



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1612 OF 2018

DANIEL GISORA NYAKUNDI.....CLAIMANT

v

KENYA AIRWAYS LIMITED.....RESPONDENT

JUDGMENT

1. Daniel Gisora Nyakundi (Claimant) was offered employment as a Customer Service Agent by Kenya Airways Ltd (Respondent) on 6 December 2011.
2. On 22 May 2013, the Respondent issued a show-cause notice to the Claimant to explain why disciplinary action should not be taken (against him) for *unprocedurally exiting the baggage hall with a bag not recorded in the Baggage Delivery Order*.
3. The Claimant responded to the show-cause on 24 May 2013 and a disciplinary hearing was held on 6 June 2013.
4. However, during the hearing, the Claimant's Union raised procedural objections to the hearing proceeding because the Claimant had been arraigned before the Magistrates Court, based on the same facts forming the foundation of the disciplinary hearing.
5. The minutes of the proceedings produced in Court by the Respondent show that the Chair of the hearing directed that the disciplinary proceedings be discontinued pending the conclusion of the criminal charges facing the Claimant.
6. On 26 June 2013, the Respondent wrote to the Claimant to notify him of the termination of (his) employment and the primary reason given for the decision was

This is to inform you that given the withdrawal of your airport security pass, details of which you are aware of, by the issuing authority – Kenya Airports Authority you have been unable to work since 17th May, 2013 to date. This has frustrated the contract between you and Kenya Airways giving management no alternative but terminates your services as per the provisions of the Collective Bargaining Agreement Clause 44(f) and the Human Resource Policy Manual.
7. The decision prompted the Claimant to move the Court on 17 December 2018 alleging unfair termination of employment and breach of contract.
8. The Respondent filed a *Reply to Claim* and a *Notice of Preliminary Objection* on 24 July 2019 and on 30 September 2019, the Court directed that the Preliminary Objection be taken during the hearing of the Cause on the merits.
9. The Cause was heard on 5 December 2019 and 12 February 2020. The Claimant, Respondent's Duty Service Manager, Quality Assurance Coordinator and Employee Relations and Staff Welfare Officer testified.
10. The Claimant's submissions were not on file by 28 February 2020 as directed while the Respondent filed its submissions on 13 March 2020.
11. The Court has considered the pleadings, evidence and submissions.

Limitation

12. The Claimant's employment was terminated through a letter dated 26 June 2013. In Court, he denied having been served with the letter

and asserted that he only saw the letter after being served with the Respondent's documents.

13. The Claimant also testified that he wrote a demand letter to the Respondent on 4 September 2018 after the withdrawal of the criminal charges seeking immediate reinstatement, but there was no response and that it was at that juncture that he considered having been dismissed.

14. The Respondent's third witness was the Employee Relations and Staff Welfare Officer. He testified that the Claimant declined to sign for the termination letter when served upon him. He asserted that the fact that the Claimant cleared was evidence that he was aware of the termination of employment.

15. The copy of the clearance form produced in Court did not have the Claimant's contact details or signature. The Claimant disowned it.

16. The Respondent did not disclose the particulars or identity of the person who delivered the termination of employment letter to the Claimant.

17. It is not in dispute that the Claimant could not access the workplace because he lacked a security pass. There was no disclosure where and how the Claimant was alerted that there was a letter for him and how he accessed the workplace to get a copy.

18. On the state of the record, the Court finds that the Respondent did not prove that it communicated to the Claimant that his employment had been terminated in 2013.

19. In the circumstances, the Court will endorse the legal principle set out in *Hindle Gears Ltd v McGinty & Ors* (1984) IRLR 477 that an uncommunicated decision to dismiss an employee is not sufficient to effect a dismissal.

20. The question of limitation, therefore, in the view of the Court does not arise.

Unfair termination of employment

21. The initial charge(s) against the Claimant was *unprocedurally exiting the baggage hall with a bag not recorded in the Baggage Delivery Order*.

22. The Respondent put the Claimant through a disciplinary process on that allegation but the proceedings were discontinued in order to allow the criminal case facing the Claimant be concluded.

23. The charges against the Claimant were withdrawn on 17 August 2018.

24. However, despite promising the Claimant that any disciplinary action would wait for the outcome of the criminal charges, the Respondent took the precipitate action to bring the employment to an end on 26 June 2013.

25. The reason, according to the Respondent was the frustration of the contract as the Claimant's pass (ess) had been withdrawn and he could not access the workplace, a security facility.

26. The minutes of the discontinued disciplinary hearing indicate that the issue of the Claimant's pass (ess) had been the subject of discussion and the Claimant had been given time to follow up on the passes with Kenya Airports Authority, and the Respondent.

27. The Panel recommended that the Claimant's Line Manager assist him and also allow him time off to follow up on the passes. There was advice to the Claimant to formally request for assistance to enable him to get the passes.

28. Three weeks later, the Respondent terminated the Claimant's employment.

29. In the view of the Court, the failure by the Claimant to attend work/obtain passes was a distinct ground for separation, though related to the events which led to the first disciplinary process, and he should have been put through a fresh round of the disciplinary process.

30. The Respondent did not remotely suggest that it asked the Claimant to show-cause why he had not been able to attend work after 5 June 2013.

31. The termination of employment, the Court finds was not only unfair in terms of section 41 of the Employment Act, 2007 but was also not in accord with justice and equity as contemplated by section 45(4)(b) of the Act.

Salary in lieu of notice

32. The Respondent offered the Claimant 2 months' salary in lieu of notice and nothing turns on the relief. If it was not paid, the Respondent should make good the offer.

Unpaid salary from 5 June 2013 to 4 September 2018

33. The Claimant was not on active duty from 5 June 2013 and by virtue of section 19(1) (c) of the Employment Act, 2007, the Court declines to allow this head of the claim.

Rebate tickets

34. The Claimant made a plea for Kshs 1,200,000/- on account of 2 annual tickets for 5 years.

35. This head of the claim was in the nature of special damages. The Claimant did not produce any contractual document providing for the rebates or prove that he incurred travel expenses in the sum of Kshs 1,200,000/-. The head of the claim was not proved.

Unpaid leave

36. On account of leave, the Claimant sought Kshs 353,500/- but since the Claimant did not work from 2013 to 2018, the Court finds that this head of the claim was contractually misplaced. The law also contemplates consecutive service in order to qualify for annual leave.

Provident fund contributions

37. This was also in the nature of special damages. The Claimant did not prove that he was eligible for provident fund contributions of Kshs 248,000/-.

Compensation

38. The Claimant served the Respondent for about 3 years.

39. The decision to terminate his employment was not communicated to him and he only became aware in 2018 after filing the instant proceedings.

40. In consideration of the length of service and the circumstances of separation, the Court is of the view that the equivalent of 10 months gross salary as compensation would be fair and appropriate (gross salary in September 2012 was Kshs 101,758/-).

Conclusion and Orders

41. The Court finds and declares

- (a) The cause of action was not time-barred.
- (b) The termination of the Claimant's employment was unfair.

42. The Claimant is awarded

- (i) Compensation **Kshs 1,017,580/-**

43. The Respondent to pay the Claimant the dues set out in the termination of employment letter if the same has not been paid, as part of this judgment.

44. Claimant acted in person. He is awarded costs on a half-scale.

Dated, signed and delivered through email in Nairobi on this 24th day of April 2020.

Radido Stephen

Judge

Appearances

Claimant in person

For Respondent Mr. Oweya/Mr. Odhiambo instructed by Gikera Vadgama Advocates

Court Assistant Judy Maina