



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1396 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JUSTUS MUTAHI IHAJI.....CLAIMANT

-Versus-

KENYA AIRWAYS LIMITED....RESPONDENT

JUDGMENT

By statement of claim dated 13th August 2012 and filed on 15th August 2012, the claimant avers that he was wrongfully dismissed by the respondent. He seeks the following remedies -

- a) Salary for the month of November 2009 to date retained by the Kenya Airways Limited Company.
- b) 3 months' salary in lieu of notice, one month's salary in lieu of notice retained by the Kenya Airways Limited Company.
- c) Terminal benefit totalling to Kshs.12,199,652/=.
- d) Any other relief this court may deem fit to grant.

The respondent filed a memorandum of reply on 20th July 2015 denying the averments of the claimant. The respondent avers that the termination of the claimant's employment was fair and prays that the same be dismissed with costs.

At the hearing of the claim, the claimant testified on his behalf and the respondent called two witness. Parties thereafter filed and exchanged written submissions. The claimant was represented by Mrs. Gulenywa instructed by Gulenywa Jonathan and Company Advocates while the respondent was represented by Mrs. Omondi instructed by Oraro and Company Advocate's.

Claimant's Case

The claimant testified that he was employed by the respondent in 1992 as a Cleaner and rose through the ranks to the position of Supplies Officer, which he held at the time of leaving service in 2009. He was Supplies Officer in charge of issuing in-flight materials and dry-stock materials used in the aircraft. He reported to his Supervisor and the Manager. His Supervisor approved requisitions before he issued materials.

The claimant testified that an internal audit was carried out which raised queries that he was asked to explain. His Supervisors were also asked to explain. He testified that he gave explanations with supporting documents. He testified that there was a claim of a loss of Kshs.11,914,0044.72. Following his explanation only a balance of Shs. 1 million remained unaccounted for.

He testified that most of the variance arose from delayed postings. He explained that posting of items issued out was supposed to be done the same day and that when the posting was done after the day of issue, the record reflected a variance. This is because the record captured the date of posting as the date of issue. He explained that it is this variance that was reflected as a loss in the audit and that in actual fact there was no loss except for the shs. 1 million that he was unable to understand or explain. He testified that such loss should have been referred to security for investigation but in his case, security was not involved.

The claimant testified that he worked for the respondent for 17 years and was never involved in any disciplinary case other than the one that led to the termination of his employment.

The claimant testified that the termination of his employment was wrong because the mistakes that led to the termination could have been corrected as they related to postings.

Under cross-examination, the claimant testified that he received internal training for the position of Supplies Officer and was knowledgeable on the system used by the respondent. He admitted that sometimes there were delays in posting and what was not posted did not reflect in the system.

The claimant testified that he was issued with a show cause letter, which he responded to admitting erroneous posting, by himself. In the response to the show cause letter, he also stated that he was experiencing challenges with the system.

He testified that after he responded to the show cause letter, he was invited to attend a disciplinary hearing, which he attended with union representatives. There were a total of three disciplinary hearings on 7th October, 3rd November and 11th November 2009. He testified that he was present with the union representatives at all the disciplinary hearings and was given an opportunity to make closing remarks. He testified that his employment was terminated after the disciplinary hearings.

The claimant testified that his letter of termination stated that he would receive terminal benefits upon clearing. He testified that he had not cleared because he was pursuing this claim in court.

The claimant testified that he was given an opportunity to appeal and attended the appeal hearing together with union representatives. At the appeal hearing, he was given an opportunity to present his case. The outcome of the appeal was that he did not produce evidence of goods received and signed for and that he did not explain normal procedures.

The claimant testified that he again appealed to the Chief Executive officer but his appeal was dismissed.

Respondent's Case

The respondent called ZACHARY WANJOHI KARIUKI (RW1) who testified

that he worked for the respondent as Procurement Manager for Network Support. He testified that he joined the employment of the respondent in 2010 and knew the claimant only through the disciplinary process, during the appeal when he was involved as Technical Manager.

Mr. Kariuki testified that among the claimant's responsibilities was issuing of goods to users, transferring goods to the respondent's contracted provider NAS for subsequent issue to flights and receiving goods from overseas and local suppliers. He referred the court to page 62 of the claimant's bundle of documents, which sets out the claimant's role profile. He testified that one of the roles of the claimant was verification of stock. He testified that the respondent's procedure under Commercial Stores Manual sets out transactions processes from main warehouse to contracted warehouse until they are issued to flights.

Kariuki testified that there was a special audit of the warehouse covering the period 2008/2009, which picked out movement of goods from warehouse with no documentation. These were the subject of the claimant's disciplinary case. The allegations against the claimant arose from transacting materials from inflight store direct to flights against laid down procedures.

Mr. Kariuki explained that the procedure provided for goods to be received in the main warehouse where the goods are receipted. The goods are then requested by Inflight Consumption Analyst based at NAS Airport Services who are the respondent's employees. Upon requisition, the Supplies Officer accesses the requisition online in the system; identifies the materials requested, processes the store transfer equivalent to the materials requested and then the materials are physically delivered to NAS Airport Services warehouse accompanied with store transfer note.

NAS employees would in collaboration with Inflight Consumption Analyst based at NAS warehouse verify those materials for completeness and accuracy of documentation then endorse the receipt of the materials. The endorsement is done by one Kenya Airways employee and one NAS employee. After this, the materials would be available for issue to flights.

Kariuki testified that according to the audit report, materials were identified having been processed by the claimant directly to the flights instead of materials for the flights coming from NAS warehouse. He testified that the show cause letter to the claimant had annexes of schedules of transactions pulled out from the system, which picked out the staff numbers of staff who made the transactions. The claimant's staff No. 6841 was reflected together with the staff number of another staff KEN MALUKI who was also issued with a show cause letter over the same issue.

Kariuki testified that the audit picked up instances of physical documents for materials received which were not in the system. The materials would then be posted into the system after the system had been updated. Some of the delays were up to 4 months. He testified that the documents the claimant was asked to present to the disciplinary panel were requests from Inflight Analyst relating to expense items in the schedule but none was presented by the claimant. He testified that the claimant was according to the procedure, not allowed to carry out the transaction of expensing, as this was the responsibility of the Analyst based at NAS warehouse.

Kariuki testified that the original figure in the audit report was a total of Kshs.11,914,044.72. Eventually the figure found missing was shs.1,157,231.12. He explained that the drop was realised after adjustment of values for milk and water, which the claimant explained.

Under cross-examination, Kariuki testified that whenever there was failure in the system manual documentation was used. The manual documents would then be fed into the system once the system started working.

LUCY WANGARI MUHIU, the respondent's second witness (RW2) testified that she was the Head of Employee Relations and Acting Human Resource Director of the respondent. She testified that the claimant was issued with a show cause letter after an audit report disclosed that goods had been transferred from the main inflight stores direct to flights. The items were in a three-page schedule attached to the show cause letter.

The claimant responded to the show cause letter on 16th September 2009 acknowledging the error. After his response, the claimant appeared before a disciplinary panel on 7th October 3rd and 11th November 2009. The claimant was present at the hearing and was represented by the Branch Secretary and Chairman of the union. The claimant and his representatives were given opportunity to ask questions. She testified that she was present at the disciplinary hearing.

She testified that the explanation by the claimant was not satisfactory and he was given an opportunity to provide documentation and explain his position, which was considered by the panel. The outcome was that the claimant was terminated from employment.

She testified that the claimant appealed to the Human Resource Director who heard him in person as is evident from the minutes of the hearing at page 116 of the claimant's bundle of documents. The outcome of the appeal was that the claimant failed to account for goods and could not explain why normal procedure was not followed. The appeal was not successful. The claimant again appealed to the Chief Executive Officer who upheld the decision of the disciplinary panel and the appeal panel.

RW2 testified that the claimant had not been paid salary for September 2009 because he had not cleared with the company. He was entitled to pay in lieu of notice and leave. She testified that the claimant was paid his provident fund benefits.

RW2 testified that the claimant's last basic salary was Kshs.43,817. He was also earning house allowance of Kshs.16,450 and transport allowance of Kshs.10,187.

Under cross-examination, RW2 testified that the claimant did many things right but was only penalised for what he did not do right. She testified that the claimant had an opportunity to call a witness from NAS but did not.

Claimant's Submissions

In the submission filed on behalf of the claimant, it is argued that the respondent was unfair in terminating the services of the claimant and rejecting his explanation. It is further submitted that the respondent did not make any payment to the claimant after his termination and he was thus treated unfairly. The claimant relied on the following cases -

- 1. Dr. Ezekiel Nyangoya Okemwa –vs– Kenya Marine and Fisheries Research Institute (Industrial Cause No. 186 of 2013)**
- 2. Mary Chemweno Kiptui –vs– Kenya Pipeline Company Limited (Industrial Cause No. 435 of 2013)**

Respondent's Submissions

In its submissions, the respondent argues that in his response to show cause letter, the claimant admitted erroneously selecting the wrong transaction type while posting transactions, that the claimant was afforded a fair hearing in the presence of union representatives in a series of three hearings and after analysis of all available evidence, was unable to account for goods with Kshs.1,157,231 which he posted to flights cost centre, while the posting should have been done by the Inflight Consumption Analyst. It is submitted that the claimant was lawfully terminated on 20th November 2009. It is submitted that the respondent observed both substantive justice and procedural fairness.

The respondent relied on the following cases –

- 1. Walter Ogal Anure –vs– Teachers Service Commission (2013) eKLR**
- 2. Fredrick Saundu Amolo –vs– Principal Namanga Mixed Day Secondary School and 2 others (2014) eKLR**
- 3. Wilson Reuben Sibiya –vs– Kenya National Examinations Council (2016) eKLR**
- 4. Anthony Mkala Chitavi –vs– Malindi Water Sewerage Company Limited (2013) eKLR**
- 5. Elizabeth Wakanyi Kibe –vs– Telkom Kenya Limited (2014) eKLR**
- 6. D. K. Njagi Marete –vs– Teachers Service Commission (Industrial Cause No. 379 of 2009)**
- 7. Addah Adhiambo Obiero –vs– Ard Inc. (2014) eKLR**
- 8. Abraham Gumba –vs– Kenya Medical Supplies Authority (2014) eKLR**
- 9. John Muia Mbuta and Another –vs– Rakim Rajan t/a Smokey's Bar and Restaurant (2016) eKLR**
- 10. Bernard Mutunga Kiio and Charles Mutuku Mbatha –vs– Kenya Aerotech Limited (2015) eKLR**

Determination

I have considered the pleadings, evidence and submissions of the parties as well as the authorities cited. The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the remedies sought in his claim.

Fair Termination

It is now a well settled principle that for termination to be fair there must be both substantive justification and procedural fairness. As was held in the case of **Walter Ogal Anure –vs–Teachers Service Commission** substantial justice refers to establishment of a valid reason for termination while procedural fairness refers to the procedure adopted by the employer in effecting the termination.

The same principle was restated in the case of **Fredrick Saundu Amolo –vs–Principal Namanga Mixed Day Secondary School and 2 others** where the court stated that dismissal or termination must meet the requirements of substantive and procedural fairness. The principle of substantive fairness is provided for in Section 43 of the Employment Act while procedural fairness is provided for in Section 41 of the Act, Section 45 prohibits unfair termination of employment.

In the present case, the claimant testified that he was issued with a notice to show cause to which was attached a schedule of the transactions he was accused transacting contrary to procedure. He responded to the show cause letter on 16th September 2009. The claimant was thereafter subjected to disciplinary hearing on 7th October, 3rd November and 11th November 2009.

He was accompanied to the hearing by the union Branch Secretary and Chairman. At the hearing, he was allowed to present his evidence and to ask questions. His representatives participated in the hearing. The minutes of the hearing were signed off by the Chairman of the panel, a union representative and management representative.

After the disciplinary panel found the claimant liable for the charges against him, his employment contract was terminated. He appealed first to the Group Director of Human Resources and secondly to the Chief Executive Officer of the respondent. He was heard at both appeals but the appeals were not successful.

At the hearing of his claim, the claimant admitted that he made mistakes but insisted the mistakes could be corrected. The claimant did not raise any issue about the disciplinary procedure.

Having considered the evidence on record, I find that the respondent complied with both procedural fairness and substantive justification. The claimant was found to have supplied goods for the warehouse to flights against laid down procedure, which he was aware of, to the effect that he should supply to NAS Airport Services upon requisition and it is NAS, which supplied to the aircraft.

The claimant was also unable to account for goods valued at Kshs.1,157,231.12

I find the termination of the claimant's employment fair both procedurally and substantively and hold accordingly.

Remedies

The claimant prayed for damages of Kshs.14,199,652. This figure was not broken down. Be that as it may, the claimant is not entitled to the same, as he did not prove unfair termination by the respondent.

The result is that the whole claim fails and the claimant's suit is dismissed. Each party shall bear its costs of the claim.

The claimant stated during the hearing that he has not been paid terminal dues as set out in his letter of termination being salary up to 20th November 2009, 15.5 accrued leave days and two months' salary in lieu of notice. He stated that he did not go to clear because he was pursuing this claim.

The respondent is directed to tabulate the terminal benefits of the claimant and the claimant is directed to go and clear so that he can be paid the said terminal benefits.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE