



**Carnevale v Balloons Safaris Limited (Cause 78 of 2014)  
[2022] KEELRC 13532 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13532 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 78 OF 2014  
HS WASILWA, J  
DECEMBER 15, 2022**

**BETWEEN**

**MICHAEL VINCENT CARNEVALE ..... CLAIMANT**

**AND**

**BALLOONS SAFARIS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this claim vide a memorandum of claim dated March 28, 2014, alleging to have been unfairly terminated and seeking for compensation for the unfair termination. He sought for the following reliefs;
  - a. Special damages as pleaded under paragraph 31 of the claim.
  - b. General damages for mental and psychological anguish caused by the respondent.
  - c. Interest on paragraph 31 as itemized in the claim.
  - d. Any other relief this honourable court may deem fit to grant.
  - e. Costs of this suit.

**Claimant's Case**

2. The claimant was employed by the respondent as a pilot commencing June 14, 2006 for a two-year renewable contract. That his contract was always renewed due to satisfactory performance.
3. It is stated that the claimant performed his duties diligently that he rose through the ranks and was promoted to the position of Director of Operations and Chief Pilot starting September, 2013, which position he held till his termination. At the time of termination, the claimant was earning a monthly net salary of US\$7000.



4. He states that among his duties were to update the managing director on the day to day operations of the respondent and advice on any issues affecting the respondent's operations. On that basis he wrote an email to the managing director dated January 24, 2014 raising some concerns that required the attention of the managing director.
5. The issues raised in the said email, according to the claimant was confidential between an employee and the employer but to his dismay, the managing director forwarded the said email to a third party that caused him to be arrested and charged in court under Narok Criminal Case Number 192 of 2014 for libel.
6. He contends that the disclosure of the confidential email communication between him and the managing director, with the third party was an infringement of his constitutional rights. Furthermore, that the purpose of the said communication was to vilify, intimidate and blackmail the claimant into resigning from employment to the respondent's benefit.
7. It is his case that the complainant in the criminal case against him was a supplier of the respondent's company and the witnesses were Mr Adrian Luckhurst, the managing director of the respondent and Mr Ricky Talma, the base administrator of the respondent, at Maasai Mara, confirming that the whole criminal charges were a calculated move by the respondent to get rid of him.
8. He states that he had legitimate expectations to work for the respondent till the end of his contract which was to expire on the June 12, 2014.
9. The claimant avers that, he was pressured by the respondent's managing director to resigning by the letter of January 27, 2014 which he refused by his response dated January 28, 2014. However, on February 8, 2014, the claimant was terminated from employment while on leave without any reason attached to the said termination, neither was he subjected to due process.
10. Based on the allegations of unfair termination, the claimant urged this court to award him compensation for unfair termination, unpaid salary for February, 2-month salary gratuity for every completed year worked, 6 months' salary in lieu of notice, 30 days accrued leave, unpaid medical insurance, unutilized air ticket (2 year) and 5 months' remainder of term of contract period.
11. During hearing the claimant testified as CW-1 and adopted his witness statement of June 14, 2022 and upon cross examination, he testified that his contract did not provide expressly for the updating of the managing director on a day to day basis but that its was proper for him to raise concerns that would jeopardize the operation of the respondent.
12. He testified that he was appointed as a pilot test examiner due to his experience not only on the word of the respondent. He testified that Munir Ismael was the complainant in the criminal charges against him and the respondent's managing director was a witness in the said case. He admitted writing the letter of January 24, 2014 seeking to remove Mr Talma from the position of base operation. He stated that he was invited to a meeting with the person he had accused as such feared that his security was in jeopardy.

### **Respondent's Case**

13. The respondent filed a response to claim and counterclaim on the April 14, 2014 admitting to employing the claimant on a two-year renewable contract with effect from April 1, 2006. Thereafter he was issued with class A entry permit allowing him to work in the county for two years from July 2, 2008. Upon expiry of that contract, he was issued with another two-year contract that expired on the May 31, 2012 which was extended to June 13, 2012.



14. It is stated that the appointment of the claimant as a flight test examiner for Kenya Civil Aviation Authority (KCAA) was on request of the respondent and not on any effort or recognition of the claimant. They added that the appointment was to relieve the two examiners and ease pressure of work.
15. The respondent denied that the claimant was tasked with updating the managing director on day to day activities of the respondent and instead stated that the claimant's main duty was to conduct balloon flights, ensure all pilots had the minimum required flight hours, had current pilot license and requisite pilot health license among others.
16. On the events of January 24, 2014, the respondent stated that the claimant had accused one of his colleagues, Mr Ricky Talma, of breaching security without giving any evidence as such the respondent was constrained on taking actions because it did not have any evidence to prefer any charges.
17. Upon being pushed by the claimant to take action, the respondent convened a meeting on the January 27, 2014 to discuss the issue and give the claimant an opportunity to table his evidence on the allegations. Present in the said meeting was Mr Adrian Lukerhurst, (the managing director) Mr Ricky Talma (Base Admonstrator) Ms Judy Talma, Mr Munir and Mike Carnevale (the claimant). However, that no evidence on the issue was tabled by the claimant as such they could not take up any further action.
18. It is stated that the information in the email was not confidential in any way because the claimant required the respondent to carry out investigations into the allegations and in doing so, third parties were to be involved. It stated that by making false accusation against his colleagues without tendering any evidence, the claimant was the one that violated the constitutional rights of others especially article 28 and 33(3) of the Constitution.
19. It is the respondent's case that the criminal proceedings were instituted with no attachment to the claimant's employment as such the allegations that the criminal case was the basis of termination is unfounded.
20. On the reason for termination, the respondent stated that the claimant had accused his colleague of unsubstantiated criminal activities and also accused the managing director of working in cahoots with some of the colleagues without supporting the allegations with any evidence. These actions on the part of the claimant were clear acts of persistent actions of insubordination and willful misconduct, which caused the respondent to terminate his services because his employment was no longer tenable in light of the said accusations against his fellow colleagues and his superior.
21. It is alleged that the claimant had previously made wild allegations that Mr Patel of Trans World Safaris Limited (his former employer) were working with others to ensure he does not get a work permit. Also on September 25, 2008, he wrote another email to Mr Luckhurst, that the former chief pilot's advice was bad and costing the respondent money without giving any evidence of the negative effect of the said advice.
22. That the claimant abused his position as a balloon flight test examiner for KCAA and refused to account for the fees received while conducting flight test for other balloon flight air operators and instead accused KCAA of being corrupt. Therefore, that the claimant's pattern of behavior in the past has been wanting justifying the termination.
23. In the counterclaim, the respondent avers that the claimant has taken 25 leave days over and above what he is entitled to under the contract as such, he should refund the respondent US\$5832 worth of the extra leave days taken.



24. On reliefs sought, the respondent avers that the claimant does not deserve compensation or notice pay because the termination was not unfair. On February salary, the respondent stated that the claimant has refused to collect his February salary when the same was available for collection. It is stated that gratuity is not provided for under the contract as such not payable. On medical insurance claim and air ticket claim, the respondent stated that the same were payable only upon utilization, which is not the case herein.
25. During hearing Adrian Luckhurst, the respondents managing director testified as RW-1 and adopted his witness statement of July 20, 2022 and upon cross examination, he testified that the claimant started as a line pilot and by the time of termination he had risen through the ranks to be the chief pilot, whose main purpose was to ensure all the other pilot employed by the respondent were following rules and regulations and were at all times licensed.
26. He testified that the claimant was dismissed from employment for insubordination and gross misconduct. He added that the claimant had accused his colleagues of criminal activities without providing evidence of the said accusation. He stated that they invited the claimant to a disciplinary hearing though he admitted he never issued any notice to show cause. He admitted that proper disciplinary hearing was not conducted before termination and only a meeting between him, the claimant and 2 other people which the claimant agreed to have attended.

#### **Claimant's Submissions**

27. The claimant submitted that section 43 of the *Employment Act* behooves upon the employer to give reason for termination, failure to which the termination will be considered unfair under section 45 of the *Employment Act*. To support this argument, they relied on the case of *CMC Aviation v Mohammed Noor* [2015] eKLR and the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
28. It is submitted that the provisions of section 41 of the *Employment Act* are couched in mandatory terms and whatever outcome of the process is, as long as the said process was not duly followed, the termination will be considered unfair. It was argued that the employee must be issued with a notice to the charges, granted an opportunity to respond and then invited to disciplinary hearing where their side of the story is heard before a decision to termination is made.
29. With regard to summary termination, the claimant submitted that the employer can terminate the service of the employee without notice or with less notice but in the offenses that attract such terminated provided for under section 44 of the *Employment Act*, the provisions of section 41 are contemplated.
30. He argued that the reason for termination was for raising concern over the involvement of the respondent with one Mr Munir Ismail who was supplying suspected adulterated fuel to the respondent which fuel was to be used to propel the balloon with potent effect if in deed the fuel was adulterated. That he raised the said concerns with the managing director in confidence as such expected to be protected instead he was summoned in front of the said Mr Munir and directed to give evidence for the allegation, which he did not for fear of his security. It was submitted that the actions of the respondent of terminating his services upon receiving such information was unfair and unreasonable in the circumstances.
31. In conclusion, the claimant submitted that the termination failed in both substantive and procedural fairness as such the claim is merited and ought to be granted as prayed.



## Respondent's Submissions

32. The respondent submitted that indeed section 43 of the *Employment Act* places a burden on the employer to justify reasons for terminating an employees' employment. Accordingly, that the reason for termination in this case was based on acts of gross misconduct and insubordination together with the fact that the claimant willfully declined to attend a meeting which was convened to explain the allegation he made against a fellow colleague and a third party. Therefore, that the claimant's action demonstrates that he had refused to obey a lawful order from his superior, therefore in subordinating the respondent's managing director. Secondly, that spreading allegation that the respondent's base commander and the managing director were working in cahoots with Mr Munir Ismail, to deal with terrorists on the benefit of receiving kickback which allegations were never substantiated.
33. The respondent urged this court on that basis and reason given for termination to use the reasonableness test in determining whether the reason for termination was justified by the employer. In support of the reasonableness test, the respondent cited the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR.
34. On whether due procedure was followed before termination, the respondent submitted that the managing director invited the claimant to a disciplinary meeting, a fact which the claimant admitted during cross examination, therefore that the respondent subjected the claimant to due process which he declined to attend. He argued that the act of declining to attend the disciplinary meeting is another demonstration of the claimant's actions of failing to heed lawful command by his superiors.
35. On the reliefs sought, the respondent submitted that notice of termination was issued upon the claimant and even if he was on leave, he was still in employment and due to receive communication from his employer and thus the notice was duly served and not due for payment. On compensation, it was submitted that the termination was justified as such compensation is not warranted. On gratuity pay, it was submitted that the same is not provided in the employment contract as such not due for payment. On notice pay, the respondent submitted that notice to be given before termination is always one month which they duly served upon the claimant as such notice pay is not payable. On leave pay, the respondent argued that the claimant utilized all his leave days and was even on leave at the time of termination, therefore the claim for leave pay is unfounded. On medical and air ticket allowance, it was submitted that the same is only payable on utilization and since none was utilized under this head, the same cannot be refunded. The respondent however admitted owing the claimant February pay and argued that the same has been available for collection but the claimant has refused to collect it.
36. In conclusion, the respondent maintained that the termination was justified in the circumstances and the claim is not warranted and urged the court to dismiss the claim with costs.
37. I have examined all the evidence and submissions of the parties herein. The claimant was terminated by the respondent vide a letter dated February 8, 2014.
38. The letter failed to give reasons for the termination. At the time, the claimant was on leave as from February 1, 2014 and he was informed that the notice period will run concurrently with the notice of 30 days with effect from that day.
39. Before the termination of the contract, the respondents managing director had written to the claimant intimating that he was expecting the claimant to resign from the company.
40. The claimant responded vide an email of January 28, 2014 indicating that he had no intention of resigning and was to serve till the end of his contract and since he was on leave, he would serve his leave and return to work on February 25, 2014 as scheduled.



41. Indeed the claimant had been charged in court for publishing a defamatory matter contrary to section 194 as read with section 36 of the Penal Code.
42. The court considered the charges and refused to admit it on the ground that the offence was not known in law.
43. The court intimated that the complainant was free to seek redress through a civil process.
44. From the evidence above, it is apparent that the reasons for which the claimant was terminated were not explained.
45. This is in contravention of section 43 of the *Employment Act* 2007 which states as follows;-

43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
  - (2) The reason or reasons 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.”
46. Other than this fact, the claimant was never accorded an opportunity to be heard as per section 41 of the *Employment Act* 2007 which states as follows;-

41. Notification and hearing before termination on grounds of misconduct

- (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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
47. In view of this fact, I find the claimant’s termination unfair and unjustified as provided under section 45 (2) of the *Employment Act* which envisages that before an employee is terminated, he/she must be accorded an opportunity to be heard and the employer must establish the existence of valid reasons to warrant the termination which in the case of the claimant, this was not done.
48. In terms of remedies, I find for the claimant and i award him as follows;-



1. 1 month's salary in lieu of notice which the respondent expected the claimant to serve during his leave 7000USD
2. Unpaid salary from February 2014 = 7000USD
3. 5 months remainder of term contract period =  $4 \times 7000 = 28,000$ USD  
Plus 12 days for June =  $12/30 \times 7000 = 2800$ USD
4. 6 months salary as compensation for the unfair and unjustified termination in view of the claimant being treated unfairly and unjustly by the respondent  
=  $6 \times 7000 = 42000$ USD
5. Service pay at 15 days salary for each year worked being  
 $\frac{1}{2} \times 7000 \times 2 = 7000$ USD  
Total = 93800USD  
Less statutory deductions
6. The rest of the claim is not tenable. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.
7. The counter claim is not proved and is dismissed accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gatuku holding brief for Aim for the Claimant – present

Juma holding brief for Archer & Wilcock for the respondent – present

Court assistant – Fred

