



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 25 OF 2015

JOE JOSHUA D'SILVA.....CLAIMANT

VERSUS

MOMBASA AIR SAFARIS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant has brought this Suit claiming his terminal dues plus compensation for unfair termination of his employment by the Respondent. The Respondent has however denied liability for the alleged unfair termination of the Claimant's employment and instead blamed him for terminating his services without notice on 29.9.2013 when he went to work for Dakota SPRL in Congo.

2. The Suit was heard on 25.9.2015, 30.9.2015, 21.10.2015, 12.11.2015 and 14.12.2015 when the Claimant testified as CW1 and called Mr. Patrick Kamau Wahome as CW2 while the defence called Mr. Muhamed Ali Ayub Noor as RW1. Thereafter the counsel filed written submissions.

Claimant's Case

3. CW1 testified that he was employed by the Respondent on 20.2.2010 as a First Officer and on 20.8.2010 he was promoted the position of a Captain on DC3 Aircraft. That his starting salary was USD 4200 per month but late it was increased to USD 6000 per month. That a portion of the salary was paid in cash while the rest was paid through the bank transfer.

4. CW1 produced pay slips for July 2012 and February 2013 showing printed sum that was paid through the bank and handwritten sum showing the cash payment after conversion of the total salary from US Dollar to Kenya shillings. He also produced bank statements confirming bank transfers corresponding to the said pay slips, on which basis he contended that his salary was more than the kshs. 140000 pleaded by the defence. He also produced a flash disc with voice record and its transcript to prove that RW1 had admitted that the Claimant's salary was USD 6000 per month. The flash disc was played in Court and the Court confirmed that a one of the voices in the records admitted that the salary for the other was USD 6000.

5. CW1 further explained that in 2013 the Respondent sold the only DC3 Aircraft she owned to Dakota SPRL and because the buyer did not have any competent crew to fly it, the Respondent requested him to fly the aircraft to Kinshasa, Congo on 29.9.2013 and continue flying it until buyer employed her own crew. CW1 contended that he never negotiated or entered into any employment contract with the Dakota

SPRL but only acted under the request from the Respondent when he flew the DC3 to Kinshasa. He maintained that he was neither served with any notice terminating his employment with the Respondent nor was he given any option to choose between going to work for Dakota SPRL or continuing to work for the Respondent. That had he been given any option, he would not have chosen to go to Kinshasa and leave his young family alone in Mombasa. That as an employee CW1 continued to receive salary from the Respondent in September and October in 2013.

6. That in November 2013 he came back to Kenya and reported to the Respondent's office and met the RW1 but the RW1 never told him that his employment with the Respondent had been terminated. That CW1 reported to RW1 that the DC3 Aircraft had some problems and he referred him to the Engineer Majit for a meeting. That the Engineer admitted that the aircraft was a complete scrap or wreck but he advised him to continue flying it with less weight on board for Congo and Passengers. CW1 produced flash disc of voice record of the conversation between him and Engineer Majit plus a transcript of the same.

7. CW1 explained that in December 2013 he returned to Kinshasa to relieve Roy Bocke and while on his last flight from Ngoma to Kinshasa the aircraft developed problem while crossing at 13000 feet above sea level. It poured oil from the engine and the lights went off forcing the aircraft to be landed at Karanga Airstrip. The Aircraft was grounded for 2 weeks before Engineers came to his rescue but sadly they could not repair the aircraft.

8. CW1 then returned to Kenya on 16.1.2014 and reported back to the Respondent's office and but he never found the RW1 in the office. He was received by the commercial Director back to the Respondent and directed that the hours he flew while in Kinshasa be updated on his records with the Respondent. However when the CW1 met RW1 later, he was told that he was no longer employed by the Respondent because he had left his employment there to work for Dakota SPRL. CW1 protested RW1 and wrote an email to the Respondents Chairman Mr. John Cleave on 24.2.2014. The Chairman responded on 26.2.2014 confirming that CW1 was no longer employed by the Respondent but offered to get a chance for him from July 2014 at a reduced salary of USD 3500. CW1 responded to the Chairman's email stating that he had not left the Respondent to work for Dakota SPRL. Thereafter he served the respondent with a demand letter on 23.5.2014 through his lawyer.

9. CW1 denied that his salary was Kshs. 250000 and maintained that it was USD 6000. He prayed for salary for February and March 2014, 2 months' salary in lieu of Notice, House Allowance for 2010 to 2014, severance pay, 12 months' salary as compensation for unfair termination and General damages for being allowed to fly a defective aircraft and thereby exposing his life to danger. In total he prayed for USD 207694.

10. On cross examination he contended that he learnt of termination when he received the email dated 26.2.2014 from the Respondent's chairman. He further confirmed that earlier he had received an email terminating his employment with Dakota SPRL and promising to pay USD4500 and releasing him to look for another job. He also confirmed that he send email dated 28.2.2014 to Mr. Micha of Dakota SPRL to follow up his salary for January 2014. That he also enquired vide the same email whether he was employee of Dakota SPRL or the Respondent. That Mr. Micha responded stating that the Claimant had been transferred to the employment of Dakota SPRL voluntarily. He also admitted that he received salary from Dakota SPRL in October, November and December 2013 and part of January 2014. He maintained that he always believed that he was employed by the Respondent but admitted that he was never given any letter seconding him to Dakota SPRL. He admitted that he did not expect any salary from the Respondent when he was working in Kinshasa because RW1 had told him that though he was employee of the Respondent, Dakota was to pay his salary while in Congo.

11. CW1 admitted that he never served any termination notice to the Respondent because it is the RW1 who requested him to fly the DC3 aircraft until Dakota SPRL employed her crew. He admitted that the day he flew from Mombasa to Kinshasa, he indicated on the Technolog that the plane had nil defects.

12. CW1 further admitted that he never alerted RW1 when he recorded their conversation in his devise.

He also admitted that he was not an expert in voice recording and that he did not have any certificate confirming that the recording device he used was mechanically sound. He admitted further that the sound was unclear and one of the voices belonged to a dog.

13. CW2 does the business of photocopying, typing and printing under the name Royal Printers. In May 2015, he was requested by Counsel for the Claimant to listen and transcript recorded voice from 2 audio flash discs. The first disc was labeled salary and the second one Manjit. That he listened and made typed transcript for the two discs. He produced both discs and the transcripts as exhibits.

14. On cross examination, Cw2 admitted that he lacked any special qualifications in listening and transcribing information from voice records (audio files). He also admitted that he never indicated his academics and professional qualifications on his statement. He admitted that he was not present when the audio recording was done. He denied ever tampering with the files in the flash discs given for the transcription but admitted that he did not know whether the information had been transferred from another recording device to the flash discs. He admitted further that audio files can be edited or deleted permanently. He explained that he did the transcript with his colleague, Mary Wambui who likewise is not a forensic expert. He could not confirm or deny whether the flash discs had not been dealt with by another person before being brought to him. He however maintained that the transcript he made was accurate.

Defence Case

15. RW1 is the Managing Director (MD) of the Respondent since 2010. He is an accountant by profession. He found CW1 still working for the Respondent as a pilot under a contract made on 20.8.2010. That under the said contract the Claimant's consolidated salary was kshs 140000 per month plus kshs. 1.50 per mile flown. That he worked until September 2013 without complaining about nonpayment of House allowance.

16. RW1 contended that the Claimant left the Respondent on 29.9.2013 without any notice and went to work for Dakota SPRL after the latter bought the Respondent's DC3 Aircraft. He produced copy of the Claimant's email to Dakota SPRL dated 28.2.2014 enquiring whether he was employed by her or the Respondent. He also produced another email by the MD of Dakota SPRL dated 28.2.2014 responding to the Claimants that he was employee of Dakota SPRL by his own choice. He contended that the payment of October 2013 salary to the Claimant was erroneous and it should be refunded. He also counter claimed for 2 months salary from the Claimant for deserting employment without notice. He also counter claimed for USD 1750 on pro rata basis in respect of his bond signed in favour of the Respondent to work for her for at least 24 months of which he served for 17 months only.

17. RW1 explained that although the title of the Aircraft sold to Dakota SPRL did not pass immediately, the responsibility of operating the aircraft passed to Dakota SPRL immediately. That the cost of operating the aircraft including maintenance and other operational expenses rested on Dakota SPRL immediately under clause 7.1.and 7.2.14 of the Purchase Agreement dated 26.7.2013.

18. RW1 denied that the Claimant was made to pilot a defective aircraft and explained that on 27.9.2013 it was flown by 4 pilots including the Claimant and was found to be without any defect according to the Techlog signed by the Claimant on 27.9.2013. That on 29.9.2013, the Claimant filled another Techlog before flying to Kinshasa indicating that the aircraft had no default that after the flight to Kinshasa, no defect was reported of any defective noted during the flight. That if the Claimant was made to fly defective aircraft while in Congo, then he should sue Dakota SPRL for exposing his life to danger.

19. RW1 denied that his voice was one of the voices recorded by the CW1 in the flash discs produced as exhibit by cw2. He contended that the place and the time of the voice recording was not known and both the voice record and the transcript were done by unqualified persons. That no certificate was adduced to prove that the recording device used was proper and the device itself was never produced as exhibit. He maintained that the relief sought by the Claimant are not tenable and they should be dismissed.

20. On cross examination, RW1 maintained that the Claimant's salary was initially ksh. 140000 but later increased to kshs 250000 plus mileage flown just like that of the MD and the Chairman of the Respondent's Board of Directors as per the salary structure produced by the Respondent as an exhibit. He however admitted that the said structure was not signed by any one and it was not on the Respondent's letter head. He admitted that the Respondent's bank account was at the Imperial bank. He also admitted that the Bank statements produced by the Claimant contained internal transfers of sums of money which tallied with the Respondent's payroll. He maintained that payments to all employees was in Kenya shillings and it included House Allowance. He however admitted that the contract was not clear on the issue of consolidation of the salary. He admitted that the salary for February 2013 was based on USD6000 @exchange rate of kshs 87.20 and the handwriting on the payslip was by Gabriel Mumba the accountant who was older than him in the company. That the said accountant was not called to contest the same.

21. On the issue of voice recording, RW1 maintained that it was not clear to him. He admitted that he had many meetings with the Claimant but not to discuss his salary or bond.

22. As regards the termination of the Claimant's employment, RW1 contended that after selling the DC3 aircraft, he gave option to the Claimant and Roy to choose going with Dakota SPRL or remain with the Respondent to pilot small aircrafts. He however admitted the employment contract provided that the Respondent could call the Claimant to fly any aircraft at any time whether owned by her or not. He further admitted that the Respondent never served notice to the Claimant before termination. He also admitted that the Claimant passed by his office in November 2013 when he came to Kenya to renew his license. He further admitted that during the said visit, he discussed the aircraft with the Claimant and referred him to Engineer Manjit Kalsi. He further admitted that he had no evidence to prove that the voice record attributed to him had been tampered with.

23. As regards the bond, RW1 admitted that by selling the DC3 aircraft to Dakota SPRL, she denied the Claimant the chance to repay the bond. He admitted that in his witness statement he stated that the aircraft was sold due to low business. However in his testimony he denied that the reason for the sale was low business and explained that by January 2014 the Travel advisories had been lifted.

Analysis and Determination

24. Upon careful consideration of the pleadings evidence and submissions presented to the court, I find no dispute in the fact that the Claimant was employed by the Respondent from 20.2.2010 as a pilot. That in July 2013 the Respondent sold to Dakota SPRL the DC3 Aircraft which the Claimant was flying and the Claimant went with the buyer to Kinshasa and continued flying it there until it broke down in December 2013. That in January 2014 the Claimant returned to Kenya and reported back to the Respondent but he was not welcomed. In the meanwhile Dakota SPRL wrote an email to him on 21.1.2014 telling him that her Board had decided to terminate his services and clarified that no contact of employment had been concluded in his favour. That Claimant sought clarification from Dakota SPRL as to who between her and the Respondent was his employer and Dakota PRSL said she was the employer. That Dakota PRSL paid salary to the Claimant from October 2013 to January 2014.

25. The issues for determination herein are:-

(a) Whether the Claimant terminated his employment on 29.9.2013 without notice or he was unfairly terminated by the Respondent.

(b) Whether reliefs sought by both Parties should be granted.

Desertion Vs. Unfair Termination

26. RW1 alleged that the Claimant terminated his services on 29.9.2013 without the requisite 2 months prior notice and went to work for Dakota SPRL. The Claimant has however denied the alleged desertion and maintained that he was requested by RW1 to fly the DC3 Aircraft to Kinshasa and continue flying it

until Dakota SPRL employed her own crew. I have considered the email dated 28.2.2014 by Mr. Micha, the MD of Dakota SPRL to the Claimant which was produced as Defence Exhibit 3 and email by Mr. Cleave to the Claimant dated 26.2.2014 and made a finding that the Claimant never deserted his employment with the Respondent on 29.9.2013 without notice. He went to Dakota SPRL with the full person of the RW1. The email by Micha stated as follows:-

“As for the agreement with MAS Muhamed was kind enough to release you and Roy to Dakota for the operation of the AC”

27. The question that begs answers is whether the Claimant was seconded to Dakota SPRL by the Respondent or he was employed by the Respondent. The said question was raised by the Claimant vide his email dated 28.2.2014 to Mr. Micha and the latter responded by his email dated 28.2.2014 aforesaid when he stated as follows:-

“Yes you transferred to Dakota’s employment. In your case, we were not able to conclude/agree on the package/contract with you as you know. The management then made a decision to send you how. There was no agreement with MAS to provide pilots, it was your decision to come to DRC”.

28. The Claimant has however denied that he personally decided to end his employment with the Respondent to go and work for Dakota SPRL. According to him he was requested to fly the DC3 aircraft until Dakota SPRL hired her own crew. He cited his employment contract dated 20.8.2010 which bound him, upon request by the Respondent, to fly any aircraft whether or not owned by the Respondent using his license and to do so anywhere in Kenya or outside the country.

29. I have perused the said contract of employment and confirmed that condition 6 of the conditions of service under the contract required the Claimant to fly using his license any aircraft whether or not owned by the Respondent at any time whenever requested to do so by the Respondent. I have also confirmed from condition number 10 that the Claimant was to be based in Mombasa but he could be made to work at any other part of Kenya and even abroad and the Respondent would meet his cost of accommodation only. The Court therefore finds merit in the Claimant’s contention that he went to Congo and flew the DC3 aircraft on request by the Respondent. That he had no option to choose between going to Kinshasa and remaining in Mombasa. He obeyed instructions from his employer to go to Kinshasa. In his view the aircraft was still owned by the Respondent until full payment of the purchase price.

30. I have considered clause 6.4 of the aircraft sale agreement dated 26.7.2013 and confirmed that title to the aircraft was not to pass from the Respondent to Dakota SPRL until the purchase was fully paid and the buyer complied with all the other terms and conditions of the sale agreement. Clause 7.2.3 of the agreement further stated that the purchaser was at his own expenses during the period of the paying the purchase price by installment to:-

“ensure that the aircraft is operated...by flight crew either seconded to the purchaser by the vendor on terms to be agreed or approved by the vendor, or by flight crew hired by the purchaser but with prior approval of the vendor”.

31. The next question that arises is whether the Claimant was released to Dakota SPRL until Dakota SPRL hired her crew. Cw1 said that honestly believed that he remained in the Respondent’s employment and that he would return to her as soon as he was discharged by Dakota SPRL. Rw1 however contended that the Claimant deserted employment without notice and negotiated his new employment with Dakota SPRL.

32. I have considered all the material placed before me and I find on a balance of probability that the Claimant was seconded to Dakota SPRL by the Respondent to continue flying the DC3 aircraft to protect her interest in the DC3 Aircraft pending the full payment of the sale price. That under clause 7.2.3 of the sale agreement, the Respondent was supposed to negotiate the Claimant’s terms of engagement at Dakota SPRL but she defaulted. That the Aircraft broke down shortly after delivery to the purchaser and before

any contract being executed in favour of the Claimant and as such the Claimant was send back to Kenya. That when the Claimant reported back to the Respondent, he was told that there was no vacancy due to low business. He was therefore terminated after his services were declared superfluously by the Respondent's chairman vide his email dated 14.3.2014.

33. The termination being grounded on redundancy was done without following a fair procedure as provided for under section 40 of the Employment Act. Under the said provision, an employer is barred from declaring an employee redundant before first serving a written notice of at least one month to the employee and the Labour Officer among other procedural requirements. In this case no prior notice was served on the Claimant and the area labour Officer before the lay off. That default rendered the termination of the Claimant's employment unfair. Even if there was good reason for laying off the Claimant, being the sale of the DC3 Aircraft and low business, the procedure followed was in breach of the law and therefore unfair and unlawful.

Reliefs

Unpaid Salary

34. The Claimant prayed for salary for February and March 2014. He is awarded full salary for February 2014 and half salary for March 2014. Claimant pleads that his salary was USD 6000 but according to the contract of employment his salary was kshs. 140000. RW1 contended that all salary for the Respondent's employees was in made Kenya shillings and not US dollars. He maintained that the Claimant's fixed salary was kshs. 250,000 at the time of his termination. The Court rejects the evidence by CW1 that her salary was USD 6000. The pay slips he produced which were all allegedly over written by Mr. Gabriel Mumba, the accountant are not authenticated. Likewise evidence produced in the form of audio flash record and typed transcript are rejected for being done by unqualified persons and for lack of certificate under Communication Act. In any case, I wonder in whose interest or detriment was the Claimant's alleged pay of USD 6000 connected with Kenya shillings and paid in two portions, one cash and the other through the bank. The court therefore applies the salary of kshs. 250000 which was reflected in the Respondent's salary structure produced in court. Consequently I award kshs. 375000 for as the salary arrears for February and March 2014.

Notice

35. In view of the finding herein that the termination was by the Respondent, I award to the Claimant kshs. 500,000 being 2 months' salary in lieu of notice.

Compensation

36. In view of the finding that the termination was unfair and in consideration that the Claimant never prayed for reinstatement, I award him 6 months gross salary for the unfair termination being kshs. 1,500,000. In my view, the Claimant would not reasonably secure an alternative job within 6 months of termination even with due diligence since the tourism business was admittedly low.

House Allowance

37. This prayer is declined because it is coming too late in the day making the court believe the Respondent's contention that the kshs. 250000 was consolidated pay.

Severance pay

38. This prayer is also dismissed because the redundancy has herein above been declared to the unfair termination and the Claimant adequately compensated.

General damages

39. This Claim is also disallowed because as contended by RW1 and supported by the Aircraft Sale agreement, Dakota SPRL was responsible for the Operation and maintenance of the aircraft. It is therefore Dakota SPRL who should be sued for exposing the Claimant life to danger by instructing him to fly a defective aircraft.

Counter claim

40. The counter claim is dismissed for lack of merits. As found herein above, the termination of the employment was done by the Respondent and not the Claimant.

Disposition

41. For the reasons stated above, judgment is entered for the Claimant dismissing the counter claim and awarding him the sum of kshs. 2,375,000 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 1st day of July 2016.

ONESMUS MAKAU

JUDGE