



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1971 OF 2011**

**AVIATION & ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant Union filed this suit on 21<sup>st</sup> November 2011 seeking resolution of a dispute framed as unlawful dismissal of the grievant Mr. Martin Wekesa. It was averred that the grievant was employed by the Respondent on permanent terms from 1<sup>st</sup> April 2007. It was averred that the Grievant was subject to the terms and conditions of the Collective Bargaining Agreement for the years 2008/2010 and 2011/2012. The Claimant averred that the Grievant was alleged to have been found in possession of an item suspected to have been stolen from a passenger and the Grievant was charged at Makadara Law Courts. It was averred that while the matter was still pending before the Chief Magistrate's Court at Makadara, the Respondent dismissed the Grievant from its service. The Claimant averred that the manner of discharge was protested given that there exists a recognition agreement outlining the manner in which issues affecting the terms and conditions of service ought to be dealt with. It was averred that the Grievant was dragged to Court without a complainant on the issue of suspected stolen good and was acquitted under Section 215 of the Penal Code. The Claimant averred that after the acquittal it wrote to the Respondent advising of the outcome of the court case and seeking the reinstatement of the Grievant. The Claimant averred that the Grievant had a young family and that they had suffered economically as a result of the loss of employment. The Claimant averred that the career of the Grievant was destroyed and that he suffered double jeopardy. The Claimant thus sought a declaration that the dismissal by the Respondent was unlawful and that the Respondent be compelled to pay all the salaries and allowances withheld by the Respondent during the pendency of the criminal trial between 17<sup>th</sup> November 2011 and 14<sup>th</sup> February 2011. The Claimant also sought that the Grievant be reinstated to employment per the terms of service in the 2008/2010 CBA as well any other relief in terms of compensation for the ends of justice to be met. The Claimant also sought that costs of the claim be provided for.

2. The Respondent filed a memorandum of reply on 24<sup>th</sup> January 2012. In the reply, the Respondent denied that the 2011/2012 CBA was applicable as it was signed on 8<sup>th</sup> August 2011 while the Grievant left the Respondent's employment in 2008. The Respondent averred that the power to charge anyone with a criminal offence lies with the Attorney General's Chambers and the Police and not the Respondent. It averred that it was entitled to hold internal investigations and disciplinary proceedings and use the same as a basis for the termination of the Grievant's employment. The Respondent averred that it complied with the recognition agreement in terminating the Grievant's employment. The Respondent averred that acquittal is not a bar to a dismissal pursuant to internal disciplinary proceedings and that it exercised due diligence before dismissing the Grievant from its employment. The Respondent averred that it complied with the law and did not breach the terms and conditions of the Grievant's employment. The Respondent averred that the Grievant was not subject to the 2008/2010 and 2010/2012 CBAs as these were signed after the Grievant was terminated from employment. The Respondent averred that the Grievant was lawfully terminated from employment after he was found with a perfume suspected to have been taken from a passenger bag, given a fair hearing and gave no acceptable explanation as to why he had the item and had no purchase receipt for the item. The Respondent averred that it was justified in dismissing the Grievant from employment and he was not entitled to the prayers in the claim. The Respondent thus prayed that the suit be dismissed with costs. The Claimant and Respondent filed documents they relied upon for the respective positions.

3. The Grievant testified on 19<sup>th</sup> January 2016 and 14<sup>th</sup> July 2016. He testified that he worked for the Respondent as a loading agent and that he dutifully worked for the Respondent until he was unfairly dismissed from employment by the Respondent on 21<sup>st</sup> January 2009. He stated that on 17<sup>th</sup> November 2008 he was stopped by Hassan Wanyama a security agent of the Respondent. He testified that he was loading and off-loading luggage from aircraft and had some perfume that he had bought from a duty free attendant on that particular day. He stated that he was running to the restroom to wear an overcoat as it was 9.30pm when he was intercepted. He testified that he was asked by Mr. Wanyama why he was in a hurry and Mr. Wanyama sought to search him. Upon the search he as requested to go to the security office. He stated that the hard object was found in his inner pocket as the outer trouser had torn pockets. He testified that the first search took place in an open space on the ramp and that he was requested to accompany the security agent to the office. He stated that he was interrogated about the perfume and that he recorded a statement and the police arrested him that night and he was subsequently arraigned in Court and released on cash bail. He testified that his airport pass was confiscated on the night of his arrest and he was not able to access the airport. He stated that

he was neither given a suspension nor a show cause and that he was called to a panel hearing on 9<sup>th</sup> January 2009 at 9.00am. He testified that he did not get a formal note and that he did not get any document. He stated that there was no complainant before the panel and neither was there any memo from the outstation complaining of loss of property. He testified that none of the three witnesses appeared before the panel or the court to give evidence. He stated that he got the perfume from duty free staff from Tour Vest, a company that sells perfumes. He testified that the seller had not given him a receipt. He stated that he later searched for the seller and produced the receipt before the Makadara Court. He testified that he was given a summary dismissal after the panel hearing on 8<sup>th</sup> January. He stated that the judgment in the criminal trial was delivered on 14<sup>th</sup> February 2011 and the court found him innocent. He testified that per the CBA one could only be dismissed for proven theft and that no witness was called to prove the theft. He stated that he never received any money from the Respondent after dismissal and that the court should declare his dismissal unlawful and compel the Respondent to pay all the salaries and allowances withheld, reinstate him to his employment and the seniority, position and grade should not be lost.

4. In cross-examination, he testified that it was not his responsibility to ascertain that baggage was locked. He stated that he was intercepted by Wanyama and that he was coming from the aircraft at Bay 14. He testified that he had finished loading and was on the way to the rest room to collect a jacket. He stated that they were allowed to wear raincoats when it is extremely cold or in rainy season. He testified that Hassan Wanyama found an object in his pocket and the procedure was that the security agent could search one before and after loading. He stated that he had been searched prior by Mr. Mumbo the supervisor of Wanyama. He testified that Mumbo confirmed that he had searched him and found nothing. He stated that Mumbo was called by Wanyama. He testified that he had bought the perfume on the way to aircraft and that he had bought the perfume and kept it at the British Army conveyor belt and informed his colleagues he would collect his jacket. He stated that he collected the perfume from Unit 3 and that he informed his colleagues that he was going to the toilet. He testified that it was not easy to tell if the perfume was from aircraft. He stated that the conveyor belt is not a place for storage and that he had just kept it there though he knew it was at risk of being stolen. He testified that he had bought the perfume from a duty free shop staff who worked for Tour Vest Company. He stated that he knew the person who sold it to him and that he got the receipt from the same person. He testified that he knew the identity of the person but did not know the person's name. He stated that he got the perfume in a box, it was full and he paid 700/-. He was referred to the receipt he had produced in evidence and he testified that the receipt given was from Safari Duty Free Limited. He stated that he obtained it after his release from Makadara and that he produced it on 30<sup>th</sup> November 2010. He testified that he consented to the search by Mr. Hassan Wanyama and Mr. Owili as the searches are conducted as part of procedure. He stated that they found the perfume on him and he was asked where it had come from. He testified that he was arrested and taken into custody by the police. He stated the KAA access badge was taken by the security agents Hassan and Owili. He testified that he was called for a disciplinary hearing and that union members were present and that the minutes attached to his evidence were the true reflection of what happened. He stated that the Respondent did not call witnesses but confirmed that Hassan Wanyama was present and he asked him questions as did the union officials. He also asked Didicus Ileri questions. He stated that the CBA for 2008/2010 was signed on 8<sup>th</sup> August 2011 and that he was not in employment at the time. He testified that the CBA for 2010/2012 was signed in 2011 after he had left the employment of the Respondent.

5. In re-examination, he testified that when he was arrested Didicus Ileri was not with him and that he never called Didicus as a witness. He stated that when he was taken to the security office he was not allowed to make any movements. He stated that he was called on 8<sup>th</sup> January to attend the panel hearing on 9<sup>th</sup> January and that it was not sufficient time to call witnesses or get documents. He stated that he did not get any right to reply and that the Respondent did not appeal the decision of the Magistrate's Court.

6. He was recalled to testify after the Respondent introduced a new bundle of documents and stated that he did not receive the letter inviting him to panel hearing as his airport pass and ID were taken away and he could not access the airport. He testified that he did not receive the payment from the Respondent and only received the salary in January 2009.

7. In cross examination pursuant to the recall, he testified that he was given a pass by the Kenya Airports Authority to access the air side. He stated that he never raised the issue of not receiving the letters when he appeared at the panel hearing accompanied by union representatives. He did not know how the union officials were notified of the panel hearing. He testified that he had a temporary pass when he went to clear from the various departments at the Respondent. That marked the end of the Grievant's oral evidence.

8. The Respondent called Hassan Mumelo Wanyama who testified that he worked with the Respondent as security investigator. He stated that he was a security agent prior to the new position and that he knew the Grievant who used to work for the Respondent as a loading agent. He testified that in the course of his duties of overseeing flight coverage he would interact with the Grievant. He testified that he was deployed at sorting area and KQ 313 from Dubai and KQ 416 departing for Entebe. He stated that on KQ 313 he supervised Martin (the Grievant) and Martin's colleagues while offloading bags from the flight and thereafter he proceeded to flight KQ 416 departing for Entebe. He testified that as he supervised loading of KQ 416 parked at Bay 11 at around 21.30 hours, he saw Martin running from Bay 14 toward the restroom and he stopped Martin. He stated that Martin sought his pardon saying in Swahili '*Nisamehe*' and he did not know why Martin was asking for forgiveness. He requested to search Martin and Martin obliged and he felt a hard object when he reached the front lower abdomen. He stated that he requested Martin to accompany him to the security office for further search and that his colleague at the office asked Martin to remove anything that did not belong to him. He testified that Martin removed the perfume which was not in a box or package and that it was Miss Dior perfume. He stated that he reported to his team leader who came to the office and recorded a statement from Martin. He testified that the Grievant alleged that he had bought the perfume on his way to work and that one of his colleagues known as Ileri had witnessed the purchase. He stated that Ileri was called and indeed confirmed that he (Ileri) had seen Martin when he reported to work and when he was shown the CCTV he changed and said that he did not witness the Grievant purchase the item. He testified that the supervisor called the Police who took statements from him, Martin's controller and he resumed his duties on the flight to Entebe. He stated that he was present from the time of the arrest to the time the Police took Martin. He testified that Martin did not give a reason as to why he (Martin) had the perfume on his body. He stated that he saw Martin running on the ramp and because safety regulations do not allow running on the ramp he stopped Martin and Martin was acting suspiciously and sought pardon hence his request to search Martin. He testified that the company Tour Vest was responsible for supply of duty free items to be sold on aircraft and there was no way one could get the items on the ground. He testified that at the time of interception there was no receipt for the item and that he attended the disciplinary hearing conducted by the Respondent. He stated that the minutes produced were the correct record of the proceedings. He testified that he gave evidence at the criminal trial. He stated that the Grievant was present at the panel hearing accompanied by union representatives and that a disciplinary panel is only held when there is notice. He testified that there was a CBA for 2006/2008 which was in force at the time the Grievant was dismissed. He stated that the Grievant had a negative pay of Kshs. 13,085.40 and that he owed the company the said sum. He testified that the provident

fund due was paid and that there was a valid reason for termination being gross misconduct.

9. In cross-examination he stated that he was an investigation officer and had been trained on the job as well as Cairo, Johannesburg, at the Pride Centre and the Kenya Civil Aviation Security Training. He stated that he also had attended the John Morrison School of Management affiliated to Concordia University Canada and was competent to make a conclusion that an offence had been committed. He testified that he saw the Grievant running and that safety regulations require that one should not run and thus he stopped the Grievant who sought his pardon and that he found this suspicious. He stated that he did not know there was a hidden perfume. He testified that before one starts loading or offloading, the security agent searches the loading agents before and after. He stated that on the day, he had worked with the Grievant on flight 313 from Dubai and then he had gone to flight 416 going to Entebbe. He stated that he had searched the Grievant before and after flight 313 and the Grievant did not have the item. He testified that the item was recovered when the Grievant was coming from another flight. He stated that it was recorded that the Grievant was running on the ramp and that he was not limited to the area he could cover and that is why he stopped the Grievant. He testified that he gave evidence at Makadara Court and also before the panel hearing and that Tour Vest can only sell the items on board the aircraft. He testified that there was a claim from a flight to Dar Es Salaam on missing items and that the case was settled by insurance and that at the time of this case the documents on that issue had not been filed. He stated that the KAA pass was retrieved from the Grievant by the KAA officials and not the Respondent's officers. He stated the final dues are paid after clearance and that the final dues prepared were after the Grievant had cleared after summary dismissal on 21<sup>st</sup> January 2009. He testified that criminal prosecution is by Republic and that the receipt given was by a duty free company known as Safari while at the ramp the Grievant had said that the item was bought from staff of Tour Vest. He stated that a CBA is effective from the date the CBA is registered and that the processes and action against the Grievant were not covered by the 2008/2010 and 2010/2012 CBAs. That marked the close of the Respondent's defence as there were no questions on re-examination.

10. The parties filed written submissions on 8<sup>th</sup> August 2016 and 13<sup>th</sup> September 2016 respectively. The Claimant submitted that the Grievant was employed by the Respondent on 21<sup>st</sup> April 2007 and performed his duties until 17<sup>th</sup> November 2008 when his service was interrupted on account of handling what in criminal law would be referred to as conveying suspected stolen item (bottle of perfume) belonging to the Respondent's client. The Claimant submitted that the Respondent's employees confiscated his work ID and the KAA pass and handed over the Grievant to the police after arrest by Mr. Wanyama a security agent of the Respondent. The Claimant submitted that the Respondent issued a suspension letter on 22<sup>nd</sup> November 2008 contemporaneously with the bringing of charges before the Makadara Court where the Claimant had been charged on 9<sup>th</sup> November 2008. The Claimant submitted the internal investigation led to a panel hearing on 9<sup>th</sup> January 2009 and the Respondent proceeded to dismiss the Grievant on 21<sup>st</sup> January 2009. The Claimant submitted that there is an elaborate procedure for handling of passenger luggage and that the loading agents are searched or frisked prior to and after the loading and offloading of aircraft luggage. It was submitted that the Respondent's witness confirmed searching the Grievant before and after the loading of the flight and that nothing was found on the Grievant. The Claimant submitted that there was no complainant in the Makadara Court alleging loss of perfume and no evidence was tendered for the allegations of a loss by any of the Respondent's passengers. The Claimant submitted that the CBA for the period 2008/2010 was applicable to the Grievant. The Claimant relied on the case of **Joseph Wambugu Kimenju v Attorney General [2013] eKLR** as well as the cases of **Joshua Muindi Maingi v National Police Service & 2 Others [2015] eKLR** and **Joseph Mwenda Mbuko v Provincial Police Officer, Central Police & 2 Others [2013] eKLR** for the propositions that the discharge by the Respondent should have been an honourable one after the acquittal by the criminal court. The Claimant urged the Court to award the Claimant the sums sought for the Grievant in the claim.

11. The Respondent submitted that the Grievant was dismissed from service after a panel hearing as conducted and on consideration of the facts and statements adduced at the panel hearing after the arrest on suspicion of having stolen perfume from a passenger's luggage. The Respondent submitted that there was a valid reason for the termination of the Grievant as provided for in Section 41(1) as read with Sections 43 and 45 of the Employment Act. The Respondent submitted that the dismissal letter of 21<sup>st</sup> January 2009 set out the reason for the summary dismissal. The Respondent submitted that the testimony of the Grievant before the panel hearing, the criminal trial and this Honourable Court were contradictory. The Respondent relied on the cases of **Fulgence Sunza Masai v Kenya Revenue Authority [2014] eKLR** and further submitted that the procedure used was proper in terminating the Grievant. The Respondent placed reliance on the case of **JWN v Teachers Service Commission [2014] eKLR** on the issue of process. The Respondent also relied on the case of **James Mugera Igati v Public Service Commission of Kenya [2014] eKLR** for the proposition that the Respondent is not bound by the criminal proceedings to undertake internal disciplinary action as against the employee. Reliance was also placed on the case of **Republic v Public Service Commission of Kenya Ex Parte James Nene Gachoka [2013] eKLR** where Majanja J. held that the disciplinary proceedings and criminal proceedings are two distinct processes. The Respondent cited the cases of **Mutua Musau v Barclays Bank of Kenya Limited [2016] eKLR**, **Margaret Auma Ingwe v Kenya Power & Lighting Co. Ltd [2015] eKLR**, **Nelson Mwangi Kibe v Attorney General [2003] eKLR**, **Kenafic Industries v Bakery Confectionery Food Manufacturing and Allied Workers Union [2014] eKLR**, **Shaw Cable Systems GP [2003] CCRI No. 211** and **Ali Joha Tsuma v Corrugated Sheets Limited [2014] eKLR**. The Respondent submitted that the Claimant is not entitled to the prayers sought in the claim.

12. It is common ground that the Grievant was employed by the Respondent and was dismissed from its service on an allegation that the Grievant had stolen some perfume from a passenger's luggage in November 2008. He was taken to court and was later acquitted in the criminal trial. He was subjected to a disciplinary process in the interim and was dismissed in January 2009. He stated that he had purchased the item from staff of a duty free company known as Tour Vest. He later produced a receipt from Safari Duty Free Limited for the purchase of the perfume. Clearly, the allegations that led to his charge in the criminal trial could be subject of the disciplinary panel. There is no bar in law for an employer to dismiss an employee who is charged in a court of law provided the employee is given all the safeguards provided for under the provisions of the contract of employment and the Employment Act section 41. The Grievant was given an opportunity to defend himself and he did not avail any evidence on his acquisition of the item suspected to have been stolen. The employer had reason for dismissal as provided Section 45 of the Employment Act. There was a fair procedure where the Grievant was present alongside union representatives who asked the witnesses for the Respondent questions. It matters not that the criminal court acquitted him under Section 215 of the Criminal Procedure Code. This was after he had been placed on his defence. The circumstances of the

Grievant's termination are in accord with the law and the claim therefore fails and is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of October 2017**

**NZIOKI WA MAKAU**

**JUDGE**