with section 41 of the *Employment Act* on notice and hearing and further all the contractual procedures including appeal. The reason for termination was valid per section 43 of the Act and fair per section 45 of the Act as it related the claimant's conduct, compatibility and the respondent's operational system. To confirm the misconduct the claimant testified thus, "I entered the airport with uniform while on off duty and accessed crew centre. It could not be accessed without uniform.... I know I should not wear uniform on off duty. I was allowed to enter crew centre on off duty if called. On that day I was not called." The respondent's witness No. 1 (RW1) also confirmed in her testimony that crew centre could be accessed lawfully by inflight managers, cabin crew administrators and pilots. Further, the claimant was not in any of those categories as she was off duty and she had not been scheduled to report at the crew centre. The 1st issue is answered accordingly that the termination was not unfair in substance or procedure. The submissions for the respondent are upheld.
33. The 2nd issue is whether the claimant has established any of the remedies. No law or contractual provision has been shown to justify payment for the unexpired of 9 months and 14 days. Notice payment is not due in view the termination was not unfair and, the section 44 of the *Employment Act* allowed the employer to dismiss with no or shorter notice than was contractual on account of gross misconduct, the established cause of termination. No evidence was provided to justify accrued allowance. No submissions were made to justify the claims. The respondent witness No. 2 (RW2) was the head of human resource Grace Wamit and she stated that she could not confirm that the claimant had been paid for the period October, November, up to 16.12.2019 and the claimant is awarded the Kshs.263, 894.00 as prayed for. It was submitted for the respondent that in cross-examination the claimant testified that she had been paid during suspension but the record does not show as such. On a balance of probability, she is awarded accrued leave at Kshs.131,947.37 as prayed for as there was no evidence of leave taken for more than one year served and leave is deemed to have been earned per section 28 of the Act. The claimant is entitled to certificate of service per section 51 of the Act costs of the suit.
34. In conclusion the suit is determined with orders for the claimant for:
- a. The respondent to deliver the certificate of service in 30-days from today.
 - b. The respondent to pay the claimant a sum of Kshs.395,841.37 less PAYE by 01.02.2024 failing interest to be payable thereon at court rates from today until full payment.
 - c. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

