



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 189 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 22<sup>nd</sup> October, 2018)**

**IMTIAZ KHAN.....CLAIMANT**

**VERSUS**

**FIVE FORTY AVIATION LIMITED.....1<sup>ST</sup> RESPONDENT**

**EAST AFRICAN SAFARI**

**AIR EXPRESS LIMITED (EASAX).....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 16<sup>th</sup> February, 2015, through the firm of Gikera Vadgama seeking damages for unlawful termination and payment of his terminal benefits. She states that she was employed by the 1<sup>st</sup> Respondent on 31<sup>st</sup> October, 2006, as the Resource Training & Development Manager (Ground Services) on terms agreeable to both the Claimant and the Respondent.

2. She avers that she diligently and satisfactorily served the 1<sup>st</sup> Respondent throughout her employment and was promoted to the position of Airport Manager vide a letter of consultancy contract dated 3<sup>rd</sup> June, 2008.

3. She avers that on or about October 2014, the Respondent without any lawful justification, and in an arbitrary and unlawful manner, verbally informed her to vacate her workstation since her services were no longer required by the 1<sup>st</sup> Respondent. As a result, she has suffered loss of income, being consigned to financial peril, stress, anxiety and trauma.

4. That as at the time of dismissal, she was earning a gross salary of Kshs. 277,202/= per month. That she had accumulated over 8 years of employment in the 1<sup>st</sup> Respondent's service and was entitled to a cumulative service pay, house allowance, unspent leave days among other benefits which in her computation she places at Kshs. 12,323,027/=. She also claims for a certificate of service, costs of the suit and interest.

5. By a Ruling of the Court delivered on 20.8.2015, the 2<sup>nd</sup> Respondent was struck out of the proceedings and subsequently the suit proceeded against the 1<sup>st</sup> Respondent only.

6. The 1<sup>st</sup> Respondent in its statement of Defence denies that the Claimant was its employee but rather was a consultant contractor and that the Claimant voluntarily resigned on 31<sup>st</sup> January, 2008. That at the material time she was a consultancy contractor having surpassed the mandatory retirement age contracted vide a letter dated 3<sup>rd</sup> June, 2008 which was later extended vide a letter dated 3<sup>rd</sup> January, 2009.

7. The 1<sup>st</sup> Respondent further avers that the consultancy contract dated 3<sup>rd</sup> June, 2008, did not constitute a promotion as alleged by the Claimant. That she was contracted mainly to recruit new staff and that did not constitute employment.

8. The Respondent avers that the salary referred to by the Claimant was a mere term of payment under the consultancy Contract and did not constitute a contract of employment. They pray for the claim to be dismissed with costs.

**Evidence**

9. The Claimant led evidence stating that she was employed by the respondent on 31<sup>st</sup> October, 2006 as an Airport Manager. That she

worked for the respondent for 8 years and in January, 2008, she asked for 2 weeks off in lieu of her daughter's wedding which permission was denied by the CEO Mr Smith. That she had no choice but to attend her daughter's wedding upon which the said Mr Smith gave her an ultimatum that if she left she should resign. At that point, she alleges she involuntarily wrote the resignation letter dated 31<sup>st</sup> January, 2008.

10. That the said Mr. Smith thereafter called her for a meeting in his office where he said that he wanted her back which she gladly accepted. She came back and continued working but was never paid any exit package after her resignation which in her mind she considered as leave the time she had been away after her resignation.

11. She stated that she had asked the Respondent for her contract letter but was informed that she did not need it as she was a permanent employee. She further stated that she was not paid house allowance as evidenced in the payslips.

12. She avers that she was employed by Flight 540 and was provided with staff uniform, she attended internal meetings and received instructions from her boss up until 30.10.2014, when she was called into a small meeting and informed that her services were terminated. She accepted the termination but demanded to be paid her dues as she had done nothing wrong but none were paid. That she was paid salary for October but was not paid salary for November 2014, December 2014 and January 2015.

13. She contends that her termination was unfair and unlawful and she urged the Court to allow her Claim.

14. In cross-examination, she stated that at the time of resignation on 31<sup>st</sup> January, 2008, she was 60 years old. That after resignation she returned to work on 3<sup>rd</sup> June, 2008. That at the meeting with Don Smith she was asked to resign verbally. She had also previously asked for unpaid leave verbally. Further that when she was asked to come back to work it was not done in writing.

15. The Respondent called one witness one Mr. Nixon Ooko who stated in evidence that the Claimant was employed on 6<sup>th</sup> November, 2006 as an Airport Manager at JKIA but was initially a Resource and Training Development Manager Ground Services.

16. That in 2008, the Claimant resigned to go to Australia to take care of her daughter who had had a baby. That the letter of resignation was via email but he did not have a copy of the said letter in Court.

17. RW1 stated that after 6 months from resignation the claimant called him asking if he had a job for her and 6 months thereafter she was offered a consultancy for 6 months effective 1.6.2008 which period was reviewed to beyond 6 months and on 3<sup>rd</sup> January the contract was converted to an open contract which could be terminated by either party giving 1 months' notice. That her salary remained at Kshs. 200,000/= gross per month.

18. That during the Claimant's service she was in poor health, she had a heart operation in India and stayed out of work for 4 months on full salary. Upon return, they placed her on flexi work opportunity and in his view, the Claimant was treated very humanely. That there are various email exchanges between the parties and it was agreed that she be retired in October 2014 and was to leave by November, 2014.

19. RW1 stated that the Claimant was given 1 month's notice which she took as her leave for which they paid her in full on 4<sup>th</sup> December, 2014. That her November salary was to be paid together with her terminal dues. That she had exhausted her leave days for 2014 and the leave granted in November was terminal leave. That the Claimant was not entitled to any leave after November 2014 as she had already left employment. That the salary quoted in her letter was a consolidated salary. That the Claimant was a member of both NHIF and NSSF and in his view she is not entitled to service pay nor was she entitled to gratuity. He urged the Court to dismiss the suit.

### Submissions

20. The claimant submits that there existed an employment relationship between the Claimant and the 1<sup>st</sup> Respondent regardless of the nature of the contract being a Consultancy Agreement. They cite the decision in **David Odworina Muhisa V Magnate Ventures Limited [2017] EKLK**, where the Court decided as follows on consultancy agreements as a form of employment relationship:-

**“Applying the test in R198, it is apparent that the Claimant though termed as a Consultant, was in fact an employee of the Respondent. It matters not what title he was given in the agreement because the nature of the work he did for Respondent show, that the work was solely performed for the benefit of the Respondent and he carried out this work which required his personal presence and supervision. It is my finding therefore that there was an employment relationship between the Claimant and the Respondent.”**

21. On the issue of whether the Claimant was unfairly terminated it is submitted that none of the requirements under the law was adhered to. No notice was given contrary to section 35(1)© of the Employment Act, no reason for termination was given contrary to section 43(1) of the Employment Act. They cite the case of **Walter Ogal Anuro Vs Teachers Service Commission (2013) EKLK** where the Court held that;

**“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”**

22. The Claimant further submits that the actions taken by RW1 are null and void as he admitted in evidence that he did not hold a valid practising certificate as required under Section 3, 22 and 23 of the Human Resource Management Professionals Act.

23. It is also submitted that the Respondent's actions violated the claimant's human dignity for the reason that the letter of termination was an email informing all other employees of her termination without giving her a formal letter. That this email was humiliating and contrary to Article 41 of the constitution of Kenya 2010 which demands that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

24. Further that the Claimant was unfairly treated on account of her age as her performance was good and no complaint had ever been raised against her and thus the Respondent should not be allowed to use the reason that she was past retirement age and therefore could be terminated unlawfully.

25. It is submitted that the Claimant is entitled to the prayers sought for she was not given any notice before termination and neither had she been receiving house allowance as evidenced by the payslips on record. She also claims gratuity calculated at 15 days salary for each completed year of service. She also prays for damages for violation of her constitutional rights and unfair termination. That she should also be paid service pay and severance pay.

26. The Claimant submits that she should be issued with a certificate of service and relies on the case of **Angela Wokabi Muoki Vs Tribe Hotel Limited, Cause No. 1712 OF 2014**, the Court held that:-

***"For the purpose of the non-issuance of the Certificate of Service, the penalty due is payment of a fine not exceeding Kshs.100,000.00 or imprisonment of 6 months or both. Upon the admissions by the Respondent witnesses that the Certificate of Service as required under section 51(1) was not issued, recognizing the good work conduct of the Claimant while with the Respondent and the mandate of this Court to ensure fair labour practice, the sanction herein shall be an award of kshs.100,000.00 to the claimant Where such monies are not paid within 7 days, the Claimant shall be at liberty to move the Court for application of the full force of section 51(3) of the Employment Act."***

### **Respondent's submissions**

27. It is submitted by the Respondent that the separation of the parties to this case was by consensus and mutual as demonstrated by the claimant in an email dated 4<sup>th</sup> December 2014 where the claimant wrote:-

***"As you recall we agreed that I would not attend the office over my period in November as per our discussions/understood that the notice month was payable as a normal salary payment. I'm sure the accounts team just need you to let them know the terms of our understanding, so this can be paid to me"***.

28. Vide email dated 30th October 2014, the Respondent's Director of Operations and Compliance and the witness herein wrote:

***"The management invites all employees to join in offering deep appreciation and warm regards to MRS. IMITIAZ KHAN, JKIA Airport Manager, who will be leaving the Company on 1<sup>st</sup> November 2014. As a career Aviation professional, Imitiaz has overseen Fly540 operational services grow to its current lever. We thank her and will always remember her diligence, creativity, no-nonsense approach and unquestional commitment to work. We wish her good luck in her future endeavour."***

29. It is submitted that the aforesaid do not tally with the allegations and claims made in the Claimant's Memorandum of Claim. That she retired on her own volition and she was never unlawfully terminated. They cite the case of **Moses Muhipi Wamalwa vs. Bake 'N' Bite Limited, Employment and Labour Relations Court at Mombasa Cause No. 347 of 2015** where it was held that the Claimant "Having chosen to resign, he should not now be heard alleging that he was constructively unfairly dismissed... the Claimant terminated his employment through voluntary resignation".

30. They also submit that the Claimant was not unfairly terminated and therefore no claim for compensation in lieu thereof should succeed. That the Claimant consumed her notice period and therefore no payment is due under this head. That the claim for arrears is strange to the 1<sup>st</sup> Respondent and should not be allowed to stand.

31. It is also submitted that the Claimant's salary was consolidated and therefore the claim for house allowance should not be allowed. That leave owed was not proved and therefore should fail. Further that the Claimant was a member of NHIF and therefore service pay does not arise. That gratuity is not provided for under the contract and should also not be allowed.

32. The Respondent submit that the claim for severance pay was not pleaded and she cannot there be granted the same. They pray for the suit to be dismissed with costs.

33. I have considered all the evidence and submissions of both Parties. The issues for consideration by this court are as follows:-

**1. What was the relationship between the Claimant and the Respondent?**

**2. Whether the Claimant was unfairly dismissed by the Claimant.**

**3. Whether the Claimant is entitled to the remedies sought herein.**

34. On the 1<sup>st</sup> issue, I note that the Claimant was 1<sup>st</sup> employed by the Respondent vide a letter dated 31.10.2006 with effect from 6/11/2010. The Claimant was employed as a Resource Training and Development Manager (Ground Services).

35. The Claimant served the Respondents accordingly and resigned from duty on 31/1/2008 as per the letter at page 14 of Respondents documents. She even thanked the Airport Security Manager for the help accorded her as she returned her pass No. AL 2422. 6 months later, she was offered a consultancy position with the Respondent as per the letter at page 15 of the Respondents documents.

36. The consultancy agreement stated that the consultancy would be for 6 months and salary payable was 200,000/= net per month and 10,000/= fuel reimbursement.

37. This consultancy was renewed on 3<sup>rd</sup> January 2009 and was open ended with a cancellation by either party after giving 1 month notice.

38. The question is whether the relationship between the Claimant post 2009 January was an employment relationship or a consultancy relationship.

39. The Claimant contends that she was still in employment. The Respondent contend that it was a consultancy relationship as the Claimant had passed retirement age. The Claimant has not denied being over 60 years during the period. Infact, the Claimant was duly paid her retirement benefits by NSSF vide the document on page 10 of the Respondent's documents on 24/3/2003. The Claimant was born in 1947 as per identify card copy annexed at page 9 of Respondent's documents. In 2008, she was therefore 61 years and post retirement age.

40. Indeed the Respondent offered her a consultancy agreement and therein it was spelt that the same could be terminated after giving 1 month notice.

41. This consultancy was thereafter terminated in August 2014. Despite the wording of the 'consultancy agreement', the Respondent continued to pay the Claimant a salary. They also remitted her NSSF and NHIF dues. In a consultancy agreement, salaries are not payable as exhibited in the Claimant's payslip herein.

42. The Claimant also worked under the direction and control of the Respondent and was periodically paid for the work done - with such indication, I find that the Claimant was an employee of the Respondent and not a consultant as worded by the Respondent.

43. On issue No. 2 on termination, there is no indication that the Respondent gave the Claimant any notice of 1 month as envisaged in the "consultancy agreement".

44. The manner of the termination was also done unfairly without according the Claimant reasons and without due process as envisaged under Section 41 of Employment Act. Even if the Claimant had reached retirement age, this fact was to be explained to her and notice of retirement given to her. I therefore find this termination was unfair in the circumstances.

45. I award the Claimant as follows:-

**1. 1 month salary in lieu of notice = 277,000/=.**

**2. 6 months' salary as compensation for unfair termination = 277,000 x 6 = 1,662,000/=.**

**Total . 1,932,000/=**

**3. The Claimant is also entitled to issuance of a Certificate of Service.**

**4. Payment of house allowance is not payable as the agreement was clear on the total amount payable to Claimant as a whole.**

**5. The Respondent will pay costs of the suit plus interest at Court rates with effect from the date of this judgement.**

**Dated and delivered in open Court this 22<sup>nd</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mugo holding brief for Munyaka for the Claimant – Present

Respondent – Absent