



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 336 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**PAUL OKUMU ONYANGO..... CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent on 13<sup>th</sup> November 2006 as a loading agent, promoted to equipment operator on 2<sup>nd</sup> June 2009 and further promoted to the position of loading supervisor on 23<sup>rd</sup> December 2009.

The claimant's employment was terminated on 8<sup>th</sup> April 2010 on grounds that while operating a conveyor belt at the airport on 14<sup>th</sup> March 2010, he accelerated when he should have applied brakes as he approached the aircraft, failing to follow the GSE operation procedure, for driving the conveyor belt at an unsafe speed when approaching an aircraft, and for approaching the aircraft when the cargo hold door was closed as a result of which the conveyor belt hit and damaged the aircraft.

It is the claimant's case that on 14<sup>th</sup> March 2010, he was on duty at 5.10 am attending a mandatory briefing meeting where he was assigned to handle arrival flight no. KQ 732 which was to arrive at 5.40 am. The flight came 30 minutes early at 5.10 a.m. He excused himself from the meeting and went to receive the flight. He had two equipment operators instead of four, one to handle super steps and the other conveyor belt, the third to operate tractor towing luggage trolley. When auxiliary power unit is not in use, the fourth operator is attached to tractor towing Ground Power Unit (GPU). He testified that all this must be done within two minutes of the arrival of an aircraft.

The claimant testified that he was the one who operated the conveyor belt as the other two operators were attached to super steps and tractor attached to trolley towing baggage.

The claimant testified that he is trained to operate conveyor belt and was duly authorised to operate it. That he had the company driving permit and airside driving permit from Kenya airports Authority (KAA).

He testified that there was a drainage trench within the passage ramp that was 10 metres away from the aircraft, that it was very early in the morning and there was a shadow therefore visibility was poor. That upon entering the trench, the conveyor belt bounced and he lost control, only managing to stop after hitting the fuselage of the aircraft. He testified that the damage was, in his assessment, minor as confirmed by the assessment report and it cost only Kshs.80,000 to repair.

The claimant testified that this was an accident that could happen even to the most qualified staff. He testified that the CCTV footage showed that at the time of the accident both his hands were on the steering. That he was not negligent and did not deserve to be summarily dismissed.

In his memorandum of claim filed on 6<sup>th</sup> March 2014 and amended on 31<sup>st</sup> May 2018, the Claimant seeks the following prayers-

*1. A declaration and finding that the Claimant was unfairly terminated, and that the termination is null and void for all intents and purposes.*

*2. An order directing the Respondent to reinstate the Claimant to his employment without loss of position, status or benefits.*

*3. An order directing the Respondent to pay the Claimant all his outstanding in the sum of Kshs.1,671,480.25 tabulated as herein below-*

*i. Service pay (3 years 15/30 x 94,893) of Kshs.142,339.50.*

*ii. Compensation for unfair termination (94,893 x 12) of Kshs.1,138,716.00*

*iii. Salary underpayments from June 2009 to November 2009.*

*a. Basic salary from 2<sup>nd</sup> June to July [(21,389 – 15,965) + house allowance (14,384 – 8,409) totaling to Kshs.11,401.00.*

*b. Basic salary from July to August [(23,582 – 18,898) + house allowance (15,182 – 9,668) totaling to Kshs.22,396.00.*

*c. Basic salary from September to November [(23,582 – 18,898) + house allowance (16,182 – 11,698) totaling to Kshs.27,504.00.*

*d. Basic salary from 23<sup>rd</sup> December 2009 to April 2010 (94,893 – 47,717) x 4 months totaling to Kshs.188,183.00.*

*iv. Underpaid notice [(94,893 x 2) – 95,434] amounting to Kshs.94,352.00.*

*v. Underpaid leave days [(19.3 x 94,893 x 1.5) – 44,983] amounting to Kshs.46,588.75.*

*4. Costs of this suit and interest at court rates from the date of filing the suit until payment in full.*

*Any other further or better relief the Honourable Court may deem fit to grant.*

The Respondent filed its reply to the claim on 11<sup>th</sup> March 2015 denying the averments in the memorandum of claim.

CAREY OLERO who testified on behalf of the respondent as RW1 adopted his witness statement dated 2<sup>nd</sup> April 2019, the defence and the documents filed in the matter as his evidence. It was his testimony that the Claimant had just been promoted to loading supervisor hence was not authorized to operate the equipment. That the equipment operators were trained, certified and authorized to operate before they are promoted. That for the Claimant to operate the equipment on the passenger ramp he was required to go through an induction which he never underwent as he was not authorized to operate equipment due to his new role.

RW1 took the court through the operating protocol before the arrival of an aircraft. He stated that the Claimant's role was to oversee the offloading of the aircraft.

During cross examination, he stated that though the Claimant was trained as an equipment operator, this role ceased when he was promoted to loading supervisor. He however conceded that the Claimant was authorised to operate the equipment.

He agreed with Counsel for the claimant that the timelines for aircraft to turnaround was 30 minutes. He testified that it was possible for 3 operators to work within those timelines. It was his testimony that the speed limit at the trench was between 5 to 6 km/h as one approached the aircraft. He testified that the distance between the trench and the aircraft was 4 meters and not 9 to 10 meters as stated in the report and at the Claimant's trial.

He stated that the conveyor belt did not have a speedometer but operators were trained on how to assess the speed. He agreed that visibility was poor but contended that the Claimant's failure to see the trench was not because of poor visibility since the conveyor belt had lights. He testified that the incident was treated as an accident.

Upon re-examination, it was his testimony that the aircraft was extensively damaged and could not ferry passengers. He stated that once the Claimant hit the ditch, he had ample time to stop and apply brakes. He testified that the Claimant was only authorized to operate the equipment at the cargo bay and not the aisle.

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

In his submissions filed on 18th December 2019, the Claimant submits that there was insufficient basis for terminating his employment as the accident happened through no fault of his own under the prevailing circumstances. That he was unfairly terminated as there was no justifiable reason that could amount to professional negligence.

The Claimant submitted that the disciplinary procedure was flawed. That the termination notice was not based on the reasons stated in his suspension letter, that he was not asked to show cause and the procedure stipulated in section 41 of the Employment Act was not followed.

The Claimant submits that he is entitled to severance pay, maximum compensation for unfair termination, underpayments and general or exemplary damages. The Claimant further submitted that he would have continued to work until his retirement were it not for the termination and as such, he is entitled to compensation for the loss of income.

### **The Respondent's Submissions**

In its submissions filed on 24<sup>th</sup> February 2020, the Respondent submitted that the substantive and procedural aspects of termination of employment as outlined in Sections 41 and 43 of the Employment Act were complied with, relying on the case of **Anthony Mkala Chitavi v Malindi Water Sewerage Company Limited [2013] eKLR**, were complied with.

It is submitted that *res ipsa loquitor* is applicable where there is no other explanation for an accident. That this was the case in the instant suit where the Claimant was accelerating instead of braking. That as such, the Claimant ought to discharge the burden of proving that he was not negligent. Further, that the Claimant was not authorized to operate the conveyor belt at the time of the accident and he had had been feeling unwell.

The Respondent submitted that the Claimant is not entitled to the claim for unfair and unlawful termination as the right procedure was followed. The Respondent urged this court not to grant the order for reinstatement because the Claimant's actions were laced with malice.

It is submitted that the Claimant is not entitled to service pay as he was making payments to the NSSF. It is further submitted that the claim for general and exemplary damages was not pleaded hence the Claimant is not entitled to the same.

## **Analysis and Determination**

I have carefully considered the pleadings filed, the evidence together with the submissions filed. The issues for determination before this Court are –

- a. Whether the Respondent's reason to terminate the Claimant's employment was justified thus valid.
- b. Whether the termination of the Claimant's employment was procedural.
- c. Whether the Claimant is entitled to the reliefs sought.

The Claimant's termination letter of 8<sup>th</sup> April 2010 read as follows-

*"We refer to the panel hearing held on 25<sup>th</sup> March 2010 over the accident of 14<sup>th</sup> March 2010.*

*We wish to advise that after careful consideration of all statements given to the panel on the hearing date, your explanation on the issue of accelerating when you should have applied brakes as you approached the aircraft, failing to follow the GSE operation procedure when you drove the conveyor belt, driving at an unsafe speed when approaching the aircraft and approaching the aircraft when cargo hold door was closed has been considered and the same is unacceptable to the Company. In the circumstances, it has been decided that your employment contract be terminated with effect 8<sup>th</sup> April 2010..."*

At the disciplinary hearing, Joel Maweru stated that regulations 4.3.5 xii, xxii, xxviii, xxix of the Ramp Handling Manual were not followed. The said regulations provided as follows-

*"xii. Equipment when approaching or leaving the aircraft shall not be driven faster than walking speed of 2km/hr.*

*xxii. Elevating devices must not be driven in the elevated position except for final positioning.*

*xxviii. GSE shall be driven along a path that does not require a sharp turn.*

*xxix. When positioning equipment, special care must be exercised to ensure adequate clearance of vehicles, aircraft, other equipment and facilities.*

The Claimant explained the reason he accelerated instead of applying the brakes was because he lost control after getting into the trench. That the conveyor belt shook after he passed the trench which he had not seen due to poor visibility. At the Claimant's disciplinary hearing, RW1 stated that the conveyor belt did not have a suspension system and bounced if it was at a high speed. That the conveyor belt did not have a speedometer. It was thus not easy to ascertain the equipment's operating speed at the time of accident. Further, RW1 admitted that it was possible for one to accelerate instead of applying the brakes because the brakes and accelerator were next to each other.

It is my finding that the claimant was not negligent and that the incident was an accident and not occasioned by the negligence of the claimant.

## **Reason for Termination**

Section 43(1) of the Employment Act requires an employer to prove the reason(s) for the termination, and where it fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

The Respondent did not prove that the operation of the conveyor belt by the claimant, though it was no

longer his role, was actuated by malice and intent to cause the accident. It was not contested that he was licensed to operate the equipment. The claimant explained that he operated the equipment because there was shortage of operators, there having been only two operators instead of 4. This was admitted by RW1, who also confirmed that the incident arose out of an accident, and was not intentional, and that the incident was treated as an accident.

Section 41 of the Employment Act requires an employer who intends to terminate the services of an employee on grounds of gross misconduct to explain to the employee the reason it is considering such termination, in the presence of a shop floor representative or a colleague of the employee's choice and give the employee an opportunity to present his case. The Claimant was heard both at disciplinary stage and on appeal.

The Claimant's assertion that he was not issued with the investigation report relied upon by the Respondent to terminate his employment has not been controverted. The Report was an important document at the disciplinary hearing and which seemed to have influenced the decision to terminate the Claimant's employment. This meant the Claimant lacked the opportunity to interrogate the contents of the report. The letter of suspension reads as follows-

*"15<sup>th</sup> March 2010*

*RSM/568/S.3*

*PAUL OKUMU*

*SN C3839*

*Through Manager Passenger Ramp Services*

*Dear Paul,*

*RE: SUSPENSION FROM DUTY*

*We refer to the incident that occurred on Sunday 14<sup>th</sup> March 2010 at 0520 hrs when you were involved in an accident while operating Conveyor Belt AV 387 causing damage to an aircraft 5Y – KYJ.*

*In view of the above, this is to advise you that it has been decided that you be suspended from duty with effect from 15<sup>th</sup> March 2010 to facilitate investigation on the abovementioned matter.*

*You will be required to remain contactable and within easy reach during the suspension period. You are therefore to avail yourself anytime the investigation team or the management require you to do so. Kindly leave your telephone number as well as your physical residential address with the undersigned. This telephone number should be reliable and reachable as it's the one to be used to contact you during the suspension period.*

*Meanwhile, you are hereby requested to explain in writing what happened resulting to the accident.*

*Your written and signed explanation should reach the undersigned by 1700 hrs of Monday 15<sup>th</sup> March 2010.*

Other than being asked to explain what happened resulting in the accident, the claimant was never informed of the charges he was to respond to at the disciplinary hearing. Section 41 requires that the charges are framed for the employee to respond to. In the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR** the Court observed that one of the ingredients of

procedural fairness is that an employer should inform the employee as to what charges the employer is contemplating the employee to respond to, a concomitant of the statutory right to be informed.

Section 45(4) and (6) of the Employment Act stipulates as follows-

- (4) A termination of employment shall be unfair for the purposes of this Part where—**
- a. the termination is for one of the reasons specified in section 46; or**
  - b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.**
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—**
- a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;**
  - b. the conduct and capability of the employee up to the date of termination;**
  - c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;**
  - d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and**
  - e. the existence of any previous warning letters issued to the employee.**

In light of the above, it is my finding that the procedure followed was flawed as the claimant was terminated on charges that were never framed before the disciplinary hearing hence he had no opportunity to respond to any specific charges. The termination was unfair within the meaning of Section 45(4) and (5) of the Employment Act.

### **Remedies**

The Claimant sought various remedies. This Court declares the termination of the Claimant's employment to be unfair but declines to declare it null and void as it would mean that the Claimant's employment was never terminated making him viable for reinstatement, a remedy that cannot be granted as more than 3 years have lapsed since the termination of his employment.

The Claimant **is awarded 5 months' compensation** for unfair termination (using his March 2010 gross pay of Kshs.79,304.00 as the basis for computation) in the sum of **Kshs.396,520.00**. In awarding this the court has taken into consideration his years and all the other relevant factors under Section 49(4) of the Employment Act.

The claim for underpayment of dues fails. The Claimant has not given a basis for the same save for an attachment which indicated that he was entitled to salary increment effective July 2008.

**In conclusion, judgment is entered in favour of the claimant against the respondent in the sum of Kshs.396,520.00. The Respondent shall bear the costs of the suit. The decretal sum shall accrue interest from date of judgment.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**