



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 244 OF 2013**

(Before Hon. Lady Justice Maureen Onyango)

**CAPTAIN JOHN M. PLAPAN.....CLAIMANT**

*VERSUS*

**AFRICAN EXPRESS AIRWAYS (K) LIMITED.....1<sup>ST</sup> RESPONDENT**

**CAPTAIN MUSA BULHAN.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Claimant, an airline Pilot, was employed by the 1<sup>st</sup> Respondent in March 2012. This was after the Claimant was sponsored by the respondent for and had concluded his training on the Embraer 120 ER Airplane from 28<sup>th</sup> January 2012 to 5<sup>th</sup> March 2012 and obtained his Type Rating endorsed on his license ATPL YK-5887-AL by the Kenya Civil Aviation Authority (KCAA).

The Claimant’s first flight as Captain of the Embraer 120 ER Airplane while working for the 1<sup>st</sup> respondent was on 29<sup>th</sup> March 2012 and this is when the Claimant was put on payroll of the 1<sup>st</sup> Respondent. At the time he left the employment of the respondent, the Claimant was earning a net salary of USD.6,000/= (Six Thousand United States Dollars) per month. The Claimant avers that he worked for 100 hours per month until December 2012

The claimant avers that on 31<sup>st</sup> December 2012, the Chief Pilot of the 1<sup>st</sup> Respondent, Capt. Ruben Gamero, acting under the express instructions of the 2<sup>nd</sup> Respondent Captain Musa Bulhan, ordered the Claimant to resign “*immediately*” without any reasonable cause whatsoever.

Consequently, the 1<sup>st</sup> Respondent issued the Claimant with a Cheque for **USD.6,000/= (Six Thousand United States Dollars)** being the Claimant’s salary for the month of December 2012. Unfortunately, when the Claimant presented the said Cheque to his bank, the Claimant was informed that the cheque had been stopped by the drawer. It is the claimant’s averment that despite several pleas to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to issue him with a replacement Cheque for USD.6,000/=, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed, refused and or neglected to do so.

It is the claimant’s case that he was forced out of his employment. That his employment was terminated without notice and without any observance of rules of natural justice. In the circumstances it is the claimant’s case that his employment was terminated unfairly, wrongfully and/ or unlawfully.

By his memorandum of claim dated 21<sup>st</sup> February 2013 which was amended on 7<sup>th</sup> March 2014 the claimant seeks the following remedies –

a. The Claimant claims from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the following –

i. Salary for December 2012..... USD 6,000

ii. One month's pay in lieu of Notice..... USD 6,000

iii. 12 months’ pay as compensation..... USD 72,000

**Total            USD 84,000**

- b. Costs of and incidental to this suit.
- c. Interest on (a) and (b) above at court rates from 1<sup>st</sup> January 2013 until payment in full.
- d. Any other order or further relief that this Court may deem fit and just to grant

The claimant avers that he did not willingly resign but was ordered and/or coerced to do so.

He pleads the particulars of coercion as herein under –

- a. Being ordered to write a resignation letter.
- b. Being ordered to write a resignation letter as a condition precedent to receiving his salary for the month of December 2012.
- c. Maliciously stopping claimant's salary payment for the month of December 2012 on January 2013 soon after receiving claimant's resignation letter.

The respondents deny the averments of the claim. Each of the respondents filed a separate defence to the claim.

The 1<sup>st</sup> respondent in its Amended statement of defence and amended counterclaim dated 18<sup>th</sup> March 2014 denies the averments in the amended memorandum of claim. It states that the claimant was employed through an oral contract as an airline pilot and was trained by the 1<sup>st</sup> respondent at a cost of USD 20,000 to fly its Embraer 120 ER airplane. That he was still on probation when he voluntarily resigned on 10<sup>th</sup> September 2012. That the claimant agreed to avail himself from time to time to fly the Embraer 120 ER while he looked for other employment.

It is the 1<sup>st</sup> respondent's averment that the claimant was initially paid USD 4,000 per month which was increased to USD 6,000 per month subject to taxation. The 1<sup>st</sup> respondent denies coercing the claimant to resign on 31<sup>st</sup> December 2012.

In the counterclaim the 1<sup>st</sup> respondent avers that due to the claimant's resignation without notice it incurred the following expenses for which it seeks judgment against the claimant –

- i. Training to fly Embraer type aircraft for 245 hours from initial route training to qualify 245 hours at USD 2,400 per hour total claim United States Dollars Five Hundred and Eighty Eight Thousand (USD 588,000).
- ii. While undergoing training the 1<sup>st</sup> Respondent had to engage the services of fully qualified pilots on the Embraer 120 ER to train the Claimant.
- iii. The 1<sup>st</sup> Respondent through the wanton resignation of the Claimant lost the sum of United States Dollars Twelve Thousand (USD 12,000/=) when the claimant flew an empty scheduled flight from Wajir to Nairobi.
- iv. Securing flights for 19 passengers booked on the Embraer 120 ER at United States Dollars Three Hundred and Eighty each per passenger (USD 380) totalling United States Dollars Seven Thousand Two Hundred and Twenty (USD 7,220).
- v. Navigation charges at United States Dollars One Hundred and Seventy Three (USD 173) and landing fees of One Hundred and Thirty Six Dollars (USD 136) for Wajir and Nairobi of the returned flight.

The 1<sup>st</sup> respondent prays that the claimant's claim be dismissed with costs and judgment be entered in favour of the 1<sup>st</sup> respondent as follows –

- a. USD 12,000 aforesaid.
- b. An additional sum of USD 595.529
- c. Costs of the suit and Counterclaim
- d. Damages to be assessed by this Court
- e. Interest on a, b and c above.

In the amended defence of the 2<sup>nd</sup> respondent, it denies the averments of the claimant in the amended memorandum of claim and reiterates the averments in the 1<sup>st</sup> respondent's amended defence and counterclaim. He further avers that as Chief Executive Officer of the 1<sup>st</sup> respondent, the claim against him is fatally defective and bad in law and he shall apply to have the same dismissed with costs.

The claimant filed a reply to 1<sup>st</sup> respondent's statement of defence and defence to counterclaim in which he reiterates the averments in the

claim and denies that he was trained by the 1<sup>st</sup> respondent at a cost of US 20,000. He avers that he did not consent to or sign any conditional offer requiring him to pay the respondent USD 20,000 in training costs and that if any training costs were paid for him it is not recoverable from his wages or in any court of law. He avers that the 1<sup>st</sup> respondent cannot limit his right to dispose of his wages in a manner he deems fit or compel him to dispose of his wages for the purpose of paying the 1<sup>st</sup> respondent USD 20,000 in which the 1<sup>st</sup> respondent has a beneficial interest.

The Claimant avers he is a total stranger to allegations made in the amended counterclaim and denies the said allegations in toto and puts the 1<sup>st</sup> respondent to strict proof thereof.

The Claimant denies knowledge of the existence of the invoice annexed to the 1<sup>st</sup> Respondent's Counterclaim and the Claimant avers that the said invoice is tabled as a mere afterthought in order to defeat the Claimant's claim herein.

The claimant avers that on 30<sup>th</sup> December 2012, the 1st Respondent's Chief Pilot Capt. Ruben Gamero called and attempted to coerce the Claimant into flying the Embraer 120 ER Airplane (Registration Number 5Y-AXJ) the next day. However, the Claimant rejected this proposal because of the anomalies in the ' Embraer 120 ER Airplane (Registration Number 5Y-AXJ) and the Claimant was constructively dismissed by being coerced into resigning by the 1<sup>st</sup> Respondent's Chief Pilot Capt. Ruben Gamero.

### **Particulars of Attempted Coercion**

- a. Attempting to force the Claimant to resume flying the Embraer 120 ER Airplane (Registration Number 5Y-AXJ) without repair and maintenance of the HMU failure as the HMU needed to be changed and a certificate of fitness for flight issued by an appropriate qualified person contrary to the Civil Aviation (Airworthiness) Regulations, 2007 and the Civil Aviation (Personnel Licensing) Regulations, 2007
- b. Attempting to force the Claimant to imperil the safety of the Embraer 120 ER Airplane (Registration Number 5Y-AXJ) by allowing persons on board the aircraft without repair and maintenance of the HMU failure.
- c. Attempting to force the Claimant to resume flying the Embraer 120 ER Airplane (Registration Number 5Y-AXJ) without reporting to the Kenya Civil Aviation Authority the airplane's failures, malfunctions or defects that resulted in HMU failure and the interruption to the 30<sup>th</sup> December 2012 flight, unscheduled change of aircraft en route, all caused by known or suspected technical difficulties or malfunctions contrary to the Civil Aviation (Airworthiness) Regulations, 2007
- d. Attempting to force the Claimant to resume flying the Embraer 120 ER Airplane (Registration Number 5Y-AXJ) without a rated and current licensed aircraft maintenance engineer conducting the required inspections of the Embraer 120 ER Airplane (Registration Number 5Y-AXJ) and its components contrary to the Civil Aviation (Airworthiness) Regulations, 2007.

The Claimant avers that he was compelled to resign by the 1<sup>st</sup> Respondent because he refused to willfully imperil the safety of the Embraer 120 ER Airplane and that of other persons and property by flying in such a manner as to cause unnecessary danger to the said persons and property.

The Claimant reiterates his claim against the 1<sup>st</sup> Respondent of USD. 84,000 (Eighty Four Thousand United States Dollars) being the Claimant's salary for the month of December 2012, One Month's salary in lieu of notice and 12 months' pay as compensation.

He prays that the 1<sup>st</sup> Respondent's Counterclaim herein be dismissed and judgment entered as claimed in his Amended Memorandum of Claim.

At the hearing the claimant testified of his behalf and called one witness CW2. The respondents called one witness. The parties thereafter filed and exchanged written submissions.

### **Claimant's Submissions**

The Claimant submitted that he was coerced to either fly the faulty aircraft or submit his resignation letter but he chose the latter. He submitted that his resignation amounted to a forced resignation which was not voluntary or unambiguous and was constructive dismissal. The Claimant relied on the decisions in **Nancy Jesang Sorgor v Kenya Women Finance Trust [2016] eKLR** and **Rose Mwikali Nzuki v Food for the Hungry Kenya [2015] eKLR**.

The Claimant submitted that he was neither afforded an opportunity to defend himself nor was he given an opportunity to be heard as envisaged under section 41 of the Employment Act. That he was not provided with the proof or reason for his termination as required under section 45 of the Employment Act. He submitted that the provisions of sections 41, 43, and 45 of the Employment Act were grossly violated by the Respondent.

The Claimant submitted that he is entitled to the various remedies as provided under section 49 of the Employment Act. He submitted that he is deserving of 12 months compensation besides other payments on account of the stopped cheque of USD 6,000, a month's salary in lieu of notice and costs of the suit. The Claimant relied on the decision in **Nancy Jesang Sorgor v Kenya Women Finance Trust [2016]** and in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR**. In both cases 12 months' compensation and other reliefs were awarded for unfair termination.

In respect of the counter-claim the Claimant submitted that the Respondent never prosecuted its counterclaim nor adduced any evidence to prove the same. He therefore submitted that having refuted the claim to pay money for the diverted aircraft the claim should fail.

### **Respondents' submissions**

The Respondents submitted that the Claimant resigned on his own volition and that at the time of the resignation he was employed as a part time pilot. The Respondent submitted that the Claimant was deployed to fly the aircraft on 30<sup>th</sup> December 2012 but instead abandoned the passengers in Wajir.

The Respondents submitted that prior to his resignation the Claimant was still on probation having completed his training and is therefore not entitled to the same rights as a regular employee as held in *Carol Nyambura Thiga v Oxfam [2013] eKLR*. The Respondents submitted that the 1<sup>st</sup> Respondent's action in stopping the Claimant's payment cheque was a mitigation measure since the Claimant was paid. The Respondent submitted that dismissal could not have arisen in the absence of a contract of employment and therefore there was nothing to terminate. The Respondent relied on the case of *John Kebaso Mose v Uchumi Supermarket [2017] eKLR*:

The Respondents submitted that once the Claimant resigned in September 2012 he could not have been forced to remain in the employment of the 1<sup>st</sup> Respondent. The Respondents relied on the case *David Njuguna v Registered Trustees of sisters of Mercy T/A Mater Hospital [2015]*.

The Respondents submitted that having trained the Claimant purposely for flying the aircraft and as evidenced in its documents the 1<sup>st</sup> Respondent is entitled to the counter-claim being the claim of USD 607,773.

### **Determination**

The issues for determination are the following –

1. Whether the claimant resigned or was constructively dismissed.
2. Whether the claimant is entitled to the prayers sought.

### **Whether the claimant resigned or was constructively dismissed**

This court has had occasion to determine the issue of constructive dismissal in several cases. In the case of *Coca Cola East and Central Africa Limited –V- Maina Kagai Ligaga (2015) eKLR* the Court of Appeal upheld a decision of this court in which the court had found that the resignation of the employee as a result of the actions of the employer amounted to constructive dismissal.

Black's Law Dictionary (9<sup>th</sup> Edition) defines constructive dismissal as:

**“A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave”**

In the case of Joseph *Aleper and Another Versus Lodwar Water and Sanitation Company Limited eKLR, Kericho Cause No. 6 of 2014*, Njagi Marete J. discussed the issue at length as reproduced below –

“Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

In England, constructive dismissal was given statutory backing through the Redundancy Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*.

This doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with Justice Radido when he stated in *Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd Cause No. 64 of 2012* that:

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution.”

In the above quoted case of *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221* Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.”

Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

- i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.
- ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.

*The second facet of this definition is in fact what was stated by Mbaru J in Emmanuel Mutisya Solomon V Agility Logistics Cause No. 1418 of 2011, Ndolo J. in Benuel Mariera V Awand Enterprises Limited Mbsa. Cause No 191 of 2013 defined constructive termination under both limbs and stated as follows:*

“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.”

The Claimants' circumstances fell squarely under both limbs. That is their employment contracts were unilaterally altered by the Respondent through its action of advertising their jobs under different titles and qualifications that they could not meet. The Respondent also made it impossible for the Claimants to continue offering their services to the Respondent.”

In the present case the respondent avers that the claimant had resigned on 12<sup>th</sup> October 2012 vide his notice of resignation dated 10<sup>th</sup> September 2012 in which he stated in part –

“I would like to inform you that I am resigning as a Captain on the Embraer 120 for African Express Airways Limited. I am giving one month's notice and my last day will be on the 12<sup>th</sup> October 2012...”

I pray this is enough time for a replacement to be sought and I will help in any way I can to ensure there will be no interruption of service. I will also be available for the company even after my notice has expired if need be.”

The respondent avers that the claimant was on duty on 30<sup>th</sup> December 2012 as a free-lance pilot paid by the day having already resigned from the company. The respondent on the same breath at paragraph 9 of the 1<sup>st</sup> respondent's amended statement of defence and amended counterclaim pleads that the claimant resigned without notice.

The claimant testified that he handed in his letter of resignation on 10<sup>th</sup> September 2012 but the 1<sup>st</sup> respondent refused to accept the resignation and instead increased his salary from USD 4,000 to USD 6,000 per month. This was never denied by the respondents either in the pleadings or by the witness.

The fact that the claimant was entitled to a salary of a whole month in December 2012 which the 1<sup>st</sup> respondent had admitted paying with the cheque that it stopped further supports the claimant's averment that his resignation of September 2012 was never accepted.

From the foregoing I am persuaded that the claimant resigned in September 2012 but his resignation was not accepted and that he continued working until he resigned on 31<sup>st</sup> December 2012.

The letter of resignation on 31<sup>st</sup> December 2012 states as follows –

“TO:

THE CHIEF PILOT,

AFRICAN EXPRESS AIRWAYS LIMITED

NAIROBI.

FROM:

CAPT. JOHN PLAPAN

AFRICAN EXPRESS AIRWAYS LTD,

NAIROBI

31<sup>st</sup> December 2012

Dear Sir,

REF: RESIGNATION

This is in regards to the telephone and verbal communication that we had, and I was requested to tender my resignation.

Effective immediately my resignation is hereby tendered.

I wish to thank African Express Airways for the opportunity to work with you. It has been a fulfilling experience and I have learned a lot.

I wish African Express Airways continued success in its operations.

Regards

SIGNED

Capt. John Plapan”

It was the claimant’s evidence that he was told to resign by the Chief Pilot following his refusal to fly the Embraer 120 ER on 31<sup>st</sup> December 2012 following the happenings of 30<sup>th</sup> December 2012 when he was forced to make an emergency landing in Wajir. The claimant stated he refused to fly the aircraft unless it was repaired. He demonstrated through correspondence that he had complained about the failure to have the aircraft serviced by qualified engineers as reflected in his letters dated 27<sup>th</sup> June 2012, 8<sup>th</sup> August 2012 and 11<sup>th</sup> December 2012. RW1 conceded that the aircraft has never been flown since the claimant declined to fly it. On 31<sup>st</sup> December 2012, CW2 also agreed with the claimant’s decision to refuse to fly the aircraft due to its poor mechanical condition, terming it courageous as the claimant would have endangered his life and the lives of the passengers and crew.

The Occupation Safety and Healthy Act seeks to secure the safety and welfare of employees at the workplace. Section 8 of the Occupation Safety and Health Act provides:

**(1) An occupier shall not dismiss an employee, injure the employee or discriminate against or disadvantage an employee in respect of the employee’s employment, or alter the employee’s position to the detriment of the employee by reason only that the employee—**

- a. makes a complaint about a matter which the employee considers is not safe or is a risk to his health;**
- b. is a member of a safety and health committee established pursuant to this Act; or**
- c. exercises any of his functions as a member of the safety and health committee.**

I find that the claimant was constructively dismissed by the 1<sup>st</sup> respondent when he was compelled to either fly the aircraft that was mechanically defective or hand in his resignation.

#### **Whether the claimant is entitled to the reliefs sought**

Having found that the claimant was constructively dismissed by the respondent he is entitled to one month’s salary in lieu of notice. He is further entitled to the salary for December 2012 paid by cheque which was stopped by the 1<sup>st</sup> respondent. He is also entitled to compensation. Taking into account the length of service, maximum compensation of 12 months’ salary would be on the higher side. I consider 6 months’ salary reasonable taking into consideration the manner in which he was forced out of employment, being punished for refusing to put his life and the life of crew and passengers in danger, being forced to resign and being issued with a cheque that was immediately stopped by the 1<sup>st</sup> respondent.

The salary for December 2012 which was paid by a cheque which was stopped shall attract interest at court rates from 1<sup>st</sup> January 2013 until payment in full as prayed while all other prayers will attract interest from date of judgment.

#### **Counterclaim**

No evidence was adduced in support of the counterclaim. RW1 and CW2 having confirmed that the plane was not safe to fly to its destination on 30<sup>th</sup> December 2012 and considering the claimant’s evidence that the plane was flown to Nairobi leaving the passengers and luggage in Wajir on the advice of the 2<sup>nd</sup> respondent and the Mechanical Engineer who had been flown from Nairobi to Wajir to look at the aircraft and further considering that the plane has not been flown ever since, the claimant cannot be held liable for the expenses incurred by the respondent as a result. The claimant is further not liable for training expenses as there was no agreement that he would be required to refund the same. Further, the figures claimed were not supported by evidence. I find no merit in the counterclaim and dismiss it with costs.

#### **Orders**

Judgment is entered for the claimant against the 1<sup>st</sup> respondent as follows –

- i. Salary for December 2012 USD 6,000

ii. One month's salary in lieu of notice USD 6,000

iii. Compensation USD 36,000

iv. Interest shall accrue on salary for December 2012 at court rates from 1<sup>st</sup> January 2013.

v. The counterclaim is dismissed

vi. The 1<sup>st</sup> respondent shall pay claimant's costs for both the claim and the counterclaim.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**