



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 414 OF 2014

(Formerly Civil suit No.5238 of 2009 in the Chief Magistrate's Court at Milimani Commercial Courts Nairobi)

GUYO ROBA GOLICHA.....CLAIMANT

-VERSUS

AIRKENYA EXPRESS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

JUDGMENT

The claimant filed the plaint in the Chief Magistrate's Court on 12.08.2009 through S.J. Nyang & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) General damages for wrongful termination of services or breach of contract.
- b) Special damages of Kshs.1, 952,268.00 being one month salary in lieu of notice Kshs.26, 382.00; service terminal benefits for 20 years worked at 15 days per year being $15 \times 20 = 300$ days = 10 months' salary of Kshs.263, 820.00; loss of employment for 5 years Kshs.1, 582, 920.00; loss of 5% monthly salary contribution to the pension scheme for 5 years Kshs.79, 146.00.
- c) Costs and interest of the suit.

The claimant's case is that he was employed by the respondent from 22.01.1988 to 30.04.2009 when the respondent wrongfully and unlawfully terminated the employment without giving a reason. Further the claimant demanded reinstatement or payment of due final benefits but the respondent has refused to act accordingly.

The respondent filed the defence on 15.09.2009 through E.K.Mutua & Company Advocates. The respondent denied that it employed the claimant because it was incorporated in 2005 and thereafter employed the claimant on 04.05.2006. Further the respondent stated that the contract of service had been for 3 years and once the 3 years lapsed, the contract similarly lapsed as it was not renewed. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant filed the reply to defence on 24.09.2009. The claimant stated that his services were terminated before the expiry of the contract so as to lose his years of service.

The claimant testified to support his case. He testified that he was employed by Air Kenya Aviation Limited in January 1988 up to 10.04.2006 in the position of a security guard. The claimant has exhibited the letter of appointment dated 22.01.1988 signed by John S. Burkley, General Manager for Air Kenya Aviation Limited.

The claimant received the internal memo of 10.04.2006 issued to all staff of Air Kenya Aviation Limited (in receivership) thus,

"SUBJECT: EMPLOYMENT CONTRACT

Today, April 10th 2006 is the day that you all cease to be employees of AirKenya Aviation Limited – In Receivership, hence your employment contract will be with AirKenya Express Limited with immediate effect.

As decided, your employment with AirKenya Express Limited will be on the same terms and conditions as laid down in your

employment contract with AirKenya Aviation Limited.

Unfortunately, issuing new employment contracts will take some weeks, but we shall try and hasten the process.

Due to my absence on leave, we shall commence the process on my return towards the last week of April 2006.

Wishing you all the best with AirKenya express Limited.

Signed

A Snir

CHIEF EXECUTIVE OFFICER

The claimant then received the letter dated 11.04.2006 stating,

“RE: TERMINATION OF SERVICES

I hereby confirm that I have have now sold the assets of AirKenya Aviation Limited as on 10th April 2006 to new company called AirKenya Express Limited.

As you have been an employee of the Receiver and Manager since 30th September 2005 (or later, if employed after that date), I am now required to terminate your services forthwith.

I further confirm that your accrued leave and any terminal benefits which have accrued since your original employment with AirKenya will be transferred to AirKenya Express Limited.

I understand that AirKenya Express Limited will be issuing new contracts of employment in due course.

I thank you for your support during the Receivership and hope that the future will be profitable in all respects.

Yours sincerely,

For AirKenya Aviation Limited (In Receivership)

Signed

R T Dunnet

RECEIVER MANAGER

The respondent AirKenya Express Limited then issued the claimant with the employment contract dated 04.05.2006. Clause 4 stated that the employment was for a three year period or until such time as it is terminated by either party as provided for under the terms and conditions of the contract. Clause 3 stated that the date of commencement was to be on execution of the contract and the contract was to be confirmed after three months and upon satisfactory performance. The claimant was appointed to the position of Security Guard reporting to the Engineering Manager. Clause 13 of the contract provided thus, **“The employment may be terminated by either party giving the other party one calendar month notice in writing....”** Further, clause 14 on years of services in case of termination stated, **“The employer shall pay to the employee all terminal benefits for a period of 17 years as the management may determine. The said terminal benefits shall only become due and payable if the employee continues being in employment for a period of 3 years or more unless the employment is determined by death or health.”** The contract states that it was entered into on 04.05.2006 so that the Court returns that it was lapsing on or about 04.05.2009. The claimant signed the letter on 10.05.2009.

The letter dated 30.04.2009 by the respondent addressed to **“To whom it may concern”** state that the claimant joined the respondent in April 2006 in administration department and he had retired from AirKenya Express Limited from the 30.04.2009.

By the declaration dated 30.04.2009 the claimant was paid Kshs.8, 794.00 as final dues stating, **“I agree that this is the final payment and declare that neither I nor any other party will ever make any other claim against AirKenya Express Ltd or related company or any director or any employee.”**

The main and only issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The claimant prays for general damages for wrongful termination of services or breach of contract. The claimant made no specific submissions or evidence to advance the claim and the Court returns that the same will fail as abandoned or unjustified.
- b) The claimant prays for one month salary in lieu of notice Kshs.26, 382.00. The contract was lapsing on 04.05.2009 but the

respondent acknowledges that the termination was on 30.04.2009. The Court returns that in such circumstances, the claimant was entitled to the strict contractual notice and is awarded the Kshs. **26, 382.00** as prayed for and in lieu of the termination notice.

c) The claimant prays for service terminal benefits for 20 years worked at 15 days per year being $15 \times 20 = 300$ days = 10 months' salary of Kshs.263, 820.00. The Court returns that as submitted for the respondent, the claimant was a member of a contributory pension scheme and the National Social Security Fund (NSSF) and he was paid accordingly. The Court returns that he is not entitled to service pay as claimed and in any event the contractual basis of 15 days per year was not established. The Court returns that it must be that the terminal dues included pension and NSSF dues within the prevailing contractual and statutory arrangements and under section 35 of the Employment Act, 2007, the claimant is not entitled to any further service pay.

d) The claimant prays for loss of employment for 5 years Kshs.1, 582, 920.00; and loss of 5% monthly salary contribution to the pension scheme for 5 years Kshs.79, 146.00. The claimant has not established that after the separation there was any factor attributable to the respondent that diminished his ability to mitigate his circumstances and engage in alternative gainful employment. The Court further considers that the claimant had since retired from employment with full social security benefits under the NSSF and pension scheme. The Court upholds the respondent's submissions in that regard and the prayers will therefore fail.

e) The Court has considered all circumstances of the case and awards the claimant costs of the suit fixed at **Kshs. 20, 000.00** only.

In conclusion judgment is hereby entered for the claimant against the respondent for payment of a sum of **Kshs. 46, 382.00** by 15.04.2019 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.

Signed, dated and delivered in court at **Nairobi** this **Friday 15th March, 2019.**

BYRAM ONGAYA

JUDGE