



**Macconell v Five Forty Aviation Limited (Cause 368 of 2018)  
[2022] KEELRC 13121 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13121 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 368 OF 2018  
AK NZEI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**AZENATH ATIENO MACCONELL ..... CLAIMANT**

**AND**

**FIVE FORTY AVIATION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent *vide* a statement of claim dated May 30, 2018 and pleaded that she was employed by the respondent on July 1, 2015 as a customer service agent at a monthly salary of Kshs 30,000, and worked diligently until sometimes on December 15, 2015 when she was suspended from duty on allegation of misappropriation of tickets, among other allegations, as stated in the suspension letter dated December 14, 2015.
2. The claimant further pleaded that she was, in January 2016, dismissed from employment without having been given an opportunity to be heard, and that the termination was unfair.
3. The claimant set out her claim against the respondent as follows:-
  - a) One month salary in lieu of notice .....Kshs 30,000
  - b) Salary for the month of December 2015.....Kshs 30,000
  - c) Compensation for unfair termination of employment @ 6 months' salary.....Kshs 180,000
  - d) Costs of the suit and interest.
4. The claimant further filed her written witness statement dated May 30, 2018 and a list of documents dated the same date, listing three documents which included her employment contract dated June



- 29, 2015, suspension letter dated December 14, 2015 and termination letter. These documents accompanied the statement of claim, save for the termination letter.
5. The respondent filed a statement of defence on November 2, 2018 and denied the claimant's claim. The respondent also filed a list of documents dated September 23, 2018 and listed some six documents which included an alleged payslip of the claimant for December 2015, the claimant's suspension letter dated December 14, 2015, some computer print outs and email correspondences. The respondent also filed a written witness statement of one Alkarim Kassam, dated July 26, 2021.
  6. When the trial opened on May 11, 2021, the claimant adopted her recorded witness statement as her testimony, and produced in evidence the documents referred to in paragraph 4 of this judgment. The claimant further testified:-
    - a) that the claimant's duties were issuance of tickets and ensuring that customers boarded.
    - b) that sometimes in 2015, the respondent's accounts officer in Nairobi wrote stating that the claimant issued a ticket, received money and did not record it
    - c) that the allegation was not just against the claimant, but against most of the customer agents in the airport office.
    - d) that the claimant responded to one complaint which concerned her, whereby a ticket had not been paid for and the claimant stated that the amount involved could be recovered from her salary. That the claimant was not involved in issuance of the other tickets in question.
    - e) that customer agents were sharing travel issuing codes and passwords, and that the manager at the airport was aware of that fact; as not everyone had a code. That this was why it appeared as if the claimant was the one issuing the tickets in issue.
    - f) that the claimant was suspended on December 14, 2015, and did not receive her salary for that month.
    - g) that the claimant's employment was terminated in January 2016, but the claimant could not remember the exact date of termination.
  7. The respondent's witness, Alkarim Kassam (RW1), adopted his witness statement dated July 26, 2021 as his testimony and produced in evidence the documents referred to in the respondent's list of documents. The witness further testified:-
    - a) that the claimant worked as a customer sales agent in the respondent's Kisumu office and her duties were ticket sales and charging for extra-baggage.
    - b) that the claimant could sale tickets, register them in the respondent's portal but pocket the money. That the respondent detected this when they noted that money was not being banked.
    - c) that each of the respondent's agents had their own password and were not allowed to share their codes and passwords to the company's portal.
    - d) that there was an agent by the name Sarah, who sold tickets and gave the money to the claimant, but the claimant voided two tickets and took the money.
  8. Cross-examined, RW1 testified:-
    - a) that the claimant was given a hearing via emails; which preceded her suspension; but the claimant was not invited for a hearing.



- b) that the claimant was not paid her December 2015 salary because the respondent was recovering money not banked by the claimant; and that the respondent had not raised a counter-claim against the claimant.
9. Upon considering the pleadings filed by both parties herein and evidence adduced, issues that present for determination are:-
- a) whether termination of the claimant's employment was unfair.
- b) whether the claimant is entitled to the reliefs sought.
10. On the first issue, section 41 of the *Employment Act* sets out mandatory procedural requirements that must be adhered to by any employer wishing to terminate the employment of an employee. The section provides as follows:-
- “(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
11. The respondent did not in any way demonstrate compliance with the foregoing mandatory procedural requirements. It was held as follows in the case of *Walter Ogal Anuro v Teachers Service Commission[2013] eKLR*
- “...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
12. The respondent may have had a valid reason to terminate the claimant's employment, but the procedure adopted by the respondent to effect the termination was unfair.
13. The Court of Appeal held as follows in the case of *Kenfright [EA] Limited v Benson K Nguti [2016 eKLR]*:-
- “apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial judge, that the termination of the respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”



14. It is my finding that termination of the claimant's employment by the respondent was procedurally unfair.
15. On the second issue, and having found that termination of the claimant's employment by the respondent was unfair, I award the claimant the equivalent of six months' salary as compensation for unfair termination of employment. That is Kshs 30,000 x 6 months = Kshs 180,000.
16. The respondent (RW1) admitted that the claimant had not been paid her December 2015 salary, and that the respondent had not raised a counter-claim against the claimant. I award the claimant Kshs30,000 being her unpaid salary for December 2015. I also award the claimant Kshs 30,000 being one month salary in lieu of notice pursuant to section 35 (1) (c) of the Employment Act.
17. In sum, and having considered submissions filed by counsel for both parties herein, judgment is hereby entered for the claimant against the respondent for:-
  - a) the equivalent of six months' salary being compensation for unfair termination of employment .....Kshs 180,000
  - b) salary for the month of December 2015.....Kshs 30,000
  - c) one month salary in lieu of notice.....Kshs 30,000

Kshs 240,000
18. The sum awarded shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.
19. The claimant is awarded costs of the suit and interest at court rates. Interest shall be calculated from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF NOVEMBER 2022**

**AGNES KITIKU NZEI**

**Judge**

**ORDER**

**In view of restrictions on physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.**

**AGNES KITIKU NZEI**

**JUDGE**

**\*\*Appearance:**

**..... for claimant**

**..... for respondent**

