



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 1587 OF 2018

ABEDNEGO NGWABE WERE.....CLAIMANT

-VERSUS-

EAST AFRICAN SAFARIS AIR EXPRESS LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claim herein is for terminal benefits plus compensation for unfair termination of contract of service on account of redundancy. It is contained in the amended Memorandum of Claim dated 22nd May, 2019 and seeks the following reliefs:

- a) One month's salary in lieu of notice – Ksh. 420,560.00.
- b) Severance pay $420,560 \times 15/26 \times 4 \frac{7}{12} = 2,183,676.92$
- c) Accrued leave days of 131 days = $131/21 \text{ days } 6\text{yrs} \times 420,560 = \text{Kshs. } 2,523,360.00$
- d) Withheld 1/3 of the claimant's salary for 9 months
 $= \frac{1}{3} \times 420,560 = 140,186 \times 9 = \text{Kshs. } 1,261,680.00$
- e) 12 months salary for unlawful termination = Kshs.5,046,720.00
- f) Interest on 1,2,3,4 and 5 above at court rates
- g) Costs of the suit.

2. The respondent filed defence denying that the claimant was her employee and averred that she engaged him as a consultant after he voluntarily resigned from formal employment and for that reason she contended that this court lacks jurisdiction to determine this suit. She denied the alleged unfair termination of the claimant's employment on 13.8.2018 and averred that on the said date, she mutually agreed with the claimant to terminate his contract because he was 78 years old, and his failing sight and the nature of his work required a good vision for the safety of the aircrafts and passengers. She contended that the agreement reached to terminate the claimant's contract did not amount to unlawful termination as alleged by him. Finally, she denied that she failed to remit NHIF, NSSF and PAYE as alleged by the claimant and prayed for the suit to be dismissed with costs because the claimant is not entitled to the reliefs sought.

3. On 13.2.2020, the parties filed a consent order by which they agreed to dispose of the suit by written submissions on the basis of the pleadings, written statements and supporting documents.

Claimant's Case

4. In his written statement, the claimant contended that he was employed by the respondent as an Engineer and progressively rose through the ranks to become Production Control Manager. He filed a payslip for November 2012 showing that his gross pay per month was Kshs. 420,560. He further filed the letter dated 13.8.2018 by which his employment was terminated by the respondent effective the same date.

5. He further stated that in the year 2018, while conducting routine pre-flight inspection on an aircraft in Mogadishu, one of the respondent's employees entered the cockpit and switched on the hydraulic pumps, which caused Skydro fluid to hit both of his eyes at PSI 3000 thus permanently damaging his eyesight. That instead of the employer compensating him under WIBA, she decided to terminate his services on

13.8.2018 on the guise that she was restructuring her operations.

6. The claimant further stated that the termination was done the same day he received the termination letter dated 13.8.2018 by which the respondent offered to pay him one month salary in lieu of notice, and outstanding leave. He contended that from January 2018, a third of his salary was withheld by the employer and he, therefore, prayed that the respondent be ordered to pay the same to him.

7. He further contended that the statutory deductions made by the employer from his salary and other employees towards NSSF, NHIF and PAYE was never remitted and KRA is now demanding the same from him and other staff the tax arrears plus penalties running into millions of shillings. He therefore prayed for reliefs set out in his amended Memorandum of Claim plus costs and interest.

Defence case

8. The Respondent's Manager George Kivindyo in his Witness Statement stated that the Claimant was employed as an Avionic Engineer on 4/5/2004 until 11/8/2009 when he voluntarily resigned and thereafter the Claimant was verbally engaged as a consultant by the Respondent's new management. He further stated that since the Claimant was an independent consultant the Respondent deducted withholding tax from his pay and to Kenya Revenue Authority (KRA) but left the claimant with the obligation of paying his taxes to KRA. He further contended that the respondent had no obligation or legal duty to pay NHIF and NSSF for the claimant. He stated that the payslip produced by the Claimant is a forgery as it is neither signed nor dated.

9. He further stated that the Claimant's injury that occurred while on duty in Mogadishu in 2018 was occasioned by his own negligence and not due to any third party. He stated that the Claimant had decided to accompany the flight Mogadishu where he carried out transit checks amongst the hydraulic quality levels.

10. As regards the alleged salary withholding, he stated that in November 2017, the Respondent called for a brainstorming meeting with its employees whereat it was mutually agreed that employees in senior management and consultants including the claimant, would have their salaries/ payments reduced.

11. Finally, he explained that in 2018, the Claimant's age was 78 and his sight was failing due to the said injury, and it was felt that he should cease the consultancy because the nature of his work needed good vision and steady nerves for the safety of the aircrafts and the passengers. Consequently, a mutual agreement was entered with the Claimant to terminate his contract. He therefore denied the alleged redundancy and maintained that the separation was through mutual agreement.

Claimant's submissions

12. The Claimant submitted that termination of his employment falls under section 40 (b) of the Employment Act and relied on the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** where the Court held that section 40 (b) of the Employment Act does not stipulate the notice period as in the cause 40 (a) of the Act but a purposive reading and interpretation of the statute would mean the same period.

13. He further submitted that he was not given any notice before the lay off and the elaborate conditions spelt out in section 40 (1) of the Employment Act were not adhered to. Consequently, he contended that the redundancy amounted to unlawful termination and as such, he is eligible to payment of 1 month's salary in lieu of notice, compensation for unlawful termination by dint of section 49(1) of the Act, severance pay for 4years 7months, accrued leave of 131 days, salary for 13 days worked in August 2013 plus one-third of his monthly salary withheld by the respondent for 8 months from January 2018 to August 2018.

Respondent's submissions

14. The Respondent submitted that there was no further contract after the Claimant's resignation vide the letter dated 11.8.2009 and there was no payment made to the Claimant showing that there were deductions and payment of his NSSF and NHIF or PAYE. She maintained that the Claimant was a consultant under an oral contract and not an employee and argued that this Court has no jurisdiction to determine the matter because it is not between an employee and an employer. She contended that the payslip produced as proof of employment relationship is not authentic and lacks any signatures.

15. On the other hand, the respondent submitted that by signing the letter dated 13.8.2018, the Claimant confirmed that the separation was through mutual agreement and that he had waived any rights that he may have had under common law. She further submitted that section 40 (1) of the Employment Act envisages a situation where the employer unilaterally terminates an employee's employment on account of redundancy and it does not apply to this case where the separation was discussed and mutually agreed between her and the employee. She relied on **Kenya Chemical and Allied Workers Union v Bamburi Cement Limited [2017] eKLR** where the Court of Appeal held that once a party has made a conscientious election that has led the other to believe that he intends to adopt a particular position going forward, he is estopped from retracting on his election.

16. With respect to the claims sought, she submitted that the Claimant took a salary cut without raising issue and as such alleged withholding of his salary does not arise. Accordingly, she contended that the Claimant is estopped from claiming the portion of the reduced salary. She relied on **IN 748 Services Limited v Theuri Munyi [2017] eKLR** where the Court of Appeal held that the employee having accepted reduced salary for a few months without any complaint, he was estopped from suing for the balance of the deducted salary.

17. As regards compensation, she submitted that the termination was through mutual agreement and as such there is no basis for invoking the provisions of section 49 of the Employment Act. she relied on **National bank of Kenya Limited v Hamida Bana &103 others [2017] eKLR** where the court of Appeal held that it is lawful for parties to an employment contract to enter into a mutual release and the court will uphold the mutual release because it amounts to a binding contract.

18. In conclusion the respondent was of the view that the entire suit lacks merit and prayed for the same to be dismissed with costs.

Issues for determination and analysis

19. Having carefully considered the pleadings, evidence and submissions, the issues for determination are: -

- (a) Whether the claimant was employed by the respondent as an employee or independent contract from 12.8.2009 to 13.8.2018;
- (b) Whether this Court lacks jurisdiction to determine this suit;
- (c) Whether the employment contract was terminated unlawfully or through mutual agreement;
- (d) Whether the claimant is entitled to the reliefs sought.

Whether the claimant was respondent's employee or independent contractor after August 2009.

20. The Claimant contended that after retiring from the respondent's employment in August 2009, he was re-employed for a monthly salary of Kshs. 420,560 as evidenced by his payslip for November 2012. He further contended that he performed his duties diligently and to the Respondent's satisfaction until 13.08.2018 when the Respondent terminated his employment on account of redundancy following reconstructing her operations and also due to eye injuries he sustained while in the course of his duties in Mogadishu Somalia.

21. On the other hand, the respondent contended that the Claimant was engaged as an engineer from 4.5.2004 until 11.8.2009 when he voluntarily resigned and thereafter the new management engaged him as consultant vide an oral agreement. In her view the claimant had become an independent contractor and as such she deducted withholding tax from his pay and remitted it to KRA. She denied that she was paying the claimant salary as a consultant and dismissed the payslip produced by the claimant as a fake document.

22. Under section 2 of the Employment Act, an employee is defined as: -

“a person employed for wages or salary and includes an apprentice and an indentured learner.”

23. Further, the Blacks' Law Dictionary, 10th Edition at Page 639 defines an employee as:

“Someone who works in the services of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.

24. In the case of **Dr. Zipporah Gathuya Vs The Registered Trustees of Getrude Garden T/A Getrudes Children's Hospital** the Court held that the employer's description of an employee as a consultant does not in itself mean that the employee is a consultant and the Court will look into all aspects of the engagement. For instance, whether the Respondent had control over the work done by the Claimant and whether he was provided with his tools of trade by the Respondent.

25. Without any written contract, I have carefully considered the available evidence to understand the relationship between the parties herein. In my view, the termination letter dated 13.8.2018 provides the answer to the instant question. The letter stated as follows:

“Dear Abednego.

Re: Termination of Employment

The purpose of this letter is to confirm the outcome of a recent review by East African Safari Air Express Limited of its operational requirements, and what this means for you and other affected staff. Further to our meeting held on 13th August 2018 where we discussed withdrawing some of our fleet, reorganizing our operations and the uncertainty of our AMO, the position of Head of Line Maintenance at our Jomo Kenyatta International Airport Station and Wilson Airport, is no longer needed. There has been concerns as well in regard to your eye sight which you admitted is a problem and it's been deemed unsafe for you to be working in the hangar with all sorts of equipment around which might hurt you. This decision is not a reflection on your performance and should the company streamline its operations and need your services, we will consider you and get you on board on consultancy basis.

Your employment will end on 13th August 2018. Your notice period is one month which you will be paid in lieu. You will be paid any accrued outstanding pay and leave upto and including your last day of employment.

We thank you for your valuable contribution during your employment with us. Please contact me if you wish to obtain a reference in the future.

Your sincerely,

George Kivindyo

Director. [emphasis added]

26. The above letter clearly indicates that the claimant was an employee, with a defined position, earning a pay, entitled to leave and notice of one month before termination of his employment. He was working from the respondent's premises (Hanger) and the tools of work were provided by the respondent. The foregoing terms and benefits fall on all fours with the description of an employee and are corroborated by the NSSF statement produced by the claimant which shows that the employer continued to remit NSSF contributions in his favour until April 2013. In addition, the payslip also corroborates the said employment relationship despite the lack of signature. Consequently, I find that the claimant has proved on a balance of probability that he was an employee of the respondent.

27. On the other hand, I find that the respondent has failed to prove that the claimant was an independent contractor as alleged. She did not produce any evidence to prove that the remuneration she was paying the claimant during the said period was not salary. She further did not produce any evidence of the alleged withholding tax deduction from claimant's pay and remittance to KRA. Finally, she did not explain why the claimant was entitled to leave and why either party would serve a termination notice of one month before separation if at all the claimant was an independent contractor providing consultancy services.

Whether this court lacks jurisdiction over this suit.

28. Having found that the claimant was employed by the respondent under a contract of service and not as an independent contractor, I proceed to hold that this court has jurisdiction to determine this suit. Under Article 162 (2) (a) of the Constitution and section 12 of the ELRC Act, this court has unlimited original and appellate jurisdiction to determine disputes between employee and an employer like in this case.

Whether the termination of the claimant's employment was unfair and unlawful

29. The Letter of termination dated 13.8.2018 clearly indicates that the termination of the claimant's employment was on account of redundancy. The Respondent alludes to its decision of withdrawing some of her fleet, reorganization of her operation and the uncertainty of AMO as reasons for the Claimant's termination. The letter clarifies that the termination has nothing to do with his performance and promises to get him on board should the company streamlined its operations.

30. Redundancy is defined under Section 2 of the Employment Act as –

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

31. Section 40 sets out the procedure for redundancy in mandatory terms. Under Section 40(1) (b) the employer is required to serve the employee and the Labour Officer with redundancy notice of at least one month.

32. In **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** the Court of Appeal held that redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.

33. In this case the Claimant's termination took effect on 13.8.2018, the same day when the redundancy notice was written. In addition, the respondent did not tender any evidence to prove that the area Labour Officer was notified of the intended redundancy as provided under Section 40 of the Employment Act, 2007.

34. In view of the foregoing I find and hold that the claimant has proved on by evidence that his lay off was unfair within the meaning of section 45 of the Employment Act because the procedure followed to terminate the claimant's services on account of redundancy was flawed as the Respondent failed to fully comply with the mandatory provisions of Section 40 of the Employment Act. I gather support from **Margaret Mumbi Mwago Vs Intrahealth International (2017) eKLR** where the Court held that:

“My understanding of the sequence in the issuance of notices under Section 40 (a) and (b) is that the first, which is the redundancy notice, goes out simultaneously to the employee or their trade union and to the Labour Officer and the second which is the termination notice, goes out to the employee in accordance with the subsisting employment contract.”

35. I further rely on the Court of Appeal decisions in the cases of **Thomas De La Rue Vs David Opondo Omutelema (2013) eKLR** and **Africa Nazarene University Vs David Mutevu & 103 Others (2017) eKLR** where the Court held that under Section 40 (1)a in writing to the employee or his union and the area Labour Officer at least one month before the termination of employment on account of redundancy.

Whether he is entitled to the reliefs sought in his Claim

36. Having found that the termination of the claimant's employment was unfair, I proceed to hold that he is entitled to salary in lieu of notice plus compensation for the unfair termination by dint of section 49 (1) of the Employment Act. Accordingly, I award him one- month salary in lieu of notice as prayed and also as offered in the termination letter. I further award him 12 months' salary as compensation considering the fact that he did not contribute to the termination through misconduct, and also because due to his old age and failing eye sight, he does not have any chance of securing alternative employment.

37. The claim for accrued leave of 131 days was not disproved by the respondents using leave records and as such I grant the said claim as

prayed. In doing so I have also considered the fact that the termination letter offered to pay for any accrued leave and outstanding pay.

38. The claim for severance pay for 4 years seven months is dismissed because the redundancy has been converted into unfair termination and adequately been compensated under section 49 of the Act.

39. Likewise, the claim for withheld salary is dismissed because the claimant accepted the reduced salary for 8 months without any complaint after the employer negotiated a salary cut with the senior management staff. I gather support from She relied on **IN 748 Services Limited v Theuri Munyi [2017] eKLR** where the Court of Appeal held that the employee having accepted reduced salary for a few months without any complaint, he was estopped from suing for the balance of the deducted salary. It follows that even the award herein ought to be based on the reduced salary.

40. In conclusion, I enter judgment for the claimant in the following terms:

Notice		kshs. 374,560
Compensation		kshs. 4,494,720
Leave	131/26x kshs.374,560	<u>kshs. 1,887,206</u>
Total		<u>kshs.6,756,486</u>

The above award is subject to statutory deductions but in addition to Costs of the suit plus interest at court rates from the date hereof.

Dated and delivered at Nairobi this 24th day of September, 2020.

ONESMUS N MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE