



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CASE NO. 1922 OF 2014**

**(Formerly HCCC 953 of 2001)**

**FRANCIS ASWANI BWANA.....CLAIMANT**

**VERSUS**

**KENYA AIRFREIGHT HANDLING LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent at the High Court of Kenya before the suit was transferred to this court some 13 years later. The Claimant averred that he was working for the Respondent until the termination on 25<sup>th</sup> January 2000. He was arrested alongside other employees of the Respondent after the theft of precious metals destined for Amsterdam on flight KL 556/1929 on the night of the 15<sup>th</sup> and 16<sup>th</sup> December 1999. His house was searched and after investigations was exonerated and was one of the witnesses against the suspects charged in Cr. Case no. 8 of 2000. He averred the accused were acquitted due to lack of evidence and Benson Okombo who testified alongside him was reinstated but he was not. He thus sought the payment of leave allowance – Kshs. 59,721.95, salary for 26 days worked in January 2000 – Kshs. 20,203/-, 6 months notice in lieu of retirement – Kshs. 174,900/-, service for years worked – Kshs.349,800/-, payment till retirement at 60 years – Kshs. 3,498,000/-, staff welfare – Kshs. 8,950/-, payment of ESOP shares (to be quantified). He also sought payment of general damages for unlawful dismissal and costs of the suit plus interest on the sums claimed at court rates.

2. The Respondent averred in its defence that the Claimant's services were terminated lawfully in terms of Section 17(c) of the Employment Act, cap 226. The Respondent denied that the Claimant worked with diligence and avers that the Claimant was careless and negligent in his service causing the loss of precious metals destined for Amsterdam. The Respondent averred that the Claimant's summary dismissal was reduced to a normal termination and the Respondent denied breaching the terms of the Collective Bargaining Agreement in force at the time. The Respondent denied that the Claimant had lost any future earnings or suffered any loss as alleged in his claim. The Respondent averred that the Claimant was entitled to payment for days worked, leave earned but not taken, company and staff provident fund contributions, one month's salary in lieu of notice which sums he received unconditionally from the Respondent. The Respondent averred that the privileges the Claimant and his family could have enjoyed on tickets were a privilege applicable to employees and cannot be enforced by action. The Respondent thus sought the dismissal of the Claimant's suit with costs.

3. The Claimant who was 60 years at the time of the hearing gave his testimony as did his witness, Okong'o Benson Kwenda. They testified as to how the precious cargo is ordinarily handled and how the consignment was taken from the safe and despite reservations placed in the hold without a sealed customs bag. The cargo did not reach Europe and they were both arrested but they were exonerated and were witnesses in the criminal trial that ensued. The Claimant's witness Mr. Okong'o testified that the cargo had to be signed for before leaving the strong room. The Claimant stated that he received around Kshs. 800,000/- upon dismissal and that he was pursuing the balance of his claim. He said that he appealed the decision to terminate his services but the Respondent did not reinstate him.

4. The Respondent called the GM Moses Mureithi Wahome who testified that the cargo was alleged to have been placed in the hold which to him was odd as the cargo that is unsealed of such a nature should be given to the flight purser and signed for. He stated that both the Police and the Respondent carried out investigations when they received the report that the cargo had not been delivered. He blamed the shift leadership for the mess including the Claimant and the others who handled the cargo. He said they were negligent in handling the precious metals leading to the loss. He stated that Mr. Bush who was in charge of KLM operations at the airport could not overrule the security officer and that the Claimant should have declined bending the procedure applied to such cargo. He testified that the cargo should have been signed for. That marked the end of oral testimony.

5. The parties were to file submissions but only the Respondent filed submissions by the time the file was remitted to me to prepare the judgment. In their submissions, the Respondent submitted that the Claimant was negligent in handling the precious consignment by not obtaining signatures for the consignment and delivering it to the cargo hold unsecured. The Respondent submitted that a panel was convened after a show cause was issued and the Claimant granted an opportunity to defend himself and he was found guilty of the negligence he was accused of leading to summary dismissal and upon appeal the summary dismissal was reduced to termination. The Claimant's dues were

paid. The Respondent submitted that the cause of action accrued during the regime of the Employment Act, cap 226 (now repealed) and on the strength of the decision in **Mary Wakhabubi Wafula v British Airways PLC [2015] eKLR** the Claimant's contract was subject to the law in force then, the common law principles as well as the Staff Travel and Safety Regulations and the Collective Bargaining Agreement with the Transport and Allied Workers Union (K). The Respondent submitted that the question arose as to whether there was unfair termination or wrongful termination. The case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** was cited where the Court of Appeal held that unfair termination involves breach of statutory law while wrongful dismissal involves breach of the employment contract. The Respondent submitted that the Claimant's case was that the Respondent had flouted the CBA and thus the dismissal herein fell in the category of wrongful dismissal. Relying on the cases of **Moses Kaunda Moro v C.M.C Motors Group Ltd [2013] eKLR** cited with approval in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on substantive and procedural fairness, the Respondent submitted that there was a valid reason for the dismissal. The case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** was cited for the argument that a valid reason is in existence where there are matters the employer genuinely believes exist, they are addressed before the termination is issued and subjected to a hearing and that they result in termination of the contract. The Respondent submitted that the Claimant was taken through the process of notice to show cause, he was allowed to present his defence, he was called for a hearing and after considering the matter the panel gave a verdict of summary dismissal which was reduced to normal termination on appeal. The Respondent thus submitted that it complied with the law. The Respondent submitted that it followed the precepts of natural justice as observed in the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**. The Respondent submitted that the Claimant received all his dues upon the reduction of the summary dismissal to normal termination amounting to Kshs. 844,171/-. The Respondent thus urged the dismissal of the claim.

6. The Claimant was dismissed after an incident that led to the loss of precious cargo on a flight to Amsterdam. The Claimant in his testimony as well as in his explanations after the show cause showed that he was negligent in handling the cargo. He stated that one could dispatch the cargo then sign for it later. This was different from what his witness and the Respondent's witness stated. They stated that there had to be a signature obtained when the cargo is moved from the safe to the aircraft. It would seem it was the failure to follow procedure that allowed the thieves to steal the cargo destined for Amsterdam. Regardless of the pressure the Claimant asserts was placed on him not to delay the KLM flight, he had an obligation as the security officer handling the consignment to make sure the protocol was followed. It was foolhardy to deposit a few kilos of gold unsealed in a cargo hold. Surely that was carelessness if not criminal. The Claimant therefore was dismissed for a valid reason. He received his dues after the reduction of the dismissal to normal termination. As stated by Rika J. in the case of **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR**, the claim for future salaries is misplaced. The learned Judge stated as follows:-

*A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy.*

I agree and have nothing useful to add.

The suit is therefore devoid of merit and is dismissed. I however order that each party bears their own costs.

It is so ordered.

**Dated at Meru this 6<sup>th</sup> day of February 2019**

**Nzioki wa Makau**

**JUDGE**

**Delivered at Nairobi this 13<sup>th</sup> day of February 2019**

**Radido Stephen**

**JUDGE**

I certify this is a true copy

of the Original

**Deputy Registrar**