



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.1184 OF 2010**

**CLAIRE NJERI MUIGAI .....CLAIMANT**

**VERSUS**

**LADY LORI KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claim herein was filed on 6<sup>th</sup> October 2010 and the defence on 26<sup>th</sup> October 2010. On 26<sup>th</sup> November 2010 the Respondent filed the Amended defence and Counter-claim and the Claimant filed a response thereto on 20<sup>th</sup> December 2010. A Further Amended Defence and Counter-claim was filed on 26<sup>th</sup> May 2011 by the Respondent and the Claimant replied on 9<sup>th</sup> June 2011. At the close of the hearing, the parties filed their written submissions.

2. These pleadings shall be considered in the analysis herein.

**Claim**

3. The claimant, Claire Njeri Muigai was employed by the respondent, Lady Lori Kenya Limited, a limited liability company. The claim is that on 26<sup>th</sup> March 2010 the Respondent engaged the Claimant orally for employment as a Pilot. On 1<sup>st</sup> May 2010 the Respondent formerly engaged the Claimant by contract as a Pilot in the operations department for 2 years at an initial salary of \$1000 per month during the probation period.

4. On 31<sup>st</sup> July 2010 the Claimant completed probation and was confirmed with a salary of \$2000 per month. Before confirmation of employment, the Respondent certified itself as to the claimant's qualifications as a Pilot of the Cessna Caravan and the G1000 system. There was no training by the Respondent for the Cessna Caravan 2006 and G1000 and she was not bonded in regard of the same.

5. On 17<sup>th</sup> August 2010 the Claimant received a letter of termination of employment from the Respondent stating no grounds for the same. The Respondent proposed to pay;

*a) August 2010 ½ salary Kshs.90, 667.00;*

*b) One month notice pay Kshs.160, 000.00;*

*c) Leave days balance 8.75 days Kshs.46, 667.00;*

*Less advance Kshs.64, 000;*

*Less cash lost Kshs.36, 800.00;*

*NET Kshs.286, 534.00.*

6. The Respondent also counter-claimed a 2 years bond on C208 G1000 which was in excess of the claimant's entitlement. The bond had no basis. The Claimant was diligent in her duties and served without any disciplinary case and the termination without any reason has caused the Claimant to suffer mentally and financially and been unable to secure alternative employment due to lack of a letter of recommendation from the respondent. The failure to give any grounds for termination was unfair.

7. The claim is that the termination was unfair, malicious and unprofessional and this was harmful to her career and is seeking;

*a) 17 days august 2010 pay Kshs.90, 667.00*

*b) Notice pay Kshs.160, 000.00;*

*c) Leave balance kshs.46, 667.00;*

*d) Per Diem Kshs.72, 000.00;*

*e) Compensation Kshs.1, 920,000.00*

*Less*

*Advance kshs.64, 000.00;*

*Money stolen from client kshs.36, 800.00*

**Total due Kshs.2, 188,534.00.**

8. The Claimant in reply to the Further Amended Statement of Defence and Counter-Claim states that on 2<sup>nd</sup> August 2010 she was called the chief executive officer of the Respondent in the office where she found the chief pilot and was confirmed as a full pilot. The proof is the doubling of her salary to \$2000 in accordance with minutes of a meeting held in Juba showing her position as pilot and not co-pilot and as the Operations Manager upon completing probation. That the contract of employment was to continue in force for 2 years from 1<sup>st</sup> May 2010 to 1<sup>st</sup> May 2012 with a salary review after every 6 months and earning \$100 per diem for any night stop and \$65 for every hour flight to Juba, South Sudan as an incentive, and was to get a medical cover.

9. The Claimant also states that on April 2010 she had a base check and a route check with the chief pilot in July 2010 where she performed well on which basis she was confirmed as a full pilot in August 2010. The Claimant avers that she was never trained by the Respondent and where she was, there was no bond conditions. She was trained as a pilot of the Cessna Caravan and the G1000 system before employment with the respondent. There was a training booking in September 2010 which was before termination.

10. The termination letter did not have any grounds and was unfair and never signed any second probation as alleged by the respondent. Money was stolen from the claimant's room among her personal belonging. The matter was report to Nairobi immediately as this was not a loss, misplacement but a theft and the Claimant was surcharged of the same. The Claimant did not take any of the respondent's vehicles for personal use as alleged and Juba Airport has no hangers and closes at 6.30pm and therefore not possible to access the same at night for the driver as alleged.

11. The Claimant also avers that she was never called for a hearing before termination and from the termination letter she had nothing to collect despite being given new responsibility of operations manager and while leaving in a hotel she was required to set up an operational office without a set timeframe. On

this basis, the defence and counter-claim lack basis and should be dismissed.

12. **In evidence** the Claimant testified in support of her claim she is a pilot and was employed by the Respondent under a contract dated 29<sup>th</sup> May 2010 with a 3 months' probation and ending 31<sup>st</sup> July 2010. She was confirmed as full pilot on 2<sup>nd</sup> August 2010 and allocated other duties as operations manager and also continued to operate the Caravan Cessna Caravan plane C208.

13. The Claimant also testified that she was in south Sudan for 8 days when she got a call to get back to Nairobi where she was given a termination letter. There was no notice and was only called by the chief officer to the office Mr Mimano and the letter stated the dues payable but refused to accept as this was not enough. She was not trained by the Respondent as alleged as her licence shows prior training and qualified by 4<sup>th</sup> February 2008 to fly the same aircraft. This was a case of unfair termination and damages are due together with the admitted owing dues.

14. The Claimant also testified that there was no hearing before termination. Her contract had 3 months' probation and was to run for 2 years though the Respondent reserved the right to renew the same. The Claimant had to meet all company requirements which she did and was confirmed. The regulations relate to Kenya Civil Aviation Act and the Authority thereto. The Claimant had a base check as a basic requirement by Respondent and a partial pass which was to be re-done and had she not passed, the Respondent would have the right to terminate employment before confirmation of contract. The Claimant was therefore sent to South Sudan upon confirmation as she was the operations manager and without qualifications for such job. Probation ended on 31<sup>st</sup> July 2010 and was not extended.

15. While in South Sudan, the Claimant undertook her duties as the employee of the Respondent and attended meetings with the chief officer as operations manager. She had the duty to handle cash by opening an account as an agent of the respondent. The cash allegedly lost was stolen and reported to the Respondent who then surcharged the claimant.

16. While with the Respondent the Claimant flew the Cessna C208 registration 5YJLL and her licence allowed her to operate the same. In an aircraft with more than 1 pilot, one is the pilot-in-command and the company appoints such a pilot-in-command but the technical log can be done by any pilot, which is lawful.

17. The Claimant was the banking agent of the Respondent in Juba together with Tom and Frank. In the business account form, the account was opened together with Mr Deng and Mawien as Respondent directors. This was not meant to disrespect lawful orders from the Respondent as alleged. She does not owe the Respondent any monies as there was no bond conditions for training and in any case, no training was done as employment was on the basis of previous training and certification as pilot in 2008.

18. The Claimant also called Captain Kipkemboi Singilai as a witness and testified that he worked with the Claimant while in the employment of the Respondent in 2009 to 2010 when he left. The Claimant was a Caravan pilot and flew together on training and as chief pilot did route checks. On 18<sup>th</sup> July 2010 he flew with the Claimant as the Pilot-in-Command. On 14<sup>th</sup> April 2010 there were 3 pilots on-board, the claimant, Frank Njoroge, Mwangi and the witness. This was training base check which the witness signed.

19. The Claimant also called Frank Njoroge as a witness who testified that he worked with the Claimant and trained her while with the Respondent from 21<sup>st</sup> January 2010 as a freelance pilot. He was appointed in April until 22<sup>nd</sup> February 2011 when he left the Respondent after promotion as Chief Pilot. He flew with the Claimant on several occasions in Cessna Caravan 5YJLL. On 14<sup>th</sup> July 2010 the technical logs sheets notes that he did the base checks with the Claimant to check her competence within the airfield. He was also in South Sudan with the Claimant and at the meeting the Claimant was allocated administrative and flight duties. The Respondent managing director was present.

## **Defence and Counter-claim**

20. In defence, the Respondent stated that on 1<sup>st</sup> May 2010 the Claimant was engaged for 3 months' probation expiring on 31<sup>st</sup> July 2010 and was never on 2 years contract. The probation period was extended subject to the Claimant passing of a base check (route check) in accordance with the provisions of the Civil Aviation (air Operator Certificate and Administration) Regulation 2007 and the Civil Aviation (operation of Aircraft) Regulation 2007, and due to the Claimant getting additional responsibilities and the Claimant was informed orally.

21. The Claimant was trained on the basis that she would commit to work for the Respondent for a period of at least 2 years which was acknowledged in the probationary contract. This commitment was equivalent to a bond and no separation bond needed to be executed to qualify the same. The Claimant was terminated within the probation period and it was not obligatory to assign any grounds. The termination was done in accordance with the law and the claim is far-fetched.

22. The dues set out as owing due to August 2010 pay; notice pay; leave balance are admitted. Such dues should be paid less advance given; cash lost by the claimant; and the bond amount.

23. The defence is also that as a consequence of the claimant's own gross misconduct that led to her termination of her second probation contract. The acts of gross misconduct are that contrary to resolution passed at a meeting on 7<sup>th</sup> August 2010 authorising the Claimant to open a bank account number with Tom Osibo and Frank Njoroge she went on to open the account with 2 other different persons, Mr Kuol and Mawien and breached the sensitive responsibility and created an impression of intended fraud; the Claimant lost, misplaced and or misappropriated the respondent's funds at KShs.36,800.00 which she acknowledged; upon the loss of the cash the Claimant went around the hotel she was resident harassing other guests by ransacking their rooms on the pretext of searching for the same and thereby tarnishing the name of the respondent; upon the loss of the cash, the Claimant followed a cleaning lady to her slum residence in South Sudan in search for the money and when told to stop and go back to her hotel she disobeyed orders from her superiors forcing the local Sudan Police to be called to ensure her safety, restrain and return her to the hotel which put her at risk and made her security volatile while in South Sudan for which the Respondent would have been held responsible.

24. Other acts of gross misconduct by the Claimant are that on several occasions she took the respondent's only utility vehicle meant for use by all staff and passengers for her own use to the detriment of others and forcing the Respondent to hire taxis for personnel and or passengers. Contrary to Respondent policy, the Claimant sent a driver to collect a technical report for a Caravan aircraft with the knowledge that no one was allowed in hangars at night and thereby risking the life of the driver for a matter that should have waited until morning.

25. Other grounds of gross misconduct are that the Claimant was always at loggerheads with other employees; the Claimant knowingly signed her Log Book as "self" thereby wrongly intimating that she was the Pilot-in-Command while at all material it was Mr Frank Njoroge who held such position. The Cessna 208B aircraft the Claimant purported to have been the Pilot-in-Command is a single pilot plane and her conduct was contrary to the Civil Aviation Act and the Rules and Regulations thereto and this would have resulted in the respondent's Air Operators Certificate being suspended and or revoked by the Kenya Civil Aviation Authority.

26. For the various acts of gross misconduct committed by the claimant, the Respondent took the decision to summarily terminate her employment. Before termination, the Claimant was called to a meeting in the presence of 2 other employees and she was informed of the reasons for termination. The Claimant refused to collect her dues offered as a gesture of good will as opposed to legal obligations and cannot claim to have suffered mentally or financially and the claim should be dismissed with costs.

### **Counter-claim**

27. **In counter-claim**, the Respondent's case is that between 26<sup>th</sup> March 2010 and 1<sup>st</sup> May 2010 and 17<sup>th</sup> August 2010 the Claimant was undergoing further training at the expense of the Respondent as she had no certification and or noted experience in flying Cessna 208B Caravan Aircraft. By the end of the raining

the Claimant had used 15 hours and 14 minutes of flying time at the expense of the respondent. A Caravan Aircraft, for training is charged at \$850 per hour making the total expense incurred at \$13,345 [Kshs.1, 067,600.00].

28. The counter-claim is also that the in the probationary contract for the Claimant executed a bond under which she was to work on confirmation for the Respondent for a period of at least 2 years to enable it recoup the said training expenses. As a result of summary dismissal before confirmation, the Respondent is not in a position to recoup the same.

29. The Claimant is only entitled to dues amounting to kshs.286, 534.00 leaving a balance of Kshs.781, 066.00 owing to the Respondent which she should pay with costs.

30. **In evidence**, the Respondent witness was Ian Mbutia Minamo who testified that he is the chief executive officer of the Respondent and hired the Claimant and issued a training contract with her. The Claimant was on probation from 1<sup>st</sup> May 2010 to 31<sup>st</sup> July 2010 and the Respondent then reserved the right to renew upon successful recruitment where the Claimant was to work for the Respondent for at least 2 years due to the investment in training her the Respondent needed to recoup the same through her employment. The Respondent had 30 days to discuss what was to happen. The contract provided for 30 days free period for flexibilities and the Respondent required to ensure that the Claimant was competent, good conduct and good in piloting. The contract was signed by mutual agreement.

31. The witness also testified that the Claimant was terminated due to grounds of integrity and misconduct and there were questions with regard to her flying records. The Claimant falsified log book entries and misconducted herself while in the public. The Claimant entered flight logs as Pilot-in-Command which was not correct as noted in her note book whereas she was employed as a pilot. The Respondent aircraft Cessna 208 registration 5Y-JLL was certified for 1 pilot and from the flight technical book the actual Pilot-in-Command had to sign. On 1<sup>st</sup> may 2010, the flight log was signed by Captain Frank Njoroge as the Pilot-in-Command and in all the cases the Claimant signed herself as Pilot-in-Command, it was supposed to have been signed by Captain Njoroge as the officer appointed by the Respondent in that role. On 6<sup>th</sup> June 2010 the flight log and technical log has the history of the aircraft and the Claimant was not serving therein; on 14<sup>th</sup> June 2010, Captain Njoroge was Pilot-in-Command but the Claimant has in her log on same date listed herself as Pilot-in-Command. This does not tally with the aircraft technical log which is not correct and is illegal.

32. He witness produced several other instances where the Claimant had made wrong entries on her book logs which were illegal. This was dishonest, fraudulent and an illegality and contrary to pilot's code of conduct and against the Civil Aviation act as one pilot is supposed to be Pilot-in-Command. It is illegal to make misrepresentations in pilot log book. The effect of this is that this amounts to a serious offence and amounts to lapse in safety which can lead to an accident which affect insurance cover for the craft.

33. The misrepresentations were only discovered upon the Respondent undertaking regular audits. Upon such discovery, the witness made a decision to ground the Claimant from flying. Her last flight was on 20<sup>th</sup> July 2010 and never took any other flight after that. Termination was not immediate and investigations were ongoing and thee was need to look at aircraft technical logs as these were held in juba. He needed to get these records before making any conclusions. The last contract date was on 31<sup>st</sup> July 2010 and termination letter was issued on 17<sup>th</sup> august 2010 as the Respondent had 30 days within which to make a decision on claimant's employment.

34. The witness also testified that they did not state the reasons/grounds for terminating the Claimant. This was meant to secure employability and did not want to ruin her future chances with other employers. As the Chief Officer of the respondent, he did investigations and became satisfied that termination was justified. If advance notice had been given to the claimant, this would have been detrimental.

35. The Claimant had not been confirmed into employment at the time of termination. The Claimant also lacked proficiency checks to show she had completed training. This was to confirm that the Claimant was

following laid down procedures and was qualified to perform her work well. In the case of the claimant, she was being trained by Captain Singilai, an employee of the Respondent at the time who prepared the documents in his returns. The date of proficiency check tally with the aircraft technical log for 18<sup>th</sup> July 2010 noting the pilots were Singilai and the Claimant. There are no records to show that the Claimant passed her training. Captain Singilai did not enter correct logs and this was noted upon an audit. There was no satisfactory completion of probation.

36. The contract of employment required that upon successful training, the Claimant was to remain with the Respondent for at least 2 years. The Claimant was therefore bonded so as for the Respondent to have a return of its investment in her training. It was conditional employment. The Claimant licence was for a single pilot and there is no evidence that she flew an aircraft along. Other than for purposes of training, the Respondent did not require to have 2 pilots in an aircraft as these were commercial crafts for cargo or passengers. There were 13 seats in each aircraft and to take the Claimant meant an extra pilot on board for training and the Respondent lost revenue from the same. This is the basis of the counter-claim.

37. For every time the Claimant flew, the Respondent lost revenue for her seat. This was training time for the Claimant and upon her termination, noting the contract bond, the Respondent computed the flight time and the seat costs and arrived at the training costs due from her payable to the respondent. The Respondent should be paid the dues owing to the raining and the fact that the Claimant misconduct led to her termination. Training costs have been liquidated. There are flight hours from technical logs to verify and support such travel and costs to the respondent. The training was a sacrifice to the Respondent to ensure the Claimant got certified to fly the craft. The costs also include insurance paid to fly the Claimant and the surcharge. Based on each flight route, the Respondent used a formula to cost each hour and made an average costing.

38. The counter-claim amounts to Kshs.781, 000.00 less the dues the Claimant was to be paid. The Claimant was expected to remain in the employment of the Respondent for 2 years within which, the costs incurred in her training would have been recouped. This was not the case.

39. The claimant's salary was \$900 together with allowances this amounted to \$1000. When sent on duty to south Sudan, the allowances increased but the basic salary remained the same as her station of work remained at Nairobi.

40. The witness also testified that Captain Singilai was terminated by the Respondent for making illegal log books. Such termination was not challenged as being unlawful or unfair. The logs related to training time with the Claimant and with the wrong log books, this put the Respondent at great risk due to the irregularities.

## **Submissions**

41. Both parties agreed to file written submissions on 7<sup>th</sup> April 2016. Only the Claimant filed the submissions on 24<sup>th</sup> may 2016.

42. The Claimant submit that on whether there was a two-year or probation contract is fundamental due to the rights set out in terms of section 42 or 47(5) of the Employment Act. The Claimant was never on a probation contract and the respondent submitted a contract that lapsed on 31<sup>st</sup> July 2010. Section 9(2) of the Employment Act an employer is bound to reduce a contract into writing to which the Claimant as employee should have given consent to as held in **Robai Musinzi versus Safdar Mohammed Khan [2012] eKLR**. That the written terms help parties to it understand the terms and conditions set out. In this case the respondent did not follow the provisions of section 10(7) by failing to produce the contract in existence during the termination of the Claimant and this should be construed in favour of the Claimant. The probationary contract between the parties was never meant to operate in perpetuity in terms of section 42 of the Employment Act and the breach apparent in terms of section 9(2) of the Act, the Claimant is entitled to damages.

43. The Claimant also submit that the failure to be confirmed into full employment she became subject to

section 37(1) (b) of the Employment Act as she remained in the continuous employment of the respondent and was performing duties similar to what she did during her probation period. Before termination, section 35(1) (c) apply with regard to notice or payment in lieu thereof. The failure to issue a written contract was the duty of the respondent.

44. The Claimant also submit that she was unlawfully terminated as due process was not followed. Under section 45 of the Employment Act, the Claimant is entitled to a declaration of unfair termination and compensation thereof. The allegations made against the Claimant were never proved and the lost cash while at work in Juba, south Sudan, the Claimant was surcharged. All the other allegations were never proved and there was no prior notification to enable the Claimant defend herself. The allegations and accusations only emerged after termination of employment. Section 41 of the Employment Act applied in this case as held in **Hosea Njeru Kagundu versus Kenya Union of Commercial Food and Allied Workers [2012] eKLR**. The Claimant should have been given notice and a hearing. In **Mercy Njoki Karigithi versus Emerald Hotels and Resorts Limited [2012] eKLR**, the court held that a contract terminated during probation is protected in terms of sections 41 and 43 of the Employment Act.

45. The Claimant further submit that she is entitled to the remedies sought based on the violations of section 35, 41, 43, 45 of the Employment Act read together with article 47(2) of the constitution by the respondent in terms of fair administrative action. The infringements of her contract of employment and the applicable law warrant payment of damages and compensation.

46. With regard to the **counter-claim**, the Claimant submit that this was not proved and should be dismissed with costs.

47. The Claimant also filed their list of authorities, which I have put into account in my analysis of emerging issues.

48. The respondent did not file any written submissions.

## **Determination**

**The employment status of the Claimant at the time of termination;**

**Whether the termination was unfair; and**

**Whether the counter-claim should be allowed.**

49. The Respondent has admitted owing August 2010 ½ salary Kshs.90,667.00; One month notice pay Kshs.160,000.00; Leave days balance 8.75 days Kshs.46,667.00; and **Less** advance Kshs.64,000; Less cash lost Kshs.36,800.00; with a total due of **Kshs.286,534.00**.

50. It is common cause that there was a written contract between the parties within the time of employment of the Claimant with the Respondent vide contract dated 28<sup>th</sup> May 2010. Both parties signed the contract of employment. The Claimant position is set out under clause 2 of the contract as *Pilot in the Operations department* with the requisite duties set out therein.

60. The contract of employment is also specific that;

*Contract of Employment*

*I have the pleasure in confirming your appointment with Lady Lori Kenya Ltd to a probation period of three months.*

*Details of your conditions of employment:*

*1. Period of employment*

*Your employment shall commence on 1<sup>st</sup> May 2010 and will terminate on 31<sup>st</sup> July 2010. The company reserves the right to extend your contract of employment should it wish to do so but no guarantee in terms of the aforementioned. This contract supersedes any previous and/or current contract of employment between yourself and the company.*

...

*... However, the company shall reserve the right to offer you a new contract of employment within thirty (3) working days of the expiration of this agreement...*

61. The contract terms were therefore set out by the parties to it and as herein. Probation was to run for 3 months and ending 31<sup>st</sup> July 2010 with a condition that any extension of the contract or renewal was to be decided upon within 30 working days upon the contract expiring.

62. It was also a condition to the contract that;

*As we have provided training and a type rating on our airaircraft at our expense, you will be expected to commit to work for the company for a period of at least two (2) years.*

63. It was also a term and condition of the contract, that within the 3 months of probation at clause 7.4 it was agreed that;

*In addition to the period of employment as per clause 1 above, either party may terminate this contract of employment by giving the other party notice of its intention to do so in writing.*

*... During the first four (4) weeks of employment as per clause one (1) above [1<sup>st</sup> May 2010 to 31<sup>st</sup> July 2010], the notice period on either side is one (1) weeks' notice and two (2) [weeks] notice thereafter. The notice period will increase to four (4) weeks once you have been employed been employed for a period of three (3) months or more. However the period of notice may be waived subject to mutual agreement of both parties ...*

64. Section 42 of the Employment Act regulate probationary contracts. The last ousts the operation of section 41 of the Employment Act with regard to probation period terms. The rider however is that any extension of a probation contract must be done with the agreement of the employee and that the same may be terminated by either party by giving not less than 7 days' notice of termination or payment by the employer to the employee in lieu of notice. This connotes that only the employer should pay in the event the notice to terminate is arrived at the rationale being the employee is keen to keep the employment and where the employer exercises the decision to terminate, there should be payment to the Claimant in lieu of notice.

65. In **Peris Nyambura Kimani versus Dalbit Group, Petition No.63 of 2014** the court held;

*Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee. [Emphasis added].*

66. The court also held that;

*Section 42 therefore becomes one of the most outstanding provisions of the law and part of the new thinking in employment and labour relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee's employment can be terminated legally*

*within this period without hearing, can be terminated within 7 days or less or be terminated immediately upon payment of 7 days wages. This is exceptional for the law to be couched in this manner.*

67. The essence of section 42 is therefore meant to give either party a fair chance within a set timeline to commence a work relationship and in the event performance, capability or conduct is assessed as wanting, then either party has the early option to opt out. This period also gives an employer the chance to further assess the review the employee based on the job allocated and the competences required while the employee has the chance to fit and ensure they give their best so as to have the position held confirmed but also opt out of the contract if there are insurmountable challenges.

68. In this case, the contract between the parties was specific to the extent that it was to commence and end within 3 months, 1<sup>st</sup> May 2010 to 31<sup>st</sup> July 2010. However, the Claimant did not leave her employment and continued to undertake the same duties and function allocated by the Respondent as done within the lapsed contract. Within this time, the contract though with a stipulation that there was a 30 days period within which the employer/Respondent had to decide whether to retain the Claimant or not, the effect of the term of the contract being fixed, affected this condition. Such condition was taking place outside the contract term whereas the Claimant did not stop work upon the lapse of her contract and the Respondent continued allocating duties.

69. In this regard, the evidence of Mr Mimano for the Respondent was clear that;

*... The last flight that the Claimant took was on 20<sup>th</sup> July 2010. She was grounded from this date. Termination was not immediate as I had not completed my investigations and I needed the aircraft technical logs which were held in Juba at the time. I have to get these logs before making any conclusions. The last contract date was on 31<sup>st</sup> July 2010 and termination was effected on 17<sup>th</sup> August 2010. ... In the contract, there were 30 days for the Respondent to decide whether or not to renew the contract. I was acting within the terms and conditions of the contract agreed upon by the parties.*

70. Noting the above, and the nature of contract between the parties, the legal safeguard the Respondent as the employer had on or before the contract lapse date on 31<sup>st</sup> July 2010 was to terminate the claimant's employment on less notice of 7 days or pay in lieu of such notice. Under section 42 of the Employment Act, termination within probation period does not require assignment of reasons or grounds and the only condition is to give notice or payment in lieu thereof. Such would have left the parties free.

71. However, the contract lapsed and the Claimant remained in the employment of the Respondent and without a contract. The Claimant was in fact in Juba, South Sudan where she continued to render services to the respondent. The Claimant got new and additional roles. In this regard, on 7<sup>th</sup> August 2010, Mr Mimano as chief officer of the Respondent was in a Meeting in Juba with the Claimant and other officers of the Respondent where key and policy decisions were made. From the meeting, the Claimant was assigned various roles including opening a bank account for the Respondent in Juba.

72. Where indeed the Respondent chief officer, Mr Mimano had commenced investigations against the Claimant and had intended to terminate her contract due to misconduct, Mimano's evidence that he grounded the Claimant as of 20<sup>th</sup> July 2010, lacks evidence. In the meeting in Juba on 7<sup>th</sup> August 2010, a time of over two weeks (18 days), such intentions to ground the Claimant do not arise. Therefore the sudden recall of the Claimant back to the office and issuance of the termination letter on 17<sup>th</sup> of August 2010 is not in tandem with the actions of Respondent officers.

73. On this basis, upon the lapse of the contract issued to the Claimant and without written notice to terminate or extend the same, and noting the provisions of section 37 of the Employment Act with regard to casual terms in employment, the Claimant was undertaking continuous duties as under her contract without a break and remained an employee of the respondent. To accept the defence that upon the lapse of probation period the Respondent was under the cover and right to have 30 days to decide on what to do

with the Claimant would be tantamount to giving the Respondent as the employer a blanket cover to operate with impunity and without giving the Claimant notice of such intentions while enjoying the claimant's labours. Such practice is contrary to principles now set out under article 41 of the Constitution that this court must guard against violations or abuse of fair labour practice. Such I find to be an unfair labour practice. I also find the Claimant was an employee of the Respondent at the time of termination with rights protected in law.

74. In **Maria Kagai Ligaga versus Coca Cola and Central Africa Limited, Cause No 511(N) of 2009**, the court held;

*... This concept [probationary contracts] like many concepts in labour law is based on the recognition of the inequality of bargaining power in the employment relationship. If it did not exist, the danger would be that employers would simply force employees to quit, and avoid paying any form of compensation. The onus of proof in this form of employment termination, unlike in other termination, lies with the employee.*

75. The Claimant in submissions has heavily relied on the cases of **Hosea Njeru Kagundu** and **Mercy Njoki Karigithi** in terms of the application of section 41, 43 and 45(3) of the Employment Act. As set out above, the respondent did not notify the Claimant of allegations against her before termination. She was allegedly called to Mr Mimano's office but there is no evidence that there was present an independent employee with the Claimant. However, in terms of the judgement and reasoning of the court in **Mercy Njoki Karingithu case**, the employment was terminated during probation. In this case, the probation period lapsed and the Claimant remained at work for 17 days. There was no written contract for the 17 days though the respondent in defence stated that they were enjoying the 30 days window period under the probation contract that had lapsed. Both cases case thus be distinguished.

76. In this context therefore, the bonding of the Claimant to work for the Respondent for 2 years following the training given by the Respondent also falls outside the contract term. Where the probationary contract lapsed on 31<sup>st</sup> July 2010, and the Claimant was required to remain bound by the training bond for 2 years, such a condition on a contract that lapsed and was not renewed or a new contract issued, to enforce the terms of bond would have no legal basis. Even where this contract with regard to bonding following training was to remain in force, the termination of the employment contract was by the Respondent without notice to the Claimant. Mr Mimano testified that due to the nature of the business, a decision was made to summarily terminate the Claimant to safeguard the work. With the termination therefore, the bond for training went with the employee. Had the Respondent left the Claimant to remain in their employment or given her notice before termination, then a consideration of what the training bond meant would have been allowed. However the Respondent took the option of terminating employment and cannot go back and seek the cover of the bond terms. Such would be to seek at equity without giving the same to the claimant.

77. I find, upon the lapse of the fixed term probationary contract, the Claimant remained an employee of the Respondent for 17 days. Her work roles remained as under her contract. Termination occurred within this short period. The Respondent has conceded that the salaries due for the 17 days is due and owing. Notice pay is therefore due pursuant to the provisions of section 35, 42 and 44 of the Employment Act with regard to giving notice before termination or payment in lieu thereof with regard to unwritten or oral contracts of employment and considering the lapsed term contract and the reasons of gross misconduct assigned for the termination. Notice pay of 7 days I find a sufficient pay in lieu of notice.

78. Noting the termination occurred before the lapse of one (1) month and the salary due is payable, in terms of section 49 of the Employment Act, no compensation shall be awarded.

## **Remedies**

79. In this case, save for the admitted dues owing to the claimant, notice pay of 7 days for probationary contracts is payable. Within the contract, the monthly salary in the contract was \$900 plus a uniform allowance of \$100 all being \$1000. The allowances payable were not part of contract sum and therefore

based on work done. The Respondent gave a conversion rate of United States Dollars (USD) at the time of termination but this payment was not paid to the Claimant. The current going rate shall apply being 99.5 USD to Kenya Shilling (Kshs.) per judgement date. For the 7 days' notice due, the owing amount is kshs.99, 510.00.

80. On the Claim for suffering and mental distress caused by the termination and failure to secure new employment due to the Respondent not issuing a letter of recommendation, the Claimant did not give any evidence of any efforts to secure new employment and could not due to the act of termination by the respondent. The evidence that a letter of recommendation was not issued is contrary to the provisions of section 51 of the Employment Act. The only document that the Respondent should issue to the Claimant upon termination is the Certificate of Service. There is no obligation on the employer to give a letter of recommendation. No damages are payable.

81. The Respondent did not set out how the salaries due to the Claimant were paid. No pay slip were submitted. Costs of the suit awarded to the claimant.

### **Counter-Claim**

82. With regard to the Counter-claim, the evidence that the Claimant was bonded to work for the Respondent for two years following training is set out in the probationary contract. However, where the probationary contract was set out so as to enable the Respondent assess the work of the Claimant so as to renew or confirm her employment, such probationary contract lapsed and was not renewed. The Respondent took the first move and terminated the claimant's employment. in essence the Claimant was not given the chance to serve her 2 years with the Respondent as termination was summary without notice or hearing so as to allow the Claimant defend herself. The Respondent can therefore not benefit from their own injustice as visited upon the Claimant noting the finding that the termination was unfair.

83. On the allegations of gross misconduct set out by the Respondent that allegedly led to the termination of the Claimant and as set out under paragraphs 14 (i) to (viii), save for paragraph what is set out in paragraph 14(ii) and (Viii) on the loss of cash that the Respondent surcharged the Claimant and the technical logs that demonstrate the Claimant entered wrong records,, I find no evidence to support allegations of the Claimant acting contrary to instructions; harassing hotel staff in Juba, use of Respondent vehicle for personal use; and conflict with other employees.

84. Upon the serious allegations made by the Respondent against the claimant, notice of such misconduct should have been issued and a hearing conducted. As held in the case of **Joseph Onyango Asare versus Brookside Dairy Limited, Cause No.1204 of 2014**, the employee must be given a fair chance for hearing at the shop floor even in a case where the evidence is not similar to criminal proceedings thus;

*... Internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably give a hearing to be able to give his defence.*

85. The Respondent evidence was that the Claimant was called in the office on 17<sup>th</sup> august 2010 in the presence of 2 other officers of the Respondent and given the reasons of termination. Such reasons are not set out in the letter of termination and the Claimant disputed to have been given any such reasons while in the office. In any case, in such a hearing, due process dictated that the Claimant be allowed to call another employee of her choice. This was not done and the termination that ensued was procedurally unfair.

86. On this basis, the counter-claim cannot stand. The amounts set out as having been used to rain the Claimant went with the summary dismissal.

**In conclusion, the counter-claim is hereby dismissed. The admitted claims set out under paragraph 49 Above are payable to the Claimant together with 7 days' pay in lieu of notice amounting**

**Kshs.99, 510.30. Costs are also awarded to the Claimant.**

**Orders accordingly.**

**Delivered in open court at Nairobi this 2<sup>nd</sup> day of September 2016.**

**M. MBARU**

**JUDGE**

In the presence of

Court Assistant: Lilian Njenga

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