



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1443 OF 2014

JACQUELINE ARKLE.....CLAIMANT

VS

FIVE FORTY AVIATION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Jacqueline Arkle, the Claimant in this case worked for the Respondent which operates a regional Airline under the brand name 'Fly 540'. The Claimant initially held the position of Marketing Manager-East Africa but was later elevated to the position of Country Manager, Uganda.
2. The Claimant brought this claim following the termination of her employment on 2nd September 2011. The claim is contained in a Statement of Claim dated 27th August 2014 and filed in court on 28th August 2014. The Respondent filed a Statement of Defence on 9th October 2014 to which the Claimant responded on 24th October 2014.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its external Counsel, Gilbert Josiah Mungu and Head of Security, Ahmed Mohamed Ali. Both parties also filed written submissions.

The Claimant's Case

4. The Claimant was employed by the Respondent on 1st May 2008 as Marketing Manager for East Africa and was later transferred to Uganda where she held the position of Country Manager.
5. The Claimant states that after her transfer to Uganda, the Respondent's regional sales declined owing to poor maintenance of aircrafts, poor customer care and a number of other factors that were beyond her control. The Claimant adds that it was not part of her contractual duties to oversee strategic and overall management of the Airline. She further avers that she was never issued with a performance benchmark. Regarding accusations that she had advanced unauthorized credit on airline tickets, the Claimant states that the said tickets were fully settled.
6. The Claimant accuses the Respondent of unlawful and unfair termination of employment. She states that she was not given a chance to explain herself, and that she was intimidated and harassed. The Claimant adds that in effecting her termination, the Respondent was malicious and unfair. She cites a public advertisement placed by the Respondent in leading regional daily newspapers; the Daily Monitor in Uganda and the Daily Nation in Kenya, over a period of one month.
7. The Claimant goes further to state that the Respondent published her profile and picture in a website known as www.dontemploye.com, a website that the Claimant states, ordinarily publishes pictures of criminals and employees found to be fraudulent.
8. The Claimant pleads that the Respondent's actions in this regard have tarnished her professional reputation and caused her severe distress. She adds that at the time of filing the current claim, the offending post was still running.
9. The Claimant further claims that the Respondent abandoned her and her family in Uganda and failed to pay her relocation allowance back to Kenya.
10. The Claimant's claim is as follows:

- a. Damages for unlawful termination.....USD 45,600

- b. Relocation costs.....Kshs. 263,000
- c. Refund of tickets to Kamanga and Uganda Rugby Union.....USD 5135
- d. General damages for defamation
- e. Exemplary damages
- f. Certificate of service
- g. Costs plus interest

The Respondent's Case

11. In its Statement of Defence dated 9th October 2014 and filed in court on even date, the Respondent states that the Claimant's suit does not disclose any reasonable cause of action as she voluntarily signed for her terminal dues in full and final settlement thereof, thus discharging the Respondent from any liability.

12. The Respondent avers that the Claimant intentionally and dishonestly concealed, altered and/or forged her letter of termination dated 2nd September 2011 with the sole purpose of misleading the Court.

13. Regarding the Claimant's duties as Marketing Manager, East Africa and Country Manager, Uganda the Respondent terms the Claimant's averment that she was not in charge of strategic and overall management mischievous. The Respondent states that the Claimant was negligent in her duties and that she was the cause of poor performance in the Respondent's Uganda Branch.

14. The Respondent goes on to state that as a result of the Claimant's poor performance, the Respondent sent its Internal Auditor whose audit report revealed an unacceptable state of affairs of the Respondent's business. The Claimant was invited for a meeting at the Respondent's Head Office in Nairobi to discuss the audit report.

15. The Respondent avers that the Claimant was advised vide email dated 26th June 2011 that if the sales did not improve then her contract would be terminated. The Respondent adds that the Claimant was accorded a fair hearing in the said meeting where she actively participated in deliberations about her poor performance. Pursuant to this meeting, the Claimant's services were terminated in accordance with the contract of employment dated 10th March 2008 and the provisions of the Employment Act.

16. It is the Respondent's case that the Claimant was lawfully and fairly terminated on grounds of poor performance and pursuant to clause 12 of the contract of employment. The Claimant was paid her final dues which she voluntarily accepted.

17. Regarding the public advertisement on the Claimant's termination, the Respondent states that as the Claimant was its Country Manager in Uganda, it was necessary to inform its customers and the general public that she was no longer working for the Respondent. The Respondent maintains that the issues the Claimant complains of are statements of fact and represent the truth and hence the issue of defamation does not arise. The Respondent denies allegations of malice made against it by the Claimant.

18. By way of counterclaim the Respondent claims the following:

- a. USD 6492 erroneously paid as severance pay to the Claimant;
- b. Kshs. 4,336,000 being unauthorized advances taken by the Claimant.

19. The Respondent also asks for costs and interest.

Findings and Determination

20. From the pleadings and evidence on record, the following are the issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant has made out a case for defamation;
- c. Whether the Claimant is entitled to the remedies sought;
- d. Whether the Respondent has made out a proper counterclaim against the Claimant.

The Termination

21. The Claimant's employment was terminated by letter dated 2nd September 2011 stating as follows:

“Dear Madam,

RE: TERMINATION OF YOUR EMPLOYMENT

.....

The above refers.

For some time in recent months, it has been evident that the revenue from Uganda in respect of ticket sales has declined drastically. The reduction is attributed to the way you have managed/mismanaged the Country office. Further, your management of money matters in the office has not been good. You variously took unauthorized cash advances and issued tickets on credit. You issued tickets to Uganda Rugby team and one Kamanga Mwangi. They never paid for them. The issuance of tickets on credit and taking of unauthorized advances are contrary to Company policy which you were supposed to uphold and safeguard. These matters have led the company to lose confidence in your performance and also the fact that you have not conducted business in the best interest of the Company as required of you. You have received both written and verbal warnings on these issues but it is unfortunate that the situation has not changed. In the circumstances, we are forced to have to do away with your services. We therefore terminate your employment as Country Manager for our Uganda Office by paying you one month salary in lieu of notice meaning that your services to us shall cease forthwith.

We enclose herewith cheque No 000421 for USD 7,823.00 made up as follows:

1. *Years of service*

Employed on 01.04.2008 at

15 days for each year worked 51.25 days x 3,800/30 days - 6,492.00

2. Nett Salary for August 2011 3,800.00

3. 1 month pay in lieu of Notice 3,800.00

TOTAL 14,092.00

LESS

Tickets for Uganda Rugby Union 4,307.00

Tickets for Kamanga Mwangi 828.00

Outstanding Petty cash advances 1,034.00

Advances on per diem 100.00

NET AMOUNT DUE 7,823.00

Kindly acknowledge receipt of this letter by signing a copy of this letter and the enclosed voucher. Do return all the Company properties that you are currently having in your possession being 2 Laptops, 1 Blackberry, 1 Nokia, 1 external hard disk and 1 modem.

We shall be ready to give you the necessary letter of reference and any certificate that may be required of us under the law.

We wish you success in your future endeavours.

Yours faithfully

FOR AND ON BEHALF OF FIVE FORTY AFRICA

(Signed for)

Don E. Smith

CHIEF EXECUTIVE OFFICER”

I JACQUELINE ARKLE OKUTOI do hereby acknowledge receipt of Cheque No 000421 as full and final payment of my dues [but subject to checking of the A/C in respect of Uganda Rugby Union payment]

(Signed)

22. The foregoing letter accuses the Claimant of poor performance with a tinge of misconduct concerning credit sales and handling of cash belonging to the Respondent. Both are lawful grounds for termination of employment but like all other grounds, they must be established at the shop floor, prior to termination.

23. With regard to termination on account of poor performance, the handling procedure was well captured by my brother **Rika J in Kenya Science Research International Technical and Allied Workers Union (KSRIWU) v Stanley Kinyanjui and Magnate Ventures Limited (Cause No 273 of 2010)** as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

24. In pursuing a case of poor performance against the Claimant, the Respondent relied on an audit report dated 30th November 2010. The report cites a number of operational shortcomings with corresponding recommendations. The Court did not however find any assignment of fault on the Claimant that could lead to termination of her employment on account of the audit report. The Respondent's position is that the Claimant was availed due process prior to termination. First, on 22nd June 2011 the Respondent's Chief Executive Officer, Don Smith sent an electronic mail to the Claimant warning her that if sales did not improve by 31st August, then her position would no longer exist and her contract would be terminated. The question is whether this email adequately pointed out the Claimant's shortcomings while offering her an opportunity to improve.

25. The parties were conflicted on the Claimant's actual duties and functions. On its part, the Respondent maintains that in her position as Country Manager, the Claimant was responsible for overall strategic management of the business and the decline in sales was as a result of her mismanagement. The Claimant denies that her job was this wide and blames the business decline on strategic misdirection by the Respondent coupled with other factors beyond her control.

26. The Claimant's job description was not availed to the Court. Indeed, the only employment document filed is her letter of appointment to the position of Marketing Manager-East Africa dated 10th March 2008. A job description is an important employment document ordinarily in the custody of the employer. If the Respondent wanted the Court to believe that the Claimant's job included overall management and strategic direction as pleaded in the Statement of Defence and stated by the Respondent's witnesses, the Respondent ought to have produced the Claimant's job description.

27. That said, even assuming that the Claimant's job was as wide as claimed by the Respondent, and if it is indeed true that she had performed poorly as alleged, the question remains whether her failures were pointed out to her and whether she was given an opportunity to improve. No doubt, the Claimant held a senior position in the Respondent's establishment and one would have expected that if the Respondent was that much concerned about her performance, then she would have been put on a clear and definite performance improvement programme.

28. Instead what did the Respondent do? Its Chief Executive Officer, Don Smith sent the Claimant a terse email on 22nd June 2011 warning her of termination of her contract if sales did not improve. The next email to the Claimant came from *Julie.Mumbi@fly 540.com* on 26th August 2011 at 10.53 AM, asking the Claimant to take a flight and travel for a meeting. The email which is rather casual in tone states *'tafadhali jump into a ndege and coming(sic) for a meeting here on Tuesday.'* A follow up email sent at 12.00 PM on the same day states *'He says he wants you here on Tuesday morning.'*

29. In the course of the trial it emerged that the twin emails served as summons to the Claimant to attend a disciplinary hearing on 2nd September 2011, which culminated in the termination of her employment on the same day. I will return to the disciplinary procedure shortly.

30. Back to the issue of poor performance. In **Lillian O. Ochang v Kenol Kobil Limited [2015] Eklr** this Court held that disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41 of the Employment Act, 2007. Put another way, an employee facing accusations of poor performance must be given an opportunity to defend their performance before any adverse action is taken. A similar requirement is placed in cases of misconduct.

31. The Claimant as well as the Respondent's witnesses, Gilbert Josiah Mungu and Ahmed Mohamed Ali testified that a meeting took place on 2nd September 2011. What is in issue is the nature of the meeting. The Claimant told the Court that she was ambushed, harassed and intimidated and was consequently not afforded an opportunity to be heard as required in law. The Respondent's witnesses on the other hand testified that the Claimant was given adequate opportunity to be heard.

32. The Claimant also took issue with the composition of the disciplinary panel which was made up of the Respondent's external Counsel, Gilbert Josiah Mungu and its Head of Security, Ahmed Mohamed Ali. Regarding Mungu in particular, the Claimant told the Court that she was perturbed that the Respondent would subject her to a disciplinary meeting led by a stranger.

33. In his witness statement dated 9th May 2017 and filed in court on even date Mungu states that he attended the disciplinary meeting of 2nd September 2011 on instructions by the Respondent. He adds that he had been given information on accusations raised against the Claimant earlier. The Court was unable to understand why an external Counsel would actively participate in an in-house disciplinary process between his client and an employee.

34. In his testimony before the Court, Mungu stated that the second member of the disciplinary panel, Ahmed Mohamed Ali was the Claimant's accuser. Who then was the independent member of the panel? The Court found none. Mungu being external Counsel for the Respondent was obviously representing his client's interests and Ali being the accuser could not play an independent role. The only finding to make in this regard is that the composition of the disciplinary panel by nature and design was skewed and could not guarantee an objective hearing to the Claimant.

35. I now turn to the disciplinary route. On 26th August 2011, the Claimant was instructed to jump into a 'ndege' for a meeting on Tuesday. No agenda and no charges were presented to her. On the date of the meeting, which was also the day the Claimant arrived in Nairobi from Uganda, she was confronted by an improperly constituted panel. In his witness statement, Mungu states that at the beginning of the meeting, he asked the Claimant whether she wanted to be accompanied at the meeting and she elected not to be accompanied. Thereafter, he disclosed the issues to which she was required to respond.

36. In *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* this Court stated the following:

“In order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

37. The Court must ask yet more questions; how did the Respondent expect the Claimant to prepare for a disciplinary meeting without notice of the exact charges facing her? How could she even determine whether to be accompanied and by who? Why would an employer require an employee to appear before a disciplinary panel on the date of her arrival from another country? On this one, the Respondent appears to have taken off on the wrong flight path and must therefore be redirected.

38. This is the correct flight path; the Respondent as an employer should have documented all the issues of performance and/or conduct concerning the Claimant and served them on her for response. These are the issues that the Claimant should have come to respond to at the disciplinary meeting. Importantly, before leaving Uganda for Nairobi, it should have been crystal clear to the Claimant what it is she was coming to face in Nairobi. This is the only way she would have prepared her defence and determined whether or not to be accompanied at the disciplinary meeting. Further, the Claimant ought to have been granted adequate lead time to prepare her defence.

39. Overall the Court finds and holds that in handling the Claimant's case, the Respondent failed to adhere to the mandatory procedural fairness requirements set out under Section 41 of the Employment Act. As a result of the foregoing failures on the part of the Respondent, the termination of the Claimant's employment emerged as substantively and procedurally unfair and she is entitled to compensation.

A Case of Defamation?

40. After termination of the Claimant's employment, the Respondent published the following public announcement:

“Name: JACQUELINE ARKLE-OKUTOI

ID No. 13073862

This is to notify the general public that JACQUELINE ARKLE-OKUTOI: COUNTRY MANAGER-UGANDA, ceased to be an employee of 540 Africa with effect from 1st September 2011.

She is therefore not authorized to transact any business on behalf of 540 Africa.”

41. The announcement, which also carried the Claimant's picture was placed as a paid advertisement in the *Daily Monitor* in Uganda, as well as in the *Daily Nation* and the *Standard* in Kenya. The Respondent's Head of Security Ahmed Mohamed Ali told the Court that the advertisement ran four (4) times in all three Newspapers. The Claimant herself testified that the advertisement ran every day for a month. She however did not provide supporting documentary evidence on the frequency of advertisement. I will therefore go by the Respondent's account on this score.

42. The Claimant states that the said advertisement was made in bad faith to injure her and her family and to destroy her career. She therefore claims damages for defamation. In its defence, the Respondent states that in light of the position held by the Claimant, the advertisement was necessary for information to its clients and the general public. In any event, the information carried in the advertisement was factual.

43. In general terms, the following are the elements in cases defamation:

- a. False and defamatory statement;
- b. Unprivileged publication or communication to a third party;
- c. Fault on the part of the person making the statement amounting to intent or negligence;
- d. Harm to the subject of the statement.

44. In its decision in *Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR* the Court of Appeal stated the following:

“A claimant in a defamation suit ought to establish that there is a defamatory statement, that the defendant has himself published or caused another to publish that statement and that the statement refers to the Claimant.”

45. The Respondent states that the content of the impugned advertisement was factual and going by the pleadings and evidence before the Court that is indeed true. However, in my understanding, the Claimant’s claim in this limb is one of defamation by conduct. She states that in running the advertisement, the Respondent was actuated by malice.

46. This is not the first time for such an advertisement to be run by an employer and the question is; what is the purpose of such an advertisement in the normal scheme of things? In my view, an employer would run such an advertisement to guard against liability arising from the actions of a former employee. A single run would suffice in such a case but where such an advertisement acquires the character of a series, like in the present case, then the Court must inquire into the *bona fides* of the employer’s action.

47. In *Radio Africa Limited & another v Nicholas Sumba & another [2015] eKLR* the Court of Appeal held that where the Respondent’s actions are motivated by malice, then an action for defamation would lie. The Respondent in this case did not explain why it was necessary to run the impugned advertisement more than once and this, coupled with the callous manner in which the Claimant’s exit was handled reeks of malice.

48. The Claimant goes on to plead that apart from the newspaper advertisement; the Respondent went further to run a similar advertisement in a website carrying information on criminals going by the name www.dontemployme.com. The Respondent disassociates itself from the advertisement in this website. Curiously however, a screenshot from the website produced by the Claimant carries the Respondent’s full address and the Respondent showed no signs of discomfort that its address had been used by an unauthorized person.

49. In light of the foregoing, this Court has arrived at the conclusion that the Respondent maliciously caused publication of the impugned advertisement in daily newspapers in Uganda and Kenya as well as in www.dontemployme.com. The Claimant has therefore proved a case of defamation and she is entitled to general damages.

Other Claims by the Claimant

50. In her Statement of Claim, the Claimant also claims USD 5135 being money recovered from her on account of air tickets issued on credit to Uganda Rugby Union and one Kamanga Mwangi. The Claimant states that it was normal to issue tickets on credit and that the amount in issue was fully recovered by the Respondent.

51. At any rate, the Respondent’s action amounts to a disciplinary action in the nature of surcharge without regard to due process (see *Fred Makori v The Management Committee of the Ministry of Works Sports Club [2013] eKLR* and *Kenya National Library Services Board v Beatrice N. Ayoti [2014] eKLR*).

52. The Claimant further seeks relocation costs in the sum of Kshs. 263,000. In support of this claim, the Claimant submitted a quotation issued to her by Cube Movers on 6th September 2011. There was however no evidence that the Claimant actually incurred this expense and the claim, which is in the nature of special damages therefore fails and is dismissed.

53. No ground was advanced for an award of exemplary damages and this claim must therefore also fail.

The Respondent’s Counterclaim

54. By way of counterclaim, the Respondent claims the following from the Claimant:

- a. USD 6492 erroneously paid as severance pay to the Claimant;
- b. Kshs. 4,336,000 being unauthorized advances taken by the Claimant.

55. In the termination letter issued to the Claimant, the Respondent undertakes to pay what it refers to as ‘years of service’. The Respondent now argues that because the Claimant was a contributing member of the National Social Security Fund (NSSF) then he ought not to have been paid service pay.

56. I will say three things on this; first, the Employment Act only sets the minimum conditions of service and nothing stops an employer from offering superior terms to its employees, including service pay even where the employees are members of NSSF (See Section 26 of the Act). Second, the Respondent did not provide either the Claimant’s appointment letter to the position of Country Manager or its Human Resource Policies to show that the Claimant was not entitled to ‘years of service’. Third, the counterclaim refers to severance pay and not service pay.

57. The counterclaim for refund of the sum USD 6492 was therefore not proved and is dismissed.

58. In support of the counterclaim for Kshs. 4,336,000 in unauthorized advances, the Respondent produced payment vouchers bearing the Claimant’s signature at the space for approval. There was however no entry at the spaces for posting and receipt and there was therefore no evidence that the Claimant actually received the advances in issue. The Claimant herself denied receipt. In light of all this, the counterclaim fails and is dismissed.

59. Before pronouncing final orders in this case, I need to comment on the effect of the discharge penned by the Claimant at the bottom of the termination letter dated 2nd September 2011. The Respondent took issue with the Claimant's failure to disclose this discharge in her pleadings filed in court. The only thing I will say is that a discharge by itself does not absolve an employer from its obligations to an employee (see *Simon Muguku Gichigi v Taifa Sacco Limited [2012] eKLR*)

Final Orders

60. In the end, I dismiss the Respondent's entire counterclaim and enter judgment in favour of the Claimant in the following terms:

a. USD 38,000 (read Thirty Eight Thousand United States Dollars) being ten (10) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this particular award, I have taken into account the Claimant's length of service as well as the Respondent's callous conduct in effecting the termination;

b. Kshs. 5,000,000 (read Five Million Kenya Shillings) as damages for defamation. In making this award, I have considered the effect of the publication by the Respondent which in my view, has effectively destroyed the Claimant's career in the highly sensitive and regulated aviation industry.

c. USD 5135 (read Five Thousand One Hundred and Thirty Five United States Dollars) being unlawful surcharge on account of air tickets for Kamanga Mwangi and Uganda Rugby Union.

61. These amounts will attract interest at court rates from the date of delivery of judgment until payment in full.

62. I direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of the case.

63. These are the orders of the Court.

DATED AND SIGNED AT MOMBASA THIS 2ND DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THI 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Mputhia for the Claimant

Mr. Kimetto for the Respondent