



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 840 OF 2019

BETWEEN

CAPTAIN JOSEPH SEBASTIAN OOGA ATAMBO.....CLAIMANT

VERSUS

DAC AVIATION [E.A.] LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono.

Andrew & Steve Advocates for the Claimant

Clive Mshweshe, Advocate for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on what appears on the Court receipt and stamp, to be 12th December 2019. It is not clear if this is a correct date, as 12th December is Jamhuri Day, a public holiday in Kenya. The Statement of Claim is dated 3rd December 2019. The Claimant gave evidence, and closed his case, on 18th February 2021. The Respondent did not file a Statement of Response or attend Court for the hearing. The Claim proceeded by way of formal proof.

2. The Claimant states, he was employed by the Respondent as a Captain [Dash -8] on or about 8th June 2012, on a gross monthly salary of KShs. 481,400, and USD 4,056 [It is not clear if the salary was paid separately, in separate currency]. He was at the time of leaving employment, a Senior Pilot.

3. His evidence is that on or about December 2017, Cabin Crew Linda Teresa, and Cabin Crew Manager Mercy Ojwang', filed complaint against the Claimant, citing bullying and harassment by the Claimant.

4. The complaint related to events of 2015, and came up at a time when the Claimant was supposed to file report surrounding the complainants. Teresa had on two separate occasions, in Chad, failed to follow the Flight Operations Manual, which required that the cargo door was closed, before securing the cabin door, before take-off. This placed Passengers and Cabin Crew at risk. The Claimant was also expected to report how Crew's luggage had been left in Cameroon, while the flight landed in Chad. The Crew had to make do without their personal effects in Chad. Teresa was responsible for this.

5. The Claimant does not clarify in his Statements of Claim and Witness, what the complaint by Mercy Ojwang' was. He states however, that the complaint was unsubstantiated, and anchored on hearsay statements made to Mercy Ojwang' by Teresa.

6. The Claimant states that the complaint was encouraged by the Director of Operations, and was intended to tarnish the Claimant's name, make the work environment intolerable for the Claimant, leading to termination.

7. He was asked to show cause why disciplinary action should not be taken against him, through a letter dated 22nd January 2018. He replied on 25th January 2018. He did not have sufficient time to respond. Disciplinary hearing was scheduled for 26th January 2018 and rescheduled to 29th January 2018 without explanation. The Claimant's evidence is that delay was a calculated move by the Director to find the Claimant culpable. Reschedule was meant to keep Claimant's Witnesses who were away on duty, unavailable.

8. Hearing went on as rescheduled. The Respondent had evidence which vindicated the Claimant, but withheld the evidence. The Claimant came to learn of the exculpatory evidence after the hearing, and decision against him had been taken. Teresa and Mercy were allowed to address the disciplinary committee on matters which were not in the complaint. The committee asked Teresa leading questions. Evidence from Cabin Crew Georgina Mulinge was taken, while she had not lodged any complaint against the Claimant. Disciplinary committee member Ramesh, bullied the Claimant when the Claimant gave his evidence.

9. The committee found the Claimant guilty on all charges. The Respondent issued the Claimant a warning letter. The Claimant appealed to the Managing Director, against the decision. The Appeal was dismissed on 21st May 2018, without the benefit of a hearing. The Claimant states he was not consistently placed on duty rota. He was frustrated, culminating in his resignation, in February 2019. The Respondent accepted resignation, and tabulated the Claimant's dues in Kshs. and USD, at Kshs. 62,337 and USD 20,520 respectively. The Respondent however declined to pay these dues. The Claimant emphasizes that the decision to terminate his contract was involuntary

10. He prays the Court to grant the following orders against the Respondent: -

- a. Declaration that the Claimant was constructively dismissed due to unfair, wrongful and illegal actions of the Respondent.
- b. General damages equivalent to 12 months' salary at Kshs. 5,776, 800 and USD 48,672 for constructive dismissal.
- c. Declaration that the Claimant was unfairly treated in his course of employment.
- d. Payment of Kshs. 62,337 and USD 20,520 together with interest at commercial rates, from February 2019 till payment in full.
- e. Costs and interest from the date of filing the Claim.

11. The Claim as stated at the outset is undefended. The evidence of the Claimant is untested. The issues raised by the Claimant may be summarized as follows: whether he was constructively dismissed; and whether he merits the prayers sought.

The Court Finds: -

12. The Claimant was employed by the Respondent as a Senior Pilot.

13. He was alleged to have been involved in acts constituting employment offences, based on complaints made by his colleagues, Teresa and Mercy.

14. He was issued letter to show cause; responded; was invited to disciplinary hearing; and was heard. The decision made against him was to issue him a warning letter. The Court does not see why a process that ends in a mere warning should have been escalated by the Claimant to an Appeal and eventually to a Claim in this Court.

15. It is not established by the Claimant that the disciplinary process, and lack of being consistently on duty rota, amounted to constructive dismissal.

16. The disciplinary process may have had procedural flaws. But the Court does not see how, an ordinary disciplinary procedure, which ended in a warning, would amount to constructive dismissal. The Respondent may have declined to grant the Claimant a full hearing on Appeal, granted that the decision made at primary level, was a mere warning.

17. The Claimant states repeatedly about calculated moves by Operations Director, without ascribing a reasonable motive to the Operations Director, for these calculated moves. If the Respondent intended to get rid of the Claimant, why then just slap him with a warning letter, not outright dismissal, at the end of the disciplinary process?

18. There are plenty of allegations made by the Claimant, faulting the disciplinary process: he was not granted sufficient time to prepare [he wonders at the same time, why disciplinary hearing was rescheduled]; evidence by Teresa and Mercy was uncorroborated; Mulinge was allowed to give evidence though she had not lodged a complaint [evidence does not have to be preceded by a complaint from the witness]; the complaints arose at the same time the Claimant was meant to prepare reports on certain flight violations involving Teresa; and exculpatory evidence was withheld by the Respondent until after hearing, and decision had been taken.

19. All these allegations would be relevant in a Claim for unfair termination, but do not necessarily show that constructive dismissal has taken place. If an Employer has taken an Employee through a disciplinary process, and issued a warning, rather than a dismissal, the Employee has no reason to resign, and strain the law on constructive dismissal. The Respondent did not act in a manner that indicated it was no longer willing to be bound by the terms of the contract. Its behaviour, in taking the Claimant through a disciplinary process, was not repudiator of the contract which governed the Parties' relationship.

20. It is helpful to remember the principles governing constructive dismissal, as laid down in the ***Kenya Court of Appeal decision, Coca Cola East and Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR.***

21. The central principle is that the Employer's behaviour must be shown to be so heinous, so intolerable, that it made it considerably difficult for the Employee to continue working. The Employee initiates termination, believing himself, to have been fired. The Employee needs to show that the Employer, without reasonable or proper cause, conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is considered as constructive dismissal, if the Employer's conduct is a significant breach of the contract of employment, and that the conduct shows the Employer is no longer interested in being bound by the terms of the contract.

22. The Respondent's conduct can hardly be said to have been so heinous and intolerable, that it made it considerably difficult for the Claimant to continue flying planes. The Claimant was taken through a disciplinary process culminating in a warning. He was not fired and had no reason to consider himself fired. He did not show that the Respondent, without reasonable or proper cause, conducted itself in a manner likely to destroy or seriously damage the employment relationship. There was a legitimate disciplinary hearing, ending in a letter of warning against the Claimant. By taking the Claimant through a disciplinary process, the Respondent acted in accordance with the Employment Act, and the contract of employment, and cannot be said to have been in significant breach of the contract. In sum, the Respondent's conduct was not repudiator, showing an unwillingness on the part of the Respondent, to continue upholding the terms of the contract.

23. The prayer for a declaration that the Claimant was constructively dismissed, is declined.

24. The prayer for general damages for constructive dismissal, equivalent of 12 months' pay at Kshs. 5,776,800 and USD 48,672, is declined.

25. The prayer for a declaration that the Claimant was unfairly treated in the course of employment has no foundation and is declined.

26. The Respondent offered to pay terminal benefits at Kshs. 62,337 and USD 20,520. There is no material to contradict the Claimant on this offer. There is no evidence of payment. Tabulation was made upon the Claimant's resignation in February 2019.

27. It is ordered that the Respondent shall pay to the Claimant terminal benefits at Kshs. 62,337 and USD 20,520.

28. Interest on the principal amount, allowed at 16% per annum from 1st March 2019, till payment is made in full.

29. Costs to the Claimant.

IN SUM, IT IS ORDERED: -

a. The Respondent shall pay net terminal benefits as offered to the Claimant, at Kshs. 62,337 and USD 20,520.

b. Interest allowed on the amounts above, at 16% per annum, from 1st March 2019, till payment is made in full.

c. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES UNDER JUDICIARY AND MINISTRY OF HEALTH COVID-19 GUIDELINES AT CHAKA, NYERI COUNTY, THIS 28TH DAY OF MAY 2021

JAMES RIKA

JUDGE