



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2307 OF 2012

EUDIA W. NJUMA.....CLAIMANT

VERSUS

AIRWORKS (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking to recover for the alleged unfair and wrongful termination of her employment. She was employed as a pilot on an annual contract basis at a salary of USD 1,800 a month and in the relevant contract dated 17th January 2012 she had 21 days leave, 28 days' notice in writing for termination and 7 days rest and relaxation. She was dismissed on 22nd May 2012 on grounds of purported habitual absenteeism for 9 days in February – 2nd to 15th February 2012, 11 days 19th to 29th March 2012 and 20 days 2nd to 22nd May 2012. She averred that she was not given a fair chance to defend herself before the decision to terminate her services was reached. She stated that the days in February 2012 when she was alleged to be absent were part of her rest and relaxation days following her 58 days of work without rest and relaxation from 29th November 2011 to 25th January 2012. She asserts that 19th to 29th March 2012 when called back to work on 13th March 2012 she advised operations in Nairobi that her licence was set to expire in two days and it was therefore not practical for her to fly back to South Sudan. She renewed her licence during the RnR. In the period spanning from 2nd April 2012 to 22nd May 2012, she stated she was at work during the period and that on 1st May 2012 she was attending a relative's funeral the Respondent having acceded to it. On 13th May 2012 she was injured and the doctor recommended 3 days rest per the medical slips. She thus sought payment of one month's salary USD 1,800, pay for the period she worked in May 2012 USD 1,320, damages to the maximum of 12 months USD 21,600.

2. The Respondent denied that the Claimant was not accorded a fair hearing before the dismissal and that she had not made out a case for unfair and unlawful dismissal. The Respondent averred that the Claimant was not entitled to the relief sought or at all. The Respondent sought the dismissal of the Claimant's suit with costs.

3. At the hearing the Claimant stated that she was a first officer working for the Respondent for about 2 years. She was based in South Sudan and Somalia. She did not agree with the reasons stated on her letter of termination. She testified that she gave the Respondent evidence of her log books for the days the Respondent had indicated she was not at work. The log book is also given to Kenya Civil Authority. She stated that she was due for RnR and the aircraft also had a mechanical fault thus in need of repair so she was on duty for 5 days and then during the RnR renewed her licence. She stated that on the other days she is said to have been absent she had done some flights to Somalia and was in Juba for the other period in question. She got sick leave and that she gave the details sought by the Respondent in regards to her alleged absences via email.

4. In cross-examination she denied that she had failed to accept the contract as the copy availed to court was not signed to signify acceptance. She stated that the Respondent had a signed copy on their file. She did not have the original log book in court as she had left it at home and did not know it was required in court. She said she was a first officer and that she had a rating on the Caravan where she flew as a second officer. She did not sign as P2 and she stated that P1 is not necessarily a captain. She conceded that the log book did not show who the captain was and the log book copy presented did not show that it was hers. She stated that the contract she signed was with Kivindu at the office.

5. In re-exam she testified that the response filed by the Respondent did not question the authenticity of the contract she had exhibited alongside her memorandum of claim. She said that the Respondent did not question the authenticity of the log book copy she provided when she was asked for it.

6. The Respondent called Eric Mutinda Kivindu who stated that he was the MD of the Respondent. He said she was employed in the position of first officer and she left in that position. Her duty was to assist the pilot in command and flew Caravans in Somalia and Sudan. He testified that her contract was an annual contract as the nature of work they got from the UN was contractual. He denied that the Claimant returned the signed contract for 2012. He said that the Claimant was absent on occasion and that in her absence a freelance pilot would have to be hired to

fly the plane. He stated that the log book could not be verified as the original was not availed and he could not say which year the totals related to as there was no way to ascertain the period covered without the original. He said the log book entries show the entry was made by the pilot in command which was not her position. He testified that the termination was lawful and that the director of operations at the Respondent was her cousin. He stated that she was absent for 6 months and could have been looking for employment elsewhere. He said her claim is unjustified.

7. In cross-examination he testified that he was an advocate and her offer of employment in January 2012 was not signed. The contract was to end in December 2012. He said that she was paid from January 2012 till April 2012. He testified that they noticed a trend of absenteeism and that the pilot keeps the logbook and is used for renewal. He said the hours shown on the logbook were correct. He doubted the authenticity of the logbook and conceded that they had not sought the production of the original. He stated that the Respondent denied everything and it was the Claimant's burden to prove. He stated that P1 is the designation for pilot and it was possible to use it to designate the first officer. He stated that the person who sits on the left side of the aircraft is the commander and that she always sat on the right. She could fly but she would have to log as P2 not P1. He said it would be fraudulent if she logged a P1 instead of P2. He stated that he would have to seek confirmation if the Claimant was paid.

8. The parties filed written submissions and the Claimant submitted that the legal fairness standard was not met in her case. Relying on the case of **Alphonse Machanga Mwachaya v Operation 680 Limited [2013] eKLR**, it was submitted that it is not enough for an employer to simply set out the reasons for the termination in the dismissal letter and that Section 41 imposed a statutory obligation upon the employer to explain to the employee the reasons for the termination and listen to any explanations. The case of **Nicholas Muasya Kyula v Farmchem Limited [2012] eKLR** was cited in support of the submission that it was not sufficient for an employer to make allegations of misconduct against the employee and that the employer was required to have internal mechanisms and processes for undertaking investigations and verify the occurrence of the misconduct before terminating the services of the employee. She submitted that she was not afforded the safeguards under Section 41 of the Employment Act and that despite offering proof of her whereabouts on email, the Respondent went ahead and dismissed her for absconding from work. The Claimant submitted that the Respondent had an obligation under Section 43 of the Employment Act to prove that the reason or reasons for termination and that having failed to do so, the termination was deemed to be unfair. The Claimant thus submitted that in terms of Section 45(2) of the Employment Act, the termination was unfair. The Claimant relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court held that there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. The Claimant submitted that the Respondent had failed to provide documents that it was required to keep in terms of Section 74 of the Employment Act and that in failing to address the averments in her claim the Respondent was deemed to have no defence. The case of **Daniel Kiplagat Kipkebut v SMEP Deposit Taking Micro-Finance Limited [2016] eKLR** was cited in support of this proposition. The Claimant urged the grant of the prayers in the claim.

9. The Respondent submitted that the Claimant had not accepted the offer of employment and therefore she was not entitled to the safeguards of Section 41(2) of the Employment Act. The case of **Gideon Mvurya Dalu v Kenya Commercial Bank Limited [2014] eKLR** where the court held that even in cases where dismissal is merited, the dismissal must accord with the law. This case was cited for the proposition that the Claimant's services were lawfully terminated notwithstanding the fact that she had not accepted and signed her annual contract. The Respondent submitted that the Claimant had not availed her original logbook for scrutiny and that the hours allegedly flown by the Claimant cannot be verified. The Respondent submitted that the Claimant could not fill a column as P1 when she was a P2 and sat on the right side of the aircraft to assist the pilot fly the Caravan. The Respondent submitted that in Sudan and Somalia most of the flights are non-instrument flights and that the logbook produced could be someone else's logbook.

10. The Claimant was undoubtedly an employee of the Respondent and it is untenable for the Respondent to submit that she was not its employee and yet failed to produce the 'unsigned' letter of offer if indeed she was not its employee. The Respondent paid her salary and subsequently dismissed her for absconding work. The argument that she was not entitled to the safeguards under Section 41 would therefore run counter to the conduct of the Respondent. The Respondent treated her as an employee in 2012 and therefore the dismissal that was meted out should have accorded with the law. It is not in dispute that the Respondent did not call the Claimant for a hearing as required under Section 41(2) of the Employment Act. The Respondent cited the case of **Gideon Mvurya Dalu v Kenya Commercial Bank (supra)** to bolster its argument that it complied with the law in the dismissal. As held in that case, even where dismissal is merited, the dismissal must accord with the law. It is clear from the evidence adduced by the parties that the Claimant was absent for a period and an explanation was sought. The Claimant availed in her defence the logbook that the Respondent disparages as fraudulent. The Claimant when testifying did not come across as entirely honest. She stated that she was permitted to sign as P1 when she piloted the plane. The seating arrangement in fixed wing aircraft such as the Caravan is that the person piloting the plane sits on the left while the co-pilot or first officer sits on the right. She did not indicate that she was on the left and thus entitled to sign as P1 not P2. She produced a logbook that left many questions unanswered. I find and hold that there was basis for her dismissal. However, in effecting the dismissal the Respondent abridged the procedural fairness that is elaborately set out in Section 41 and as confirmed in precedent such as the case of **Walter Ogal Anuro v Teachers Service Commission (supra)** and **Daniel Kiplagat Kipkebut v SMEP Deposit Taking Micro-Finance Ltd (supra)**. In the view of the court, in accordance with Section 41, the Respondent having established cause for dismissal ought to have accorded the errant Claimant the safeguards under the Employment Act. In the final result the dismissal was unfair. Given that the Claimant substantially contributed to her predicament I will award compensation capped at 1 month. She was entitled to notice which she will have plus ½ of the costs for the matter as she contributed to the termination extensively. In the final analysis I enter judgment for the Claimant for:-

- a. One month notice USD 1,800
- b. One month compensation USD 1,800
- c. ½ the costs for the suit.

It is so ordered.

Dated and delivered at Nairobi this 19th day of October 2018

Nzioki wa Makau

JUDGE