



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 25 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 21st May, 2020)

STEPHEN CHASE KISAKA.....CLAIMANT

VERSUS

EMIRATES AIRLINE LIMITED.....RESPONDENT

JUDGMENT

1. This suit was instituted on 25/11/2016 to challenge the dismissal of the Claimant's employment and to seek payment of his terminal dues. In particular, the Claimant seeks the following reliefs-

- a. General damages for unfair termination of the Claimant's contract of employment (Kshs. 556,468 x 12) amounting to Kshs. 6,677,616.00.*
- b. General damages for unfair administrative (sic).*
- c. Exemplary damages for breach of the Claimant's constitutional rights to fair labour practice.*
- d. Kshs. 593, 565.95 on account of 32 leave days not taken.*
- e. 11 service-related concessional tickets for the Claimant and his family already earned at the rate of (\$2,500 x 11) amounting to \$27,000.00.*
- f. Service-related concessional tickets for the next 51 years at the rate of (\$2,500 x 51) amounting to \$127,500.00.*
- g. One months' pay in lieu of notice of Kshs. 556,468.00.*
- h. Certificate of Service.*
- i. Profit share for 9 weeks, valued at Kshs. 1,104,616.75 for the 2014/2015 financial year.*
- j. Leave travel allowance of Kshs. 30,655.00 for the 2014/2015 financial year.*
- k. Kshs. 83,210.00 on account of salary underpayment for January 2014 to October 2014.*
- l. Kshs. 26, 139.50 on account of the Provident Fund.*
- m. Declared bonus by Emirates Airline to its employees from the Emirate's Group's Profits of Dhs. 5.5 billion for the 2014/2015 financial year.*
- n. Interest on a, b, c, d, e, f, g, I, j, k, l and m at current mean commercial rates.*
- o. Cost of this suit.*

In the Alternative

p. An order for reinstatement.

q. An injunction restraining the Respondent from replacing the Claimant.

r. An order for the payment of all salary arrears from the date of termination.

s. Costs of the suit.

2. On 6/12/2016, the Respondent filed its Reply denying the allegations set out in the amended claim and urged this Court to dismiss the cause herein, with costs.

The Claimant's Case

3. The Claimant avers that on 13/1/2006, he was employed as a Flight Analysis Superintendent situated in the Respondent's head office in Dubai. On 16/9/2007, he was transferred to the Respondent's offices in Nairobi and re-designated as the sales manager in charge of Kenya, Chad, Democratic Republic of Congo, Malawi, South Sudan, Central Africa Republic, Congo Brazzaville, Equatorial Guinea and Gabon.

4. The Claimant avers that on 26/8/2014, he received a letter sending him on suspension to facilitate an objective investigation for undisclosed allegations against him. He avers that on 10/9/2014, he received a letter from the Respondent informing him that from the investigation conducted he faced possible charges of negligence, non-disclosure of conflict of interest, breach of trust and non-disclosure of pertinent information.

5. The Claimant requested to be furnished with copies and full particulars of the said allegations to facilitate a concise response. However, in her letter of 22/9/2014, the Country's Manager, Anita Kongson; declined to issue the Claimant with the same. Subsequently, on 23/9/2014, the Claimant's disciplinary hearing was set for 1/10/2014.

6. It is the Claimant's case that the Country Manager nominated herself to sit in the disciplinary hearing, something that the Claimant objected to and requested for her recusal. However, she refused to recuse herself and the hearing proceeded as scheduled. On 27/10/2014, the Claimant was summarily dismissed on the following grounds:-

a. Gross negligence regarding failure to escalate or officially report an allegation against a member of the sales staff for alleged impropriety.

b. Failure to, once again, report to the Country Manager the alleged conflict touching on two members of staff.

7. The Claimant avers that he appealed the decision but his appeal was rejected. At the time of termination, he was earning a gross salary of KShs.504,189.00 exclusive of the monthly union negotiated award of KShs.39,209.31.

8. According to the Claimant, the Country Manager acted in bad faith by alleging that he had failed to escalate the conflict of interest between two staff members yet he was not involved in the handing over between the Country Manager and her predecessor.

9. It is the Claimant's position that by refusing to recuse herself, the Country Manager sat as an accuser, a prosecutor and a judge in her own cause. He is also of the position that the Respondent's refusal to avail the investigation report to the Claimant was in breach of its own internal requirements that the full nature of the misconduct ought to be given in writing.

10. The Claimant avers that the Respondent maliciously and unfairly withheld his negotiated salary until 18/12/2014 when only part of it was paid after being threatened with litigation.

11. He further avers that the Respondent has failed to adjust his salary based on the merit performance where he had been awarded a revenue performance of 8% increase over the 2012/2013 financial year. It is his position that he achieved 19% revenue performance in the 2013/2014 financial year entitling him to a maximum merit performance salary increment of 3%.

12. It is averred that the Claimant was entitled to a 9% increment on his basic salary from 1/1/2014. It is further averred that at the time of his termination, the Respondent underpaid him by raising his gross salary to KShs.548, 147.00 instead of KShs. 556,468.00 a month.

13. He avers that the Respondent failed to adjust its remittance to the provident fund. It also failed to pay him KShs.593,565.95 for the leave days earned but not taken.

14. The Claimant avers that pursuant to the CBA of 30/7/2014, he is entitled to a 9 weeks profit share for the 2014/2015 financial year as declared by the Respondent on 7/5/2015. He further avers that for the 9 years he has worked for the Respondent, he is entitled to 11 concessional economy, upgradable to business class air tickets, to any destination on the Respondent's network.

15. Lastly, the Claimant avers that the Respondent failed to pay his salary under the new salary structure, yet other staff members were promptly paid under the new structure.

16. During trial, the Claimant testified as CW1 and adopted his witness statement filed on 16/5/2019, the bundle of documents filed on 25/11/2016 and the supplementary bundle of documents filed on 16/5/2019, as his evidence. The witness statement reiterates the averments contained in the claim, as outlined hereinabove.

17. He testified that the disciplinary panel comprised of Anita Kongson – Country Manager, Emma Weeks – HR Specialist, Mohammed Ighal – Finance Manager and Sammy Kibot a colleague who attended at his invitation.

18. It was the Claimant's testimony that during the disciplinary proceeding, he rejected the investigation reports as crucial information had been omitted.

19. It was his evidence that the name of the employee involved in the impropriety was disclosed at the hearing but not in his dismissal letter. He admitted to not disclosing that some members of staff in sales had spouses working in the travel industry. However, he contended that the staff were individually liable for the conflict of interest, yet they were still in employment.

20. During cross-examination, he conceded that his juniors reported to him while he reported to the Country Manager. He testified that he knew of the conflict of interest when he joined the industry but contended that he reported the same to the Country Manager in 2009; who indicated that he had knowledge of the same. He denied having knowledge that a member of staff was collecting money from the public.

21. He stated that he was seeing the schedule that prorated leave days to 20 days, for the first time but contended that he could not have taken more than 1 day of leave as there had been no Country Manager. It was his concession that some of the leave days were paid after the Respondent was threatened. He further conceded that a cheque of Kshs.480,953.00 for 20 untaken leave days, was paid to his advocates.

22. It was his concession that profit share was payable only to employees who contributed but contended that he had made contributions continuously.

23. Upon re-examination, he maintained that he had informed Shamsi of the conflict of interest who told him that he was handling it at the regional level. As regards the employee who was collecting money from the public, he maintained that he had no personal knowledge of the same.

The Respondent's Case

24. The Respondent is a limited liability multi-national company incorporated in Kenya to carry on the business of passenger and cargo air transport.

25. The Respondent contends that the claim of Kshs. 593,565.95 is without basis as the Claimant had 19.5 days of outstanding leave amounting to Kshs. 315,364.60 which was paid out to him.

26. The Respondent further contends that the claim for profit share of Kshs. 1,104,616.75 for 9 weeks in the 2014/2015 financial year has no basis. Instead, the Respondent avers that the retrospective computations made by the Claimant are untenable as he seeks to rely on calculation of profit share applicable after he left employment.

27. It is averred that the Claimant is not entitled to participate in the profit share for the following reasons.

a. The profit share provisions are not a contractual entitlement as they are contained in the Pay and Allowances Manual.

b. For an employee to be eligible, they must be in employment on the date the profit share is paid out. Further, employees who are dismissed or are undergoing disciplinary action which will ultimately lead to a dismissal, on or before the payroll processing date in the month the profit share is paid out, forfeit eligibility to any profit share payment immediately.

c. The profit share is usually paid out in July following the announcement of the group results. By this time, the Claimant had ceased to be the Respondent's employee hence not eligible.

28. The Respondent denies the claim for leave travel allowance of Kshs. 30,655.00, as it was paid in his March 2014 salary.

29. During trial, Carolanne Groves testified as RW1. She adopted her witness statement and all the documents filed in this case as her evidence. She stated that in August 2014, she was notified by the Group Security that there was an investigation on a potential misconduct in Nairobi.

30. Employees were interviewed and a further investigation conducted which culminated into the suspension of the Claimant together with other employees. She testified that they were issued with letters to show cause. The Claimant responded to his, enquiring on the composition of the disciplinary panel and requested to be furnished with certain documents.

31. It was her testimony that the Claimant was held responsible having known that two of his juniors had spouses working in the travel industry. She contended that Shamsi had been the commercial manager and not the HR manager. She denied the allegation that Anita had been the complainant.

32. It was her testimony that the decision to dismiss the Claimant was taken by the Human Resource based in Dubai.

33. As regards the reliefs sought, she stated that the Claimant was not entitled to notice pay as he had been summarily dismissed. She further stated that the concessional tickets were non-contractual benefits.

34. She testified that the Claimant was compensated for the untaken leave and leave travel allowance. It was her position that profit share was not payable to someone who had been dismissed. As regards underpayment, it was her testimony that the Claimant received a total of 10% increase.

35. During cross examination, she conceded that the Claimant was not personally conflicted and that paragraph 2.3 of their policy tasked an employee to disclose their conflict of interest. However, she contended that the Claimant had knowledge of the conflict of interest as he had been informed by Francis and Morris that they were conflicted. It was her position that he ought to have followed the procedure stipulated in the policy.

36. She admitted to having no knowledge of whether an investigation was carried out after the Claimant had informed Shamsi that there were employees who were conflicted. It was her testimony that Morris and the Claimant were good friends.

37. She referred to a report of the investigation findings conducted by Group Security but conceded that she did not have a copy in Court. She further conceded that the complaints filed against the Claimant and the sales team were not in Court.

38. In her testimony, she stated that no conflict of interest was confirmed in the case of Francis but conceded that the Claimant's employment was terminated on account of Francis's alleged mistake. She testified that Francis and Morris were no longer the Respondent's employees.

39. It was her testimony, that the Claimant had requested to be furnished with the report that formed the basis of his accusation, but it was not given to him. She admitted that the Respondent never nominated a representative as required by clause 3.2.6 of the manual.

40. Upon re-examination, she maintained that the decision to dismiss an employee was made by the Human Resource.

The Claimant's Submissions

41. In his written submissions filed on 15/12/2019, the Claimant submits that the termination of his employment was unlawful and unfair. For instance, the Respondent failed to prove the allegations against him, no investigation report was availed to him and no reasons on why his appeal was rejected were given to him.

42. He relies on the case of **Donald Odeke vs. Fidelity Security Limited [2012] eKLR** where the Court held that regardless of the offence an employee committed, their employment termination is unfair if they were not heard. He also relies on the case of **Kiama Wangai vs. Egerton University [2016] eKLR** where it was observed that fundamental protection accorded to an employee under article 41 of the Constitution and section 41 of the Employment Act requires that they be informed of the allegations against them and be given an opportunity to make their representations.

43. The Claimant submits that the disciplinary process was marred with unfairness and unlawfulness which culminated into the violation of his right to fair trial. For instance, Anita sat in the disciplinary proceedings instead of recusing herself, even after he objected to her presence.

44. He relies on the case of **Patrick Abuya vs. Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR** where the Court held that an employer should commence disciplinary proceedings without any biases, listen to and consider any representations made. He also relies on the case of **Joshua Rodney Marimba vs. Kenya Revenue Authority [2019] eKLR** where the Court held that there cannot be a fair hearing where the Committee sitting to hear a matter is improperly constituted, acts with bias and denies one the opportunity to present their case.

45. The Claimant submits that the duty to disclose any conflict of interest vests in the conflicted individual. He asserts that he never knew about the conflict of interest and denies concealing the misconduct of other employees. As such, it was unfair to subject him to disciplinary proceedings for breach of contract on something he was not personally liable for.

46. The Claimant submits that he is entitled to the reliefs sought because he was underpaid, was not paid a salary commensurate to his performance and was not paid for the untaken leave days.

The Respondent's Submissions

47. In its submissions filed on 20/2/2020, the Respondent submits that the Claimant was informed of the reason they were considering disciplinary action vide the show cause letter of **10/9/2014**. Further, his dismissal letter outlined the reasons why his employment had been terminated.

48. The Respondent submits that the grounds forming the basis of the Claimant's termination are outlined in Section 44 (4) (c) of the Employment Act. As such, the reason for terminating the Claimant's employment was justified as his omissions were untenable with his continued employment.

49. The Respondent relies on the Court of Appeal case of **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR** where the Court observed that dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship.

50. It is submitted that the Claimant was accorded procedural fairness. An objective investigation was conducted which found that the Claimant had a case to answer. He was issued with a letter to show cause and was given the opportunity to respond to the allegations in writing. He was furnished with the company policies but was not issued with the investigation report due to its confidential nature.

51. The case of **Leland I. Salano vs. Intercontinental Hotel [2013] eKLR** has been cited where the Court observed that documents are confidential if their unauthorized disclosure could damage the essential interests of the employer's business. Further, documents are deemed confidential when their owner takes reasonable steps to limit their access to employees and other unauthorized persons.

52. The Claimant was subjected to a disciplinary hearing and no new matters were introduced. The issues raised in his show cause letter formed the basis of the disciplinary enquiry. It is submitted that the minutes of the hearing confirm that the Claimant only made representation on the charges raised.

53. The Respondent relies on the case of **Anthony Mkala Chitavi vs. Malindi Water Company Limited [2013] eKLR** where the Court observed that procedural fairness involves informing an employee of the contemplated charges, according them the opportunity to prepare and present their defence and considering their representations.

54. Consequently, the Respondent submits that the decision to terminate the Claimant's services was based only on two grounds. It is further submitted that the Claimant was afforded the right to an appeal wherein the decision to uphold the termination was made after considering all the relevant documents.

55. It is submitted that the composition of the disciplinary panel was fair, and that the Respondent was the complainant, not Anita; a fact that had been explained to the Claimant when he objected to her presence at the hearing.

56. To fortify the foregoing position, the Respondent has cited the case of **Bett Francis Barngatuny & Another vs. Teachers Service Commission & Another [2015] eKLR** where the Court held that if an employer has conducted disciplinary proceedings fairly in accordance with the statutory or laid down procedures, then the court should exercise caution before interfering with the findings.

57. As regards the reliefs sought, the Respondent submits that there is no basis for the claim for damages for unfair termination as the Respondent has demonstrated that the termination was just, fair and procedural. The Respondent further submits that the issue of administrative action does not arise in this case as there existed a private contractual relationship between the parties.

58. The Respondent avers that the Claimant is not entitled to punitive or aggravated damages as they are awarded in specific cases where the Claimant demonstrates that Respondent's motives, conduct and manner of breach were actuated by malevolence. The Respondent relies on the case of **Margaret Omondi vs. Kenya Authority [2013] eKLR** where the Court held that exemplary damages were not payable in cases of breach of employment contract.

59. The Respondent submits that the claim for underpayment of salary is unmerited as the Claimant received a salary increment.

60. It is submitted that the Claimant is not entitled to payment of his outstanding leave. The Respondent contends that the Claimant never demonstrated how he arrived at the figures claimed. Nevertheless, his leave days were prorated to 20 days and then paid to him.

61. The Respondent submits that the claim for concessional tickets has no basis as they were benefits accruing to employees in active employment. As such, the Claimant having been dismissed could not claim the same. It is submitted that the Claimant is not entitled to payment in lieu of notice as she was summarily dismissed.

62. It is the Respondent's submissions that the Claimant is not entitled to payment of profit share since she was not an employee by the time the shares were announced and paid out.

63. It is submitted that the Claimant is not entitled to leave allowance as the same was paid to him in March 2014. Further, the claim for reinstatement is untenable having been overtaken by events.

64. I have examined all the evidence and submissions of the Parties herein. Issues for this Court's determination are as follow:-

1. Whether there were valid reasons to warrant the Claimant's dismissal.

2. Whether the Claimant was subjected to a fair disciplinary process.

3. Whether the Claimant is entitled to the remedies sought.

Reasons for dismissal

65. The Claimant was served with a dismissal letter dated 27.10.2014 which stated as follow:-

".....the reason for your dismissal is gross negligence regarding your failure to escalate and officially report an allegation regarding one of our sales staff illegitimately collecting money from a travel agency. In addition to this, you did not share information with your current Country Manager regarding a conflict of interest matter where two of your sales teams' wives were employed with organizations operating within the travel industry in Nairobi....."

66. According to the evidence of the Claimant, he did not know about any sales staff collecting money from a travel agency. The Claimant in his evidence indicated that the name of the sales staff involved was not disclosed to him even during the disciplinary hearing.

67. In their evidence in Court RW1 also failed to indicate who the alleged sales staff who was collecting money from a travel agency was. This issue therefore remained unproved.

68. On the second limb of the dismissal, the Claimant was dismissed for failing to disclose conflict of interest of his staff in that they were having spouses in the travel industry. The two staff in this case were Francis and Morris who reported to the Claimant. On this issue the Claimant indicated that he reported to one Shamsi.

69. The RW1 indicated that she did not know whether any investigations were conducted after the Claimant reported to Shamsi.

70. RW1 also indicated that the Group Security was involved in investigation of the issue but she was not able to produce the investigation report and neither was the Group Security called as a witness to shed light on the findings of the alleged investigations.

71. RW1 indicated that there were complaints made against the sales team by Agents. The said complaints were not also availed to Court.

72. The RW1 stated in cross-examination stated that the 2 staff who were found to be conflicted were however not terminated at the time and one Francis resigned later but recently she terminated Morris though they continued in employment after the Claimant was dismissed.

73. Given the above finding, the reason given by the Respondents in dismissing the Claimant do not hold.

74. Section 43 of the Employment Act 2007 states as follows:-

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".

75. Indeed it is imperative that an employer intending to terminate an employee must have valid reasons and must prove the existence of the said reasons.

76. In the case of the Claimant, I do not find the Respondents demonstrating the validity of reasons for termination given that they have not disclosed the sales staff soliciting for money and that the Claimant was aware of it. They have also not established that the Claimant was one conflicted but other staff who the Claimant indicated he disclosed to one Shamsi.

Disciplinary process

77. On the issue of the process leading to dismissal, the claimant told Court that he was subjected to a flawed process because his immediate boss Anita was the complainant and the judge and he complained about the composition of the disciplinary panel but the Respondent chose to ignore him.

78. The Claimant vide a letter dated 15/9/2014 sought some documents from the Respondent Country Manager – Kenya. These included a copy of the Respondent's Employment Regulation Manual ER No. C6-3 and a copy of the preliminary investigation report that formed the basis of accusations against him.

79. Vide a letter dated 22.9.2014, the Respondent's Country Manager Anita Kongson replied and indicated that the documents requested were confidential company documents and so she could not share with him.

80. The Minutes of the disciplinary hearing that led to the Claimant's dismissal have not been provided.

81. From the evidence of the RW1, the people who made the decision to terminate the Claimant were the Human Resource and which she says was an error.

82. Under Article 50 (1) of the Constitution:-

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

83. Section 4(1) of the Fair Administrative Action Act (FAAA) states as follows:-

1) "Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair".

84. Section 4(3) (g) also provide as follows:-

g) *“Information, materials and evidence to be relied upon in making the decision or taking the administrative action”.*

85. Under Section 7(2) (a) states as follows:-

“A court or tribunal under subsection (1) may review an administrative action or decision, if:

a) the person who made the decision:-

i) was not authorized to do so by the empowering provision;

ii) acted in excess of jurisdiction or power conferred under any written law;

iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv) was biased or may reasonably be suspected of bias; or

v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case.

86. In the case of the Claimant, the Respondent failed to supply him with the relevant documents requested to defend himself. The Respondent also failed to adhere to the law by the Respondent's Country Manager insisting on chairing the meeting that heard the Claimant's disciplinary case despite objection from the Claimant.

87. In the circumstances, the Claimant was subjected to a flawed and unfair disciplinary process thus breaching his right to fair labour practices.

88. From my analysis above, it is my finding that the dismissal of the Claimant was unfair and unjustified as provided for under Section 45 (2) of Employment Act 2007 which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

Remedies

89. In view of my findings above, I find for the Claimant and award him as follows:-

1. Earned tickets for a year as admitted in his evidence by RW1 and as prayed by the Claimant under prayer No. (e) - \$27000 at the dollar rate to Kenya shillings as at date of this judgment.

2. 1 month salary in lieu of notice = 504,189/=.

3. 10 months' salary as compensation for the unfair dismissal given the fact that there were no valid reasons for the dismissal and the disciplinary process was flawed = 10 x 540,189= 5,041,890/=.

4. Profit share for 9 weeks as per paragraph 36 (c) of Claimant's contract on profits. The RW1 admitted that Claimant was in employment and contributed to the profits of the company. I award this as prayed at Kshs.1,104,616.75.

TOTAL = 6,650,695 + 27000 dollars

5. Other monetary prayers having not proved, nothing else is awarded.

6. The Claimant be issued with a Certificate of Service.

7. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Simiyu for Claimant – Present

Sheikh holding brief Kirimi for Respondent – Present