



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1135 OF 2015**

**TIMOTHY ELIUD OLOO.....CLAIMANT**

**- VERSUS -**

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

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> May, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.07.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action to terminate the claimant's employment was unlawful, unfair and false and that the claimant is entitled to payment of his terminal benefits and compensatory damages.
- b) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.1, 149, 372.00 (being 12 months' salaries at Kshs.95, 781.00 per month).
- c) An order that the respondent issues to the claimant with two airline tickets to a destination of his choice on an annual basis for the rest of the claimant's lifetime.
- d) Interest on (b) above from the date of filing suit till payment in full.
- e) Cost of the suit plus interest thereon.

The statement of response was filed on 16.11.2015 through Ochieng', Onyango, Kibet, & Ohaga Advocates. The respondent prayed that the claimant's suit against it be dismissed with costs.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant effective sometimes in 1990 and the claimant served until 07.07.2012.

The claimant last served in the capacity of Customer Service Agent – Cargo and reporting to the Manager Terminal Operations and effective 09.11.2007.

The claimant's testimony is that on 21.06.2012 he reported on duty at 8.00am and was allocated to work at a counter. Some luggage was brought and he weighed the cargo and took dimensions of the cargo. He then gave the customer the relevant document for airway bill. The customer returned the airway bill to the claimant for data capture in a computer system known as the Cargo Spot System (CSS). The airway bill was given to the claimant's workmate one Israel Omboma to capture the data and he did so by entering the details of the airway bill. The customer then paid for cargo handling charges and proceeded to do other necessary work to facilitate the cargo to be shipped by going to the customs and screening services. The customer gave the claimant all the necessary documentation and the claimant proceeded to print proof of acceptance. The computer failed to work because it had a printing defect. The claimant proceeded to give the customer a manual proof of acceptance of goods which he did in his hand writing. The claimant testified that the queue was building at his work station and so he did whatever he was able to do in the circumstances.

Thus he issued the customer the manual proof of acceptance (POA) of the goods and after about 1.5 hours, he issued a computer generated proof of acceptance of the goods (when the computer resumed functioning). The manual proof of acceptance was technically referred to as Goods Acceptance Note (GAN). The claimant testified that the Cargo Operation Manual permitted all that he had done. The cargo was said to be destined to Lagos Nigeria via Add on Ethiopian Airlines.

The material on record as per the respondent are that the consignment in issue under AWB No.07121683583 consisting of 6 pieces had been declared as spare parts but turned out to be 345 pieces of elephant tusks.

The claimant was suspected in the matter because in dealing with the consignment in issue under AWB No.07121683583 he issued two documents with different information or entries that is POA that was computer generated where he indicated the shipping agent as “agent by Self” while in the manual GAN he indicated agent as Transline and in both he indicated dealing with Mr. Mutisya and whose ID numbers were different in POA and in GAN.

The further evidence as per the investigating officer’s report KQ1, on the morning of 22.06.2012 KWS personnel by the names Jonathan Musuni and Elka Makhanu in the company of their K9 canine (Dick) made an impromptu inspection at ACHL acceptance yard and in the process their K9 immediately responded positively upon sniffing all the six boxes under AWB No.07121683583. A decision to rescreen the cargo was made and all images on the screen were homogeneous in configuration and similar to those of elephant tusks. The boxes were later forced open in the presence of KWS officials, Kenya Police, KRA officials, KAA, and KQ staff and the content was indeed confirmed to be 345 cut pieces of elephant tusks wrapped in aluminium foil and sprinkled with pepper perhaps to irritate the sniffer dog. The shipment had a gross weight of 751Kg but the elephant tusks had a net weight of 601Kgs. The investigator recommended that the claimant be dealt with in accordance with the staff rules and regulations because on 21.06.2012 as a Cargo Service Agent (CSA) at ACHL acceptance yard he was heavily involved in a conspiracy of attempted illegal conveying of 345 pieces of elephant tusks disguised as spares under AWB No.07121683583 on Ethiopian Airline allegedly to LOS. The investigator concluded that the claimant in an effort to conceal his trail, he deliberately produced a manual goods acceptance note (the GAN) but 2.5 hours later he produced the acceptance form after BM security on duty insisted. The claimant, as per the investigator, was an accomplice to the crime and was to be dealt with in accordance with the staff rules and regulations.

The claimant was subsequently suspended from duty and invited for disciplinary panel hearing as per the letter dated 03.07.2012. The letter set out the following allegations against the claimant:

- 1) Issuing a manual proof of acceptance note for the shipment instead of a system generated one and only producing the system generated one upon being asked to do so by the G4S staff.
- 2) Failing to ensure that the ID card numbers of the driver was the same in the Goods Acceptance Note and the Proof Acceptance Document.
- 3) Giving different information in relation to the agent on the Goods Acceptance Note (GAN) and the Proof of Acceptance (POA) document where you indicated the agent as Transline on the GAN and self on the POA.

The hearing was scheduled for 05.07.2012 in Block A room 309 at 9.00am. The claimant was free to bring along his witnesses, documentary evidence or any respondent’s serving member of staff including a member of the Aviation and Allied Workers Union (AAWU) branch level representative. The evidence by the claimant shows the hearing took place on 06.07.2012.

The Court has carefully considered the record of the disciplinary hearing. The evidence is that issuance of the manual GAN instead of the computer generated POA was acceptable where, like it has been shown by evidence in the present case, the printer was faulty. Indeed the respondent had provided a booklet for standard forms for drawing the GAN. The Court returns that the printer having failed, the claimant was entitled to generate the manual GAN.

The Court has further considered the record of the disciplinary hearing. The claimant offered no explanation for the discrepancy in GAN whereby the claimant admitted that one party had not signed as required. Further, he did not explain why he had failed to ensure that the ID card numbers of the driver was the same in GAN and POA. Again, the claimant failed to explain why the GAN indicated the agent as Transline and the POA indicated self. In that regard and taking all the evidence on record into account, the Court returns that the respondent has established that the established reasons for termination related to the claimant’s conduct and the respondent’s operational requirements as provided in section 45 of the Employment Act, 2007. Further and in view of the matters the Court has found the claimant failed to offer explanation at the panel hearing, as at the time of the termination the respondent has established that it had a valid or genuine reason to terminate the employment as envisaged in section 43 of the Act. In his testimony the claimant confirmed the Court’s findings in that regard thus, “...I issued GAN and POA. POA and GAN had variation in details of customer. I wrote ID No. on POA. There was a mistake.” The evidence is that the respondent accorded the claimant a notice and a hearing as per section 41 of the Act and the Court returns that the procedure leading to the termination was not unfair. Accordingly the claimant’s claim and prayer that the termination was unfair will fail.

It was not in dispute that the claimant received final dues of Kshs. 171, 642.00 and he signed the release and discharge in full and final settlement. It was submitted for the respondent that the release and discharge as executed by the claimant barred the claimant from filing the suit. The letter of termination is dated 07.07.2012 and while mentioning gross misconduct, the claimant was not dismissed but was terminated with pay of 2 months in lieu of notice and other entitlements being pay for accrued leave days, days worked and provident fund dues. The Court returns that the termination was within section 35 of the Employment Act, 2007 and it was not a dismissal. Section 35(4) (a) provides that nothing in the section affects the right of an employee whose contract is terminated from disputing the lawfulness or fairness of the termination as envisaged in section 46 of the Act. The claimant disputed the reasons for termination and he was entitled to file the suit.

The prayer for 2 tickets per annum for life was based on the human resource policy that an employee who serves for more than 10 years is entitled to the tickets but the entitlement is lost only if one is dismissed or terminated on disciplinary grounds. The claimant having been terminated on disciplinary grounds, the claim and prayer for the tickets will fail. The Court has considered all the circumstances of the case including the claimant’s long service and the respondent’s contributory factor that the printer failed on the material day and each party shall bear own costs of the suit.

In conclusion the claimant’s memorandum of claim is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 17<sup>th</sup> May, 2019.

**BYRAM ONGAYA**

**JUDGE**