



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 95 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS WAKHU SHIUNZI.....CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Francis Wakhu Shiunzi filed a Memorandum of Claim dated 24th January 2012 against the Respondent, Kenya Airways Limited. He avers that he was employed by the Respondent on 31st July 1998 on probation and was confirmed with effect from 13th July 1999 as shown in Appendix A and Appendix B of his documents. That Appendix B provides for among other things, termination of employment and Rules and Regulations which Rules and Regulations are more particularly recorded in the interim agreement between the Respondent and Aviation & Allied Workers Union on terms and conditions of service effective from 1st July 2008.

That on or about 21st November 2011, he was charged before Chief Magistrate's Court at Makadara with tramped up charge of having suspected stolen goods contrary to section 323 of the Penal Code but was acquitted and discharged on 3rd February 2011. That he was wrongfully and unlawfully dismissed by the Respondent vide a letter dated 21st January 2009 and that the Respondent had wrongfully omitted to comply with **Rule 22 of the CBA**; instead of suspending him pending the hearing and determination of the criminal charges.

He avers that having been found not guilty, he ought to be reinstated and that he has written to the Respondent on 18th July 2011 but has not received any acknowledgement. That he has also not been paid compensation for wrongful dismissal and that he thus makes this claim for reinstatement without loss of any benefits and/or payment of his full salary and compensation for unlawful termination of employment as follows:-

- i). 12 months gross pay Kshs.918,960
- ii). 1 month's salary in lieu of notice Kshs.76,580
- iii). Outstanding salary February 2009 to January 2012
(76,580 x 36) Kshs.2,756,880
- iv). General damages for wrongful dismissal.

The Claimant prays for judgment and/or award against the Respondent for a declaration that the termination of his employment was unfair and unlawful; for the Respondent to be ordered to reinstate him back to his employment without loss of benefits or in the alternative, be paid all his dues as provided for in the CBA and the labour laws; and costs and interest at court rates. He also annexes documents marked **Appendix C - G** in support of his claim.

The Respondent filed a Memorandum in Reply dated 15th March 2013 admitting to having employed the Claimant but denying that it wrongfully and unlawfully terminated his employment. It avers that the Claimant was legally summarily dismissed for gross misconduct. That it summarily dismissed the Claimant from employment before execution and implementation of the interim agreement between Kenya Airways and the Aviation and Allied Workers Union dated 1st September 2009 which is therefore not applicable to the Claimant who was at that time not its employee or a member of the Union.

It avers that on 21st November 2008, the Claimant who was its cabin grooming team leader was found in possession of 9 mobile phones by Kenya Airports Authority security as he attempted to leave JKIA runway exit used by staff to leave the airside. That he had not made any prior declarations to the airport security or the Respondent's security office regarding the said phones and that since he did not give any plausible explanation, he was handed over to the airport security for further investigation and arrest. That he later explained in a witness statement to the police that while inspecting aircrafts, he had found the mobile phones in a polythene paper in one of the aircraft registered as KQT, which he did not report. That it thus placed the Claimant on suspension from duty on 27th November 2008 so as to facilitate investigations on the matter on half basic pay and full house allowance and that the same was communicated to him. That on 10th December 2008, the Claimant provided it with an explanation letter that contradicted his statement to the police, which it had considered in its internal investigations of the incident.

That its internal investigations recommended disciplinary action that resulted in the Claimant being invited before a disciplinary panel as shown in its investigation report and invitation letters annexed and marked as **KQ4** and **KQ5**. That a panel hearing was held on 12th January 2009. That after carefully considering the investigation report, statement to the panel and the Claimant's two written statements, it found that he had indeed been in possession of mobile phones suspected to belong to a passenger without any explanation as shown in the annexed Minutes of the panel marked **KQ6**. That the Claimant has no legal claim or right to enforce reinstatement or compensation for wrongful dismissal and that he is not entitled to all or any of the reliefs sought. It prays that the Court dismisses this claim and for costs. It also annexes **KQ1**, **KQ2** and **KQ3** in support of its case.

In an undated Reply to the Respondent's Response filed on 8th April 2013, the Claimant denies that he was granted a fair hearing stating that his union protested at the unfairness by walking out of the intended disciplinary meeting. That he similarly declined to participate in the alleged disciplinary proceedings when he realised that his accusers were the same as the prosecution witnesses in the criminal trial which was by then pending in court and that it was pure injustice for his accusers to adjudge him. That he was a registered member of the said Union up to and including the date of his unlawful summary dismissal, late registration of the agreement notwithstanding. That he was acquitted by the court of the charge against him because he was innocent and the Respondent is bound by that decision being that no appeal was preferred or contemplated. He denies to have made a written statement to the police and avers that the annexure marked **KQ1** was not his handwriting nor was it signed by him and that he is not party to its contents. He avers that there was no sufficient and credible evidence to justify his summary dismissal. He prays for the Respondent's Response to be dismissed with costs and that judgment be entered in his favour as pleaded.

The respondent filed a Witness Statement dated 29th November 2018 made by its Manager, Employee Relations, Grace Wamiti who states that the Claimant was employed by the Respondent as a Team Leader Cabin Appearance, Grade C and that during the incident herein, he was a Cabin Grooming Leader for the Respondent. That the letter inviting the Claimant for the disciplinary hearing also requested him to bring any witnesses who were serving staff of the Respondent or the union to represent him at the hearing and documentary evidence to support his case. That when the union representative objected to the panel hearing, the chair of the panel made a finding that the internal proceedings of the Respondent are independent of the court process and that the internal proceedings could thus not be hampered. She states that the Claimant is not entitled to any of the reliefs sought as he was summarily dismissed and that he was paid the following final dues less the amounts owed to the company: *"Salary and all applicable allowances up to and including 21/01/2009; such accrued leave days as at 21/01/2009; and Provident fund contributions in accordance with the rules and regulations governing the Respondent's fund."*

Evidence

The Claimant testified in court that when he found the mobile handsets, he took them to the nearest security post which was at the gate, manned by KAA and Kenya Police since there was no security of Kenya Airways manning the aircraft. That when he got to the said gate and reported the same to one Kiplagat, he was told that he must have had a plan which he denied. That he was told to go get the person who gave him the phones. That he requested a person from the screening machine, one Robert who helped him call the Supervisor by the name Gabriel Malakwen and that while in the said supervisor's office, the supervisor told him he also had alcohol. That when he denied having alcohol, the supervisor hit him telling him to accept whatever he was saying and that in the said office, he saw 5 KQ security staff. That they took him to the DCIO office which was next to the office they were in. That he wrote a statement as per their instructions which they tore up and told him to rewrite. That the second statement was also torn. That a Police Officer called Kimatolwe then took a plain paper and told him to sign and that they then wrote a statement for him.

He further testified that at the time of dismissal, his gross income was Kshs.76,580/=. He referred the court to his payslip at *App C*. He prayed for general damages for wrongful dismissal. He urged the court to consider his response to the Respondent's Reply as part of his evidence. He also relied on his appendices and statements on record.

In cross-examination, he stated that he had worked as Team Leader for 10 years and was well versed with staff rules and regulations. He confirmed that he was not a union member when the interim agreement was signed. He also confirmed that he was acquitted under Section 210 of the CPC and that he was at work in September 2008 which was the reason the union representatives accompanied him.

RW1, GRACE WAMITI testified that she had worked for the Respondent for 3 months and was aware of this case from the records available. She adopted her witness statement as her evidence in chief. In cross-examination, she confirmed that the Claimant's last payslip is part of the respondent's bundle and that it itemises his payments. In re-examination, it was her testimony that the people who handled the case had left employment. She states that the Claimant had been given an opportunity to read the minutes of what had transpired during the disciplinary hearing. She also testified that the report she referred to had been prepared by the Security Department and further that Claimant's last payslip does not reflect any deduction of union dues.

Claimant's Submissions

The Claimant submits that the disciplinary panel of the Respondent refusing refusal to adjourn until the determination of the criminal proceedings was highly detrimental to him and placed him unfairly into double jeopardy which this court should hold so. That if for whatever reason the interim agreement at Appendix C is not applicable to him, he will rely on Section 41 of the Employment Act on notification and

hearing before termination on grounds of misconduct and Section 43 on proof of reason for termination. That the evidence of RW1 should be dismissed as hearsay because no sufficient evidence was availed as to why the two witnesses could not be called to testify. That the Respondent also failed to act in accordance with justice and equity in terminating his employment as required under Section 45(4) of the Act.

He submits that his acquittal under Section 210 of the Criminal Procedure Code is sufficient evidence of his innocence in respect of the charges he was facing and that while the respondent was granted right of appeal, it has not exercised that right to date. That he adopts the reasoning and determination of the Court of Appeal in Mombasa Civil Appeal No. 62 of 2015: Bamburi Cement -V- William Kiconzi which was delivered on 27th May 2016. He prays for judgment for damages pleaded in paragraph 11 of his Claim being Kshs.2,756,880/=; General damages for wrongful dismissal being Kshs.2,194,861/=; and reinstatement.

Respondent's Submissions

The Respondent submits that Section 41(1) as read together with Sections 43 and 45 of the Employment Act require an employer to provide an employee with valid reasons for considered termination while Section 44(4)(g) of the Act specifically lists an employee committing a criminal offence against an employer as a ground for summary dismissal. That the summary dismissal letter dated 21st September 2009 in paragraph 2 contains the reason for summary dismissal as against the Claimant and that the burden of proving that unfair termination of employment or wrongful dismissal has occurred, rests on the employee as set out under Section 47(5) of the Employment Act. That it has accordingly discharged the burden of good reason to summarily dismiss the Claimant. It relies on the case of Nicholas Otinyu Muruka -V- Equity Bank Limited [2013] eKLR where the court stated that mere suspicion is not enough and that the employer must demonstrate reasonable and sufficient grounds linking an employee to acts of criminal nature that amount to gross misconduct so as to justify a summary dismissal.

It is submitted by the Respondent that in terminating the Claimant's employment, fair and proper procedure was followed pursuant to the Claimant's contract of employment, the Staff's Rules, Regulations and Practices, CBA between the Respondent and the recognised Union and the Employment Act. That it first gave him a suspension letter on half basic pay and full house allowance to facilitate investigations, gave him a fair and just hearing in the presence of union representatives and an opportunity to examine the witnesses but which right he chose not to exercise. It cites the case of JWN -V- Teachers Service Commission [2014] eKLR where the Court held that what the law requires is not a perfect hearing but a fair hearing. The Respondent in this instant case submits that it acted in accordance with equity and justice in compliance with Section 41 and further Sections 43 and 45 of the Employment Act.

It submits that in James Mugeru Igati -V- Public Service Commission of Kenya [2014] eKLR, the court held that it has been expressed in the past how internal disciplinary proceedings and public criminal proceedings are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. That Majanja J distinguished the two processes in Republic -V- Public Service Commission of Kenya Ex Parte James Nene Gachoka [2013] eKLR by holding that disciplinary proceedings cannot be equated to a 'trial for an offence' so as to attract the defence of double jeopardy doctrine and that such proceedings being civil in nature is not a punishment given by a Court. That in Wilberforce Ojiambo Oundo -V- Regent Management Limited [2013] eKLR, the industrial court cited the case of Hezekiel Oira -V- Kenya Broadcasting Corporation and Another [2013] eKLR where it was held that the sequencing of internal disciplinary proceedings before conclusion of criminal proceedings facing the claimant did not of itself invalidate the disciplinary proceedings. The Respondent urges this Court, in view of the foregoing, to find that the Claimant's termination was fair and just and therefore lawful.

The Respondent submits that the Labour Relations Act, 2007 defines a collective agreement as a registered written agreement between parties whereas Rule 35(5) of the Industrial Court (Procedure) Rules provides that a collective agreement shall not take effect until it has been registered by the Court. Section 59(5) of the Labour Relations Act further provides that a collective agreement becomes enforceable upon registration by the Industrial Court as under Section 60 of the LRA and shall be effective from the date agreed upon by the parties. It relies on the case of Kenafric Industries Limited -V- Bakery Confectionary Food Manufacturing and Allied Workers Union [2014] eKLR where the court concluded that prior to registration of a collective agreement, the agreement remains an intention of the parties that can be referred to but can only attain the status of a legally binding and enforceable document upon registration by this Court.

It submits that since the Claimant has failed to discharge the burden of proof under Section 47(5) of the Employment Act that wrongful dismissal has occurred, he is not entitled to any remedies for unlawful and wrongful dismissal. That in Menginya Salim -V- Kenya Revenue Authority Civil Case No. 1139 of 2002, J.B. Ojwang J stated that it would be injudicious to found an award of damages upon sanguine assessment of prospects and the Respondent in this instant case urges this Court to consider this dictum and apply the same principal in this case. That this court should dismiss the Claimant's claim for compensation for the pendency of the criminal case between 17th November 2008 and 14th February 2011 as the claim has no legal or factual basis. That the Claimant cannot be awarded the maximum compensation as he has not proved or justified the same has and that since he was paid his final dues as per his dismissal letter, he is not entitled to any further terminal benefits.

The Respondent submits that the clause on reinstatement under the CBA has no retrospective application and that Section 12(3) of the ELRC Act provides for remedies that can be awarded in the case of a dismissal such as an order for reinstatement of an employee within 3 years of dismissal. That the Claimant was dismissed in 2009 and that more than three years have since lapsed. It opposes reinstatement of the Claimant and cites the cases of Kenya Airways PLC v Alex Wainaina Mbugua [2018] eKLR, Attorney General and Another -V- Andrew Maina Githinji and Another [2016] eKLR and Pamela K. Butalanyi -V- University Council for the Kenya Polytechnic University College [2015] eKLR.

It also submits that the Evidence Act permits instances where evidence based on records taken in the normal course of duty can be adduced and that in any event, the documents had already been produced in the Respondent's Bundle of Documents at the time of filing its Reply to the Claim.

Analysis and Determination

The first issue for determination is whether the Claimant was wrongfully dismissed from his employment by the Respondent. The second issue for determination is whether the interim Agreement between the Respondent and the Union applied to the Claimant. The third issue for determination is whether the Claimant is entitled to the reliefs sought.

It is not contested that notice of a disciplinary hearing was given to the Claimant and that he attended the same with representatives from his union but chose to walk out after the respondent refused to stay the disciplinary hearing because of the then pending criminal case against him. The Respondent specified the Claimant's criminal offence as a ground for summary dismissal under **Section 44 of the Employment Act** while the Claimant submitted he had been acquitted of the alleged criminal offence by the court in the criminal case. An acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process as held by the Court in the **James Mugeru case** above.

On the second issue, the interim agreement does not apply to the Claimant because it became enforceable after he had been dismissed from employment.

Having found that there was valid reason for termination of the claimant's services and that he was availed the opportunity to appear before a disciplinary panel but squandered the opportunity, the respondent was justified in terminating the claimant's employment.

The respondent further complied with fair procedure. The termination was therefore valid and fair both procedurally and substantively.

The claimant having been paid terminal dues, he has no further claim against the respondent.

For these reasons the claim fails and is accordingly dismissed.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE