

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 126 OF 2018

TERESA MUTHONI WACHIRA.....CLAIMANT

VERSUS

NAS AIRPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her alleged unlawful and arbitrary termination. The Claimant averred that she was employed by the Respondent in November 1998 as a laundry attendant earning a salary of Kshs. 3,300/- which salary was raised progressively over the years and at the time of dismissal she was earning Kshs 75,300/- a month. The Claimant averred that she worked diligently for the Respondent until 11th July 2017 when the Respondent arbitrarily and/or unfairly terminated her services verbally without notice in violation Article 41 of the Constitution and the provisions of the Employment Act. The Claimant sought a declaration that her termination was unlawful, the sum of Kshs. 1,764,20.40 as gross biennial pay, three months pay in lieu of notice – Kshs. 220,502.55, Kshs. 1,396,516.15 for the years served less Kshs. 462, 74 paid into the Claimants account purportedly her full terminal benefits.

2. The Respondent filed a memorandum of response and averred that the Claimant's duties were accessing the apron at the Jomo Kenyatta International Airport for purposes of offloading and cleaning of aircrafts as per the Respondent's instructions. The Respondent averred that the Claimant and her colleague Alex Kitonyo were allocated duties on 7th July 2017 on flight KQ 101 and that when the said aircraft arrived and passengers disembarked, the Claimant and her colleague boarded the said aircraft to perform their duties and upon completion of their tasks proceeded to the next aircraft. The Respondent averred that later, a Kenya Airways representative received a complaint from a passenger who was on board flight KQ 101 indicating that she had left two passports together with an envelope containing British Pounds in her seat pocket. The Respondent averred that the Kenya Airways security team searched the specific seat and managed to trace both passports but did not find the envelope containing the money. The Respondent averred that the Claimant and her colleague were then summoned and taken to the Kenya Airways Security office for investigations. The Respondent averred that the Claimant denied having taken the money but upon carrying out a physical search, it was discovered that she had concealed 17 £50 notes amounting to £850 in a latex glove between her legs. The Respondent averred that the matter was reported to the Kenya Police Service for further action. The Respondent averred that it also carried out its own investigations and recorded statements including one from the Claimant. The Respondent averred that a disciplinary hearing was conducted in the presence of the Claimant accompanied by a shop steward from the Claimant's union, security manager and HR manager. The Respondent averred that the Claimant was permitted to make representations but her response was unsatisfactory and hence the Respondent proceeded to summarily dismiss her with effect from 10th July 2017. The Respondent averred that her terminal dues were calculated and she was paid Kshs. 462,674/-. The Respondent averred that the summary dismissal was justified as there was a valid reason being the theft incident and that fair procedure was also followed. The Respondent thus prayed that the suit be dismissed with costs.

3. The Claimant filed a reply to the memorandum of response. She averred that she never stole the £850 as alleged and that the statement she made during investigations was sufficient but the Respondent conveniently disregarded all that she said and instead chose to orchestrate a scheme with the said security teams, under which they intimidated and victimized her by conducting sham disciplinary proceedings turning themselves into the judge, jury and executioner against the precepts of natural justice and Kenyan justice system. The Claimant denied hiding the said currency between her legs and found the allegation disgusting and demeaning having voluntarily handed over the notes to the authorities, and the purported investigations and findings of misconduct were tainted with bias against the Claimant. The Claimant contended that she was not accorded a fair hearing and the summary dismissal was malicious, unlawful, invalid as due process was not followed, and the Respondent had no reasonable and sufficient grounds to warrant the Claimant's summary dismissal under Section 44(g) of the Employment Act.

4. The Claimant and the Respondent's witness testified. The Claimant adopted her statement and the list of documents as her evidence in chief. She testified that she was allocated service on the aircraft and as she worked, she found the cash on the plane. She stated that she then carried the cash to the next plane so that she could report that she found the cash after work. She said that she did not have a radio call and did not want to delay the second aircraft which was due to depart. She stated that the aircraft have short intervals and if you delay one of them one will be fired and she had 3 aircraft to work on. The Claimant testified that it was less than 20 minutes and she had not finished her work when a security man came and started asking them if they had seen anything she was taken to JKIA cells at Unit 4 where she spent the night and was charged at the JKIA court but she was later acquitted as there no cause for arrest. In cross-examination she stated that she had the cash but she said she did not deny that she had it. She testified that the security guard found her on another plane and that she did not have a meeting with the Union. She stated she discussed the issue on phone. She testified that when she left the cell she went to work and went to see the personnel manager who called the shop steward and the Claimant was asked to hand over the Job ID and leave. The Claimant testified that she found the cash on the seat under a pillow when she was carrying out her duties. She confirmed in cross-examination that she expected to finish cleaning then report. She stated that she worked for 18 years and was paid a sum of Kshs. 462,000/- but she did not understand how it was calculated.

5. The Respondent's witness was Samwel Gathogo an assistant HR manager. He adopted his statement and testified that after they received a report from a passenger who was on transit from London to Entebbe, the security team went to check on the aircraft and when they did not

find the money and they went to a different aircraft and found the Claimant and her colleague and from them they enquired if there was anything they had gotten from the previous aircraft and they responded in the negative after which they were taken to the KQ offices where they were frisked. He said that the money was found in the Claimant's inner wear. He stated that thereafter statements were taken from the Claimant, her colleague, the security team and safety officer. He testified that the Claimant was taken through a disciplinary meeting and she was given an opportunity and time to explain and she stated that she had taken the money with an intention to return it to KQ. He testified that the explanation the Claimant gave was not satisfactorily as she denied knowledge of the loss and concealed the money which showed that she did not have the intention to return it and she was therefore dismissed summarily. He stated that the Claimant was paid her salary up to 10th July, 20 days leave, 10.8 months gratuity and she was given a certificate of service. He said that the Claimant was not entitled to notice as she was summarily dismissed. In cross-examination he stated that he was not present when the money was found and that he was only relying on the statement of the person who was present when the money was found. That marked the end of oral testimony and the parties were to file submissions.

6. The Claimant submitted that her explanation on the incident was plausible and that the Respondent's evidence was worthless as the airline passenger who allegedly lost the money was not called as a witness and the security officer who purportedly recovered the money from the Claimant did not testify. She submitted that the Respondent's witness testimony was mere hearsay which is worthless in law. The Claimant submitted that the purported investigations and findings of misconduct on her part were therefore tainted with bias against her. The Claimant submitted that she was not accorded a fair hearing and the summary dismissal was thus malicious, unlawful and invalid as due process was not followed. The Claimant submitted that the Respondent did not have any reasonable and/or sufficient grounds to warrant the summary dismissal under Section 44(g) of the Employment Act. The Claimant submitted that her constitutional rights under Article 41 of the Constitution and rights under the employer-employee relationship as governed by the Employment Act were violated. She submitted that this resulted in economic ruin and she therefore deserves all declarations sought and the sums claimed, as well as general damages for distress, and compensation. The Claimant relied on the authorities of **Teachers Service Commission v Joseph Wambugu Nderitu [2016] eKLR** and **Jacob Oriando Ochanda v Kenya Hospital Association Ltd T/A the Nairobi Hospital [2019] eKLR**.

7. The Respondent submitted that it was justified in termination as it had basis to believe that the incident of theft had occurred and in accordance with Section 43(2) of the Employment Act, these were matters that the Respondent believed to genuinely exist at the time of the termination. The Respondent submitted that there was indeed a hearing as confirmed by its witness and the Claimant herself prior to her termination. The Respondent submitted that the requirements of Section 41 of the Employment Act were satisfied and the termination justified. The Respondent submitted that the Claimant is not entitled to payment in lieu of notice. The Respondent submitted that the Claimant admitted being paid her terminal dues which included gratuity as per CBA. The Respondent submitted that there is no legal basis for gross biennial payment and also that the payment for Kshs. 1,396,516.15 has not been particularized by the Claimant and therefore all claims should be dismissed with costs.

8. The Claimant was dismissed for her alleged involvement in theft of £850 which was left by an airline passenger enroute to Entebbe, Uganda. The Claimant was assigned to clear KQ 101 the flight the passenger had come on. She took the cash and was in her words 'waiting to hand it over after work'. She was summoned from the second aircraft that was being cleaned and upon a search conducted the money was found secreted between her thighs. This was in my view not in keeping with someone who had the intention of surrendering the cash. She was taken through a disciplinary process by her employer where the safeguards under Section 41 of the Employment Act were availed to her. She even had a Union representative with her. It matters not that the criminal trial collapsed as the complainant who is the passenger was not availed to testify or record a statement. The Claimant was dismissed for cause and her dues paid. The Respondent was generous in paying her salary up to 10th July, 20 days leave, as well as gratuity, a benefit she could easily have lost on account of the summary dismissal. As the suit was unmerited the same is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 26th day of February 2020

Nzioki wa Makau

JUDGE