



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1074 OF 2015

LEE MWENGA KIOKO.....CLAIMANT

VERSUS

DAC AVIATION (E.A) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 22.6.2015 contending that he was unfairly dismissed from employment by the respondent and prayed for the following reliefs:

- (a) Declaration that he was discriminated against and subjected to imminent danger and risk by the respondent.
- (b) One month’s salary in lieu of notice.....Kshs. 178,884.00
- (c) Compensation for unfair termination
 - i) 12 Months’ Salary (178,884.00 x 12).....Kshs.2,146,608.00
 - ii) 12 Months’ allowance of (USD 2400/
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 - (a) Approximately Ksh.233,040 x 12)..... Kshs.2,796,480.00
 - (d) Medical examination..... Kshs. 5,000.00
 - (e) ATPL Renewable fees..... Kshs. 8,700.00
 - TOTAL Kshs.5,135,672.00**

2. The respondent denied the alleged unfair termination and averred that the claimant’s probationary contract was lawfully terminated after an evaluation done on 30.9.2014 by his immediate supervisor and the Chief Pilot Mr. Maurice Ngugi. She denied that the termination was due to the accident on 21.8.2014 and averred that the investigations on the said accident is still on going. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 5.4.2018 when the claimant testified as Cw1 and the respondent called Nora Mbithe Kimeu and William Wambugu who testified as Rw1 and Rw2 respectively.

Claimant’s Case

4. Cw1 testified that he was employed by the respondent on 10.7.2014 as a Captain (pilot) for a monthly salary of Kshs.247,480. The contract was subject to a probation period of 3 months. On 21.8.2014 he was involved in an accident while flying C-208B due to mechanical problems which interfered with the landing at Sahmwana Airstrip DR Congo. Cw1 contended that he did his best to land the aircraft as a result of which he was able to save all his passengers and crew and also the aircraft.

5. Cw1 further testified that he returned to Kenya on 23.8.2014 and reported to the respondent’s office on 24.8.2014 when he was asked to

write an Hazard occurrence report but on 30.9.2014 the respondent's Chief Pilot Mr. Maurice Ngugi told him that he was dismissed. He faulted the said dismissal contending that it was not preceded by any warning letter complaining that services was unsatisfactory. He therefore prayed for the reliefs sought in his suit.

6. On cross examination, Cw1 admitted that as at the time of the termination, he was serving under his 3 months probation period. He further admitted that he read through his employment contract and accepted the terms by signing it. He further admitted that he was trained on the aircraft for 2 weeks before beginning his flights. He also admitted that he had landed the same aircraft in Shamwana Airstrip 3 or so times before the accident on 21.8.2014. He denied the alleged performance evaluation on 30.9.2014 and maintained that the Chief Pilot merely told him that he was fired and referred him to Nora (Rw1) who declined to issue him with termination letter.

7. Cw1 denied that he was given any assets/property upon appointment except his Employment Card (Crew Card), which he misplaced. He therefore denied demand by the respondents for items, which he never signed for.

Defence Case

8. Rw1 is the respondent's HR Manager. She stated that the claimant was employed by the respondent vide contract dated 8.7.2014 under which he was to serve on probation for 3 months. She further contended that on 30.9.2014, the claimant's probationary contract was terminated after a probationary evaluation by his immediate supervisor Mr. Maurice Ngugi who was also the respondents Chief Pilot. The termination was vide letter dated even date but the claimant allegedly declined to receive it until he spoke with the respondent's Accountable manager Mr. William Wambugu.

9. She further contended that the claimant absconded work thereafter and never collected the letter, and as such she served the termination letter through the claimant's last know email address on 5.11.2014. She therefore blamed the claimant for breach of contract by not serving through the 7 days' notice period given by the letter dated 30.9.2014 and for failure to hand over His Employee Card, Material Cards, Manuals, Client's Card which enabled him access clients facilities like the World Food Programme (WFP).

10. On cross examination, Rw1 admitted that she was not present during the evaluation meeting between the claimant and the Chief Pilot. She also admitted that the evaluation report was not filed nor were any minutes of the evaluation meeting filed in court. She maintained that she served the termination letter through the claimant's email address leemwenga@yahoo.com, which he had given in his employment details.

11. Rw2 was the Accountable Manager and General Manager for the Respondent in 2014. He admitted signing the contract of employment for the claimant, which took effect on 10.7.2014 subject to 3 months' probation period. He contended that before the lapse of the probation period he was evaluated by the respondent's Chief Pilot Mr. Maurice

Ngugi after which he recommended for termination of the claimant's service.

12. Rw2 further contended that based on the said recommendation by the Chief Pilot, he wrote termination letter giving the claimant 7 days' notice, which was to end on 7.10.2014. However the claimant declined to take the letter dated 30.9.2014 and absconded work during the notice period and never went back to clear with the company by surrendering company property.

13. On cross examination, Rw2 admitted that he was not present during the probationary evaluation of the claimant by the Chief Pilot. He contended that after writing the letter, he handed over the same to Rw1 to serve the claimant but the claimant declined to receive. He denied seeing the claimant on 30.9.2014 after declining to receive the termination letter from Rw1.

Analysis and Determination

14. There is no dispute that the claimant was employed by the respondent on 10.7.2014 and that his first 3 months were to be his probation period. There is also dispute that the claimant's services were terminated by the respondent on 30.9.2014. The issues for determination are:

- (a) Whether the termination was unfair.
- (b) Whether the reliefs sought should be granted.

Unfair termination

15. The claimant contends that she was unfairly dismissed because of the accident which he strongly believes was caused by a mechanical fault and not his negligence. The respondent has however maintained that the termination had nothing to do with the said accident, which is still under investigations, but on recommendation by the Chief Pilot after a probationary evaluation of the claimant. According to the respondent such exercise was within her rights under the contract of service and correct procedure was followed by serving the claimant with 7 days' notice vide the letter dated 30.9.2014.

16. Rw1 produced copy of the said letter contending that the claimant refused to receive before talking to Rw2 but absconded work during the notice period and never returned to collect the letter. As a result, she emailed the same through the claimant's email address.

17. The production of the termination letter dated 30.9.2014 was not objected to. It is therefore a valid piece of evidence for the defence to prove that indeed a notice of 7 days was given to the claimant before his probation contract was terminated. The termination letter never mentioned the aircraft accident at Shamwana Airstrip in DR Congo. The letter only cited the probationary evaluation done on 30.9.2014 as the basis for not confirming the claimant's appointment.

Consequently, I find that the termination of the claimant's contract was not due to the said accident in DR Congo as alleged in his case.

18. In addition to the foregoing, I further find that under section 42 of the Employment Act, termination of the claimant's probationary contract was not subject to prior hearing or one month notice in writing. It was enough for either the employer or the employee to serve 7 days' notice in writing to lawfully terminate the contract before the lapse of the 3 months' probation period. Section 42 of the Employment Act provides that:

“A party to a contract for a probation period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment of by employer to the employee, of seven days' wages in lieu of notice.”

Reliefs

19. In view of the foregoing finding that the termination of the claimant's probationary contract was fair and lawful, I dismiss the claim for one month salary in lieu of notice and compensation for unfair termination. I however award him salary for 7 days in lieu of notice as per the termination letter dated 30.9.2014 being $Kshs.247,480 \times 7/26 = Kshs.66,629.50$.

20. The claim for Medical Examination was withdrawn while the claim for ATPL renewal fees is dismissed since it was incurred after the termination of the contract of employment on 27.11.2014.

Conclusion and Disposition

21. I have found that the termination the claimant's contract of service was fair and lawful under section 42 of Employment Act and the probationary contact.

Consequently, I enter judgement for him in the sum of Kshs.66,629.50 plus half costs of the suit.

Dated, Signed and Delivered in Open Court at Nairobi this 30th day of November, 2018

ONESMUS N. MAKAU

JUDGE