REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.1519 OF 2014

MAX MASOUD ROSHANKAR ……..…CLAIMANT

VERSUS

SKY AERO LIMITED ……..…….. RESPONDENT

Consolidated with

CAUSE NO. 1518 OF 2014

MARIANA ONICA ……..……..…… CLAIMANT

VERSUS

SKY AERO LIMITED ……..…..RESPONDENT

JUDGEMENT

1. The issue in dispute herein is the unlawful/constructive termination and refusal to pay salary and other dues to the claimants.

2. Both suits [Cause No.1519 and 1518 of 2014] were consolidated on 4th December 2014 for purposes of hearing and disposal pursuant to the provisions of Rule 9 of the Industrial Court Procedure Rules. There are the two claimants suing the same respondent.

3. The claims herein by Max Masoud Roshankar and Mariana Onica were filed on 1st September 2014 together with applications through Notice of Motion under Certificate of Urgency. Both suits were amended and filed on 8th December 2014. The respondent Sky Aero Limited filed a Replying Affidavit to the notice of Motion on 9th September 2014 together with a Notice of Preliminary Objection on the same date. On 16th September the respondent filed their Answer to the Statement of Claim and on 2nd October 2014 the claimants filed Reply to the Answer to the Statement of Claim.

Background

4. The suit herein commenced by the claimants filing applications through Notice of Motion under Certificate of Urgency on 1st September 2014 and seeking for orders that the matter be heard during the Court Vacation on the grounds that both claimants are foreign nationals with no relatives or family in Kenya and the respondent maliciously neglected to pay their salaries and removed them from the rented premises leaving them destitute. Other grounds are that the respondent refused to have the claimants work permits renewed, terminated their contracts of employment without giving notice. The claimants have no

source of income or a place to stay and the respondent refused to pay air tickets to enable the claimants return back to their countries in Sweden and Romania respectively.

5. On 9th September 2014, the matter came for *inter parties* hearing and after hearing both parties the court made the following orders with regard to **MARIANA ONICA**;

> *1) The respondent to pay the undisputed sums owed to the claimant at $23,959 in the following manner;*
>
> > *a) The sum of $13,959 be paid immediately and not later than 12th September 2014;*
> >
> > *b) The balance of $10,000 be paid on or before the 18th September 2014;*
> >
> > *c) The matter be mentioned on 19th September 2014 to confirm compliance.*
>
> *2) The claimant will remain within the Republic of Kenya and the respondent to make a daily provision of Kshs.2, 500.00 to the claimant for the next 15 days in place and instead of the offer for a one-way air ticket which issue will be dealt with on the 19th September 2014.*
>
> *3) The other prayers sought by the claimant will be canvased at a full hearing on a date to be fixed on priority basis*
>
> *4) The respondent has 7 days within which to file their defence*
>
> *5) Upon service the claimant will be at liberty to reply and set down the matter for the main hearing.*

6. With regard to **MAX MASOUD ROSHANKAR**, the court made the following orders;

> *1) On the undisputed amounts of $14,000 admitted by the respondent, the same to be paid immediately and not later than 12th September 2014;*
>
> *2) The court will mention the matter on 16th September to confirm compliance;*
>
> *3) The respondent to file their defence within 7 days;*
>
> *4) Upon service the claimant to reply within 7 days where this is found necessary;*
>
> *5) The parties to take a hearing date on priority basis;*
>
> *6) The respondent will make a daily provision of Kshs.2,500.00 and the court to give further directions on 16th September 2014;*
>
> > *7) The claimant will remain within the Republic of Kenya pending further directions of the court.*

7. On 15th December 2014 both parties were in court for mention of the case and for directions. The Claimant's Advocate noted that hearing date was to be allocated on priority basis as the claimants are foreign nationals and their work permits have long expired. The provisions directed by the court have not been paid and the claimants are now destitute.

8. The respondent's advocate agreed that hearing date was to be allocated on priority basis but the witness for the respondent is in Juba. The claimants have amended their claim and more time is required to reply.

9. Upon hearing both parties, the court gave the following directions;

1) Hearing scheduled for the 19th of December 2014 at Noon;

2) Respondent has until 16th December 2014 to reply to the amended claim; and

3) Interim orders remain in force.

10. On 17th December 2014, the respondent filed their application through Notice of Motion seeking for orders that the orders made on 15th December directing that hearing proceed on 19th December 2014 be reviewed and time extended within which time the respondent is able to reply to the amended statement of claim. The application was on the grounds that the respondent directors were unavailable making it impossible to amend and file a response to the amended claim. The respondent will be condemned unheard and in the interests of justice time be extended and the matter be removed from the hearing list on 19th December 2014. Court directed the respondent to serve the application and appear for hearing on 19th December 2014 when the matter was also scheduled for main hearing. Upon service of this application upon the claimants, a Replying Affidavit was filed immediately on the basis that the scheduled hearing date on 19th December 2014 should not be compromised.

11. On 19th December 2014, upon perusal of the application dated 17th December 2014 as filed by the respondent, court directed parties to proceed for full hearing noting that hearing dates for the 19th December 2014 were given in court by consent of both parties and particularly on a date that was most convenient for the respondent's advocate. Throughout the preliminaries, both parties noted that hearing was to proceed on priority basis as the claimants continued to remain in Kenya without permits other than the court orders.

12. Upon directions that hearing was to proceed, the respondent advocates filed their application seeking to withdraw from acting for the respondent. Such application though filed, it was not served upon the respondents in person as required and thus the advocates on record remain the legal representatives of the respondent until the application as served and heard in the presence of the respondent.

The court thus proceeded to hear the claimants in the absence of the respondent or their advocates.

13. In has been important and crucial for the court to give the above background as this has impact on the overall conduct of the respondent and the hearing of the matter. Where parties take directions such directions are not given in vain and should be adhered to. In the application by the respondent advocate field on 19th December 2014 seeking to withdraw from acting for the respondent at paragraph 4 and 5 Sheilla Sheikh Advocate depones;

4. I consequently called Mr John L Clarke and he confirmed that they had closed down for the festive season until 20th January 2015 and that he was out of the country.

5. that the said Mr. John L Clarke also informed me that his co-director Mr. Shaun Dewey had resigned as the co-director and since he was the one who was dealing with legal issues, it was not possible for him to give instructions within a short notice since he needed more time to acquaint himself with the legal department which was exclusively in the docket of the same Mr. Shaun Dewey.

12. From the above statements made under oath, the respondent advocate had contact with the respondent, was aware that hearing was scheduled for the 19th December 2014 which date was allocated by consent and the events within the respondent notwithstanding; there was a responsibility upon counsel to advice the client accordingly. The fact that the respondent offices were closed for the festive season is no excuse to fail to attend court on a matter given priority noting the claimants are foreign nationals and ought to be back to their countries upon conclusion of their case. The averment that the respondent had

closed office for the festive season makes them available to attend to court as business was not running. To therefore fail to attend court for the hearing of their case, this is contempt, condescension and disregard of due process and without any justification. The court thus heard the claimants in the absence of the respondents and their advocate.

Claimants' case

13. Max Masoud Roshankar was on 1st May 2013 employed by the respondent; a company incorporated in the Isle of Man and with a registered office at Aerospace Consortium Limited at JKIA Nairobi. The claimant's position was that of a Frist Officer. The claimant was issued with a letter of appointment and his terms and conditions of work were that his salary was at $4,500 per month plus an allowance of $25 for each air flight hour he was to perform as well as a per diem of $40 for each day spent away from base. He was also eligible for a mileage allowance of Kshs.32 per mile from home to work and return while on duty. These provisions were outlined under paragraph 8 of the contract of employment and in the emails exchanged between the parties. It was also agreed that the respondent would ensure the claimant got 60 hours of flight every month together with a fixed figure of $1,500 per month to make the salary at $6,000 per month. The provision for 60 hours of air flight would count towards the claimant's competency and renewal of his pilot's licence as required under the relevant regulations and statute.

14. On 10th June 2014 the claimant gave his three (3) months resignation notice to the respondent which was precipitated by the respondent's actions in that; the respondent deliberately failed to secure the claimant a work permit as had been agreed in their negotiations; failure to secure the claimant a work permit meant that he would not be in a position to fly and thus accumulate the requisite hours to enable him pass the competency tests and renew his licence every 6 months; failure to secure the work permit also meant that the claimant could not fly the agreed 60 hours per month and thus would not be in a position to earn the agreed $25 for every flight hour recorded; the claimant had on 7th June 2014 written to the chairman of the respondent raising his fundamental concerns on safety of the aircraft and performance as well as training of some Captains in the team who were superior to him as a First Officer yet the DFO had specifically asked him to keep an eye on them during flight and he noted that the training the captains were receiving was not in accordance with the regulations by the Kenya Civil Aviation Authority.

15. The claimant also stated that he faced other challenges that frustrated his contract of service. there were other 4 pilots, 3 Kenyans and a Ugandan who were able to fly and clock the requisite hours and qualified for renewal of their licences and earned their allowances. He could not fly or clock the set hours and get the agreed allowances as he had no work permit. His situation was further exacerbated by the fact that a workmate Mariana Onica was detained at the airport for not having a work permit and the respondent promised to regularise this together with the claimant's work permit but this was not done. He was not accorded similar treatment and good work environment like other pilots which was discrimination against him.

16. The claimant also stated that the respondent had a policy allowing pilots to freelance so as to earn an income or accumulate flight hours and the respondent would deduct from his salary monies earned from freelancing while other pilots did not get the deductions which was discriminatory.

17. Under the above circumstances where the claimant was unable to accumulate the requisite air flight hours, the discrimination against him and the unfair deductions and the failure by the respondent to get a work permit for him he was led to resign from his position with the respondent by giving 3 months' notice as his contract entailed. In response to the resignation the respondent immediately terminated the claimant's employment for the reasons that the claimant had removed himself from the duty roster and put a condition that his salary would only be paid once he returned respondent's property. The respondent thus ignored the resignation and instead terminated the claimant which was illegal and unlawful as he was not subjected to any disciplinary process. the respondent gave the reason for termination as that the claimant had removed himself from the duty roster; which the claimant did necessitated by the fact that he had no work permit and the respondent had failed and or refused to obtain one for him hence the claimant

was constructively and unfairly terminated by the respondent.

18. Following the termination, the claimant demanded for his salary that had been delayed since April 2014 and on 24th June 2014 the parties met and agreed on how salary arrears were to be paid as well as the 3 rebate tickets for the claimant as under his contract. The respondent was also to pay $5,500 deducted when he was freelancing, the owed mileage allowances noting that from February 2013 he was forced to use his own means of transport covering 20 kilometres all amounting to kshs.61,440.00. Respondent failed to pay NSSF dues and thus service pay of $3000 should be paid. His per diem was miscalculated at $1,200 instead of $3,200 and demand this amount. From June 2014 the claimant was left without accommodation and demand Kshs.80, 000.00 per month as the rented lease the claimant had was terminated and no alternative accommodation was provided.

19. On 9th September 2014 the court ordered the respondent to pay admitted amounts of $14,000 which was paid and daily allowance of Kshs.2, 500.00 which he was paid for 8 days and stopped and the claimant is seeking subsequent payments. The claimant is also owed gratuity at 5% of the gross pay which he claims as due following his termination.

20. The claim is therefore based on the grounds that the respondent deliberately discriminated against the claimant by subjecting him to unequal treatment and opportunities with his fellow pilots with regard to failure to allocate him flying hours; breach of contract by failing to secure a work permit so as to clock 60 hours flying time; breach of contract when the respondent terminated the claimant upon his resignation; putting his career at stake by failing to provide the claimant with a work environment for a pilot in terms of competency tests thus jeopardising his chances of getting a new job; frustrating action by falling to address safety concerns and gravely jeopardising lives leading to a resignation that amounted to constructive termination; and by the respondent subjecting the claimant to emotional and mental torture when they failed to pay dues owing known that he was a foreigner in Kenya and had no other source of income; the claimant is therefore seeking;

a) A declaration that the actions of the respondent amounted to constructive termination

b) A declaration that the claimant's alleged termination after resignation was unlawful and unfair;

c) Payment of $66,450 and Kshs.546,000.00 as owing dues;

d) General exemplary damages for cruel and inhuman treatment and suffering unfair and unlawful dismissal;

e) Payment of $133,500 and Kshs.863,440 for;

i) 12 months compensation for unfair termination at $72,000

ii) Leave for one month at $6,000

iii) 3 months' notice pay at $18,000

iv) Salary for April to June 2014 at $18,000

v) Gratuity at 5% gross pay for May 2013 to June 2014 at $3,200

vi) Money illegally deducted for freelancing at $5,500

vii) Accrued per diem at $3,200

viii) Service pay for one year at $ 3,000

ix) 3 rebated tickets at $1,500 at $4,500

Total being $133,500

x) Mileage allowance for February to June 2014 at Kshs.61,440.00

xi) Accommodation/house allowance for June to December 2014 at Kshs.560,000.00

xii) Daily allowance ordered by the court on 9/9/14 at Kshs.242,000.00

Total due at Kshs.863, 440.00

f) Costs of the suit and interest

g) Any other relief as the court may deem just and fit.

21. In evidence to support his case, **Max Masoud Roshankar** testified that he is a Swedish national and came to Kenya on a work permit to work for the respondent as a Pilot. Terms and conditions of work were negotiated through exchange of emails and the same put in the contract of employment. salaries for pilots is $5,000 but the respondent offered $4000, 60 hours of flying time where the claimant would earn $5,500 making his salary $6,100. Other benefits agreed included accommodation at Kshs.80, 000.00 per month, work permit obtained by the respondent, mileage allowances, air ticket home, allowances of $40 per flight, per diem when out of station at $40 per night.

22. The claimant served diligently and went ahead to do extra duties for the benefit of the respondent. he was however forced to resign for various reasons being, the failure by the respondent to get him a work permit and he feared staying in Kenya illegally; salary was not paid the last pay being in March 2014, per diems were not paid; his last flight had safety challenges and as a responsible pilot he did a safety report. In one such instance, he was in a flight to Kisumu on 7th June 2014 and before landing the air traffic controller directed him and the co-pilot to taxi and enters the runway 24 and back but the command pilot decided to enter the runway in the opposite direction. This is dangerous as one has to obey the air controller to avoid accident. The claimant informed his co-pilot that the procedure he took was wrong, he also talked to the air controller to allow them to use the opposite direction and by luck the air traffic in Kisumu was not busy as otherwise they could have had an accident.

23. The climate also gave evidence that he resigned from his position by giving 3 months' notice noting that for him to be able to work for the respondent, he required a work permit. The respondent instead terminated the claimant on the spot stating that he had removed himself from the flying roster but failed to address the issue of safety and the fact that the claimant did not have a work permit.

24. Both parties had a meeting and agreed on how the claimant was to be paid his terminal dues. In March 2014 the claimant was removed from his apartment rented by the respondent and a new employee was given the same but no allowance was given to enable the claimant seek alternative accommodation. He has since been accommodated by different friends as his March to June salary was never paid and the due allowances. The claimant filed this matter under certificate of urgency and the court directed the respondent to pay a daily allowance that the respondent paid partly and then stopped.

25. The claimant also gave evidence that as a pilot his claim is not just about his terminal dues but concerns his career. He was supposed to fly 60 hours a month which was not the case and this has impact on renewal of his licence as a pilot. He cannot get a job with his current record as he has not been flying for over a year. Under Kenyan law he should fly for 105 hours per month. No employer will take him as his record of flying will show he has not met the threshold. The respondent had other 4 pilots similar to the claimant who received preferential treatment. His career is dented and it will be near impossible to get a new job thus seek compensation for unfair termination.

26. The claimant never took leave and is seeking $6000. Notice before termination was due amounting to $18,000. Salary arrears from March to June is due and owing and demand the same. The contract he had was for 5 years but the respondent breached it.

27. The claimant also testified that when he took up employment with the respondent he had planned to stay in Kenya and bring his parents here and is now in a mess as he has to start life all over against. His contract had a gratuity clause for 5% and demand the same. All pilots were allowed to freelance so as to generate income for the respondent and the claimant was entitled to $25 per hour when freelancing. When other pilots were freelancing they did not have any deductions and thus he is claiming for the sums deducted which was an act of discrimination against him. Per diems were due when the claimant was out of station amounting to $3,200. He was not registered with NSSF and thus seeks service pay. He was to get 3 tickets per year to travel home to Sweden and back but the respondent did not issue and seek their value. When the claimant joined the respondent he used their car that would pick him from his house but the schedules were not conducive as this would come too early or leave the office very late. When he did not have to go to the office early there would be no transport provisions and was forced to hire his own transport. He was entitled to accommodation or allowance but the respondent sent somebody else, a lady to stay in his house forcing the claimant to leave. Part of the agreed terms were that the claimant would get an allowance for housing and demand the same.

28. The claimant also testified that the general damage to him is severe as being a pilot who has not flown for a year he is considered not capable of flying. Seek the court to consider the damage to his career as he has had a good record having served in Tanzania for 4 years and in Togo but since joining the respondent, he has not been able to clock the required flying hours so as to renew his pilot licence.

29. In the case of **Mariana Onica**, she stated that she was employed on 19th April 2013 as a consultant with provisions that she would get a salary of $3,000 per month when working at the Nairobi office; a charge for services rendered by the claimant outside Kenya at a monthly fee of $3,000 prorated for the part of the month served; was entitled to holidays with return economy class air ticket to Bucharest every 6 months for holidays exceeding not more than one calendar month; and a per diem of $40 for every night stay as well as a refund for all other reasonable expenses incurred for the purpose of enabling the claimant to carry out her duties. The contract of employment was reviewed on 19th April to reduce the termination notice period from two months to one month.

30. The claimant was to provide the respondent with aircraft engineering and maintenance, planning and technical record services. The claimant worked diligently until May 2014 when the respondent failed to pay her monthly salary as agreed. The claimant had a meeting with the respondent and it was agreed that due to her hard work her salary would be increased by $1000 and backdated to November 2013 which increments were to be paid with the June salary. In June the claimant applied to go on annual leave and also utilise her 3 tickets as per her contract as she had not taken leave since employment. She indicated her itinerary from Nairobi, Gothenburg and Bucharest and back to facilitate reservations.

31. On 27th June 2014 the claimant wrote to the respondent John Clarke with regard to her annual leave and noted that she was facing very difficult times financially as she had not been paid. The respondent replied and indicated to the claimant that she could go for a 6 weeks leave instead of one month and asked for her date of travel. It was also suggested that her contract should be reviewed and that the respondent would not be able to pay the backdated arrears once but would pay as much as possible. The claimant was not able to go on leave as she was the only maintenance engineer for the respondent.

32. In July 2014 the respondent indicated that it was considering hiring another maintenance engineer who apparently was more qualified and experienced than the claimant which the claimant agreed to but demanded that her arrears be paid. On 15th August 2014 the claimant together with the respondent calculated her unpaid salaries and other dues in anticipation of the new replacement for her job. The claimant indicated that she would not leave the country without payment of her dues in full and only then would she complete her travel plans and vacate the respondent rented premises. The respondent coerced the claimant to sign a resignation letter as a cover up in the irregular recruitment of another engineer but the claimant indicated that she would only do so once her dues were paid in full as she was a foreigner and had no place of abode and was without a work permit which the respondent was supposed to procure to enable her continue serving in Kenya.

33. On 23rd August 2014 the claimant wrote to the respondent and noted that the respondent had failed to respondent to her concerns; she would remain at her rented premises until her dues were paid as she had nowhere else to stay in Kenya; her payments was to be finalised by 15th August; and she had not resigned from her employment. on the same date the respondent officer Shaun Dewey replied indicating that all communications with the respondent should be directed to John Clarke who was based at the Isle of Man and that the lease for the rented apartment where the claimant was resident would be terminated on 24th August 2014 and that she should look for alternative accommodation. This move was meant to cause the claimant mental torture as she had not been paid her salary since May 2014 and could not afford to rent new premises or buy a ticket back home to Romania and was thus reduced to a destitute which was cruel and inhuman and should be paid damages.

34. On 25th August 2014 the respondent terminated the claimant sighting that the claimant had resigned on 15th August 2014 which was not the case. The respondent offered to pay part of her dues by 1st September 2014 which was only paid after the claimant filed her suit in court. The hiring of a new engineer to take over the duties of the claimant was meant to force the claimant to resign and to force her out of employment which effectively was constructive dismissal. The claimant was aware that the person hired to replace her was paid 3 months in advance and had a higher salary than hers which amounted to discrimination against her and an unfair labour practice. The respondent failed to procure a work permit for the claimant which led to her being detained by the Director of Immigration for being in Kenya and working without a work permit despite filing her forms and handing them over to the respondent to process the work permit which the respondent failed to follow up.

35. The claimant has no fixed place of abode, has no money to rent accommodation due to the negligence of the respondent that was also malicious. The respondent has failed to pay terminal dues as under her contract of employment.

36. The claim herein is thus is on the grounds that the respondent acted in a manner consistent with constructive termination when they failed to procure a work permit for the claimant and withholding her salaries; by recruiting another person to replace the claimant while she was still their employee and paying him more than what the claimant earned; coercing the claimant to write a resignation letter before her dues would be paid; and the respondent subjected the claimant to extreme mental and emotional torture by refusing to procure a work permit, terminating her accommodation, failure to buy an air ticket for return home to Bucharest and terminating her without notice. The respondent also breached the contract of employment and the thus claim damages.

37. The claimant is therefore seeking the following;

a) A declaration that the claimant's actions amount to constructive termination

b) A declaration that the claimant's termination was unlawful, illegal and unfair;

c) Payment of $71,350 and Kshs.740,000.00 made up as follows;

i) 12 months compensation for unfair termination at $48,000

ii) One months' notice at $4,000

iii) Salary increment arrears for 10 months at $10,000

iv) Service pay for 1 year and 6 months at $3,000

v) Accrued leave for 1 year and 6 months at $6,000

vi) Visa and dinner at $350

Total $71,350

vii) Accommodation for September to December 2014 at Kshs.520,000.00

viii) Daily allowances ordered by the court on 9/9/14 at Kshs.220,000.00

Total Kshs.740, 000.00

d) Costs of the suit and interest

e) Any other relief as the court may deem just and fit.

38. In evidence, the claimant testified that she is a national of Romania and was employed by the respondent to work in Nairobi and based at JKIA where the respondent had an office as the Aircraft Maintenance Planning Engineer. She signed her contract on 19th April 2014. The job had two components ordinarily to be done by two people but she did the job alone. Her duties were to purchase spares and technical reports in South Africa and worked with vendors and manufacturers around the world.

40. While at work, the respondent failed to get for her a work permit. Upon inspection by immigration she was detained for a day as she was in Kenya illegally and then the respondent stopped payment of her salary. In March 2014 her salary was delayed which was not paid until up to the time of termination. In November 2013 after completing probation the claimant got a salary increment noting the double duties she performed and an increase of $1000 was added making her salary $4000 from November 2013.

41. The claimant demanded payment of her dues and the arrears but instead the respondent hired a new engineer Serge Leroy who took over her duties and while the claimant was still performing her duties and was paid more than she was earning. The claimant confirmed this from the new employee who also noted that he had been paid for 3 months in advance. He commenced work on 1st August 2014 and by then the claimant had not been paid her salary arrears.

42. The respondent coerced the claimant to resign but she refused to do so until her dues were paid in full. She did not resign. On 25th August 2014 the respondent wrote to the claimant noting that this was the termination of her employment upon her resignation, but the claimant had not resigned her position as her contention was that she did not have a work permit and her accommodation had been terminated on 24th August 2014. She was forced to move in with a friend on shared rent but has not money to pay for it.

43. The claimant is thus seeking compensation for unfair termination and damages for breach of contract. She is seeking $71,350 and Kshs.740, 000 as outlined in her claim. The claim for visa and dinner is on the grounds that the claimant travelled to South Africa on respondent business and had to seek extension of her visa and had dinner with guest while on respondent business. Provision for accommodation was at kshs.130, 000.00 per month and is due from August 2014. She was entitled to tickets to Bucharest after 6 months and a per diem of $40 while out of Nairobi and all cash spent while on respondent business which the respondent has not paid. Costs should be paid by the respondent together with interest.

Respondent's case

44. In defence, the respondent admitted that with regard to Max Masoud Roshankar he was employed on 1st May 2013 at a salary of $4,500 but he was not a responsible employee as he was errant, hostile and volatile temperament making it extremely difficult for the employer to carry on business. He was to fly on 7th May 2014 as per duty roster but he absconded from duty, was unreachable despite several calls and emails without notice to the respondent and was later found detained in Nigeria while flying for another company, an Astral Ltd. Despite these gross breaches, on 5th June 2013 the respondent issued him with a warning letter as he failed to communicate with any employee while on standby. The claimant was negligent and in breach of his contract on the grounds that;

a) he made unauthorised freelance in Nigeria causing 3 weeks delay in ferry of C5-LIM during the months of April-May 2014;

b) unauthorised freelance after return from Libya during May 2014;

c) unsatisfactory performance on flight C5-LIM HESH/HDAM/HKJK and failed simulation test which is a perquisite for holding a pilot's licence;

d) unsatisfactory performance C5-AEB HLLt/FTTJ/FNLU/FAOR/CRM/instrument flying;

e) inability to comply with agreed freelance protocols;

f) missed classes because of unapproved personal time in RSA during the Christmas period;

g) leaving in the middle of class without valid explanation and did no effort to catch up what was missed;

h) unsatisfactory performances 5Y-CDPHKJK/HTDA/FAOR/HTDA/HKJK (situational awareness/instrument flying);

i) refusal to accept responsibility;

j) inability to manage emotional/erratic emotions;

k) Failure to complete requested tasks;

l) Lack of communication skills, blatant rudeness and throws tantrums;

m) insubordination and punctuality issues;

n) travelling with an expired visa and attempting to use the USA visa when he knew or ought to have known the same was not valid;

o) assessed by Pan Am Academy simulator in USA as giving an unsatisfactory performance in regard to situational awareness;

p) unauthorised and undocumented freelance flying;

q) the claimant requested for a variation of his terms of employment to be titled a pilot, however according to the Aviation Rules, the claimant was not only fit to be a First Officer; a positon which he was already struggling to cope with and striving to reach a suitable standard of docket performance;

r) the claimant was moonlighting for another company, one Astral Ltd without any notice or authorisation from the respondent company;

s) the claimant was on the duty roster of the respondent company yet he failed to attend or communicate with the respondent;

t) the respondent c=became aware that the claimant was moonlighting when on 7th May 2014, the flight operations director arrived at Kenya Civil Aviation Authority to pay for the claimant's instrument rating. On the said date, the Operations Director surprisingly became aware of the fact that the claimant had already paid for his instrument of rating and was registered as an employee of Astral Ltd;

u) this breach was committed during the claimant's tenure with the respondent;

v) after the respondent became aware of the breaches committed by the claimant, in their good will and good faith, it was decided to issue him with a warning letter to allow the claimant to rectify the situation;

w) in response the claimant removed himself unilaterally from the duty roster before tending his resignation with the respondent;

45. The respondent also stated that the claimant resigned from his employment and was never terminated. The respondent provided accommodation to the claimant and had a valid work permit. He refused to furnish the respondent with any alternative accommodation details and while moonlighting for another company the issue of work permit was not an issue and he was thus in breach of his contract. Despite the moonlighting, the claimant was paid half salary for April 2014 as $2,250, April at $4,500 and $1,300 until June 2014. The respondent was undergoing hash economic difficulties and thus offered to pay in instalments.

46. The claimant was supposed to give termination notice of 3 months but he removed himself from the duty roster before his resignation. The claimant was only entitled to 3 months' pay in notice which the respondent was willing to pay. The respondent only owed $14,000 by virtue of good faith and the respondent indulged the claimant by holding multiple meetings to facilitate an amicable solution despite breaches of contract and it was agreed that the only dues owing are $28,034 and the respondent requested for time to be able to pay. The respondent therefore states the only dues the claimant has is the payment of $14,000, the rest of the suit be dismissed and costs be paid as the court may deem fit.

47. With regard to **Mariana Onica**, the respondent did not file any statement of defence. There is a memorandum of appearance and appointment of advocate, a reply to the Notice of Motion, but no defence on record. Cause No. 1815 of 2014 and Cause No.1819 of 2014 were consolidated on 4th December 2014 way after pleadings had closed. The consolidation was for purposes of hearing and determination. I take it then the claim by Mariana Onica is undefended.

48. Before discussing the identified issues, it is material for the court to reiterate once again that it is not the practice and procedure in the industrial Court to file a Memorandum of Appearance once a party has been served with Notice of Summons and Statement of Claim. A respondent is required to file a Response. This practice is based on the Industrial Court (Procedure) Rules and on the objective of facilitating the just, expeditious and proportionate resolution of employment disputes within the shortest time possible. Employment enables a person to earn a living and live decently and in dignity. These provisions are also to be found under section 3 of the Industrial Court Act, Articles 28 and 10(1) (b) of the Constitution of Kenya. In this regard, by requiring a respondent to file response, two weeks are saved unlike the situation obtaining under the Civil Procedure Rules where an appearance is entered and then a further two weeks is allowed to file a defence. This then creates room for labour disputes to be adjudicated expeditiously and with minimal costs and in the shortest time possible.

The issues arising for determination are;

Whether there was termination, resignation or constructive dismissal;

Whether there was discrimination against the claimants; and

Whether there are any remedies.

49. Termination and resignation are matters of law or can be agreed upon by mutual consent of the contracting parties. An employee is allowed to resign and or terminate the contract of service upon giving notice or making payment in lieu of the agreed notice period. Equally and employer can exercise similar right of terminating an employee with notice or make a payment in lieu of such notice. However, where an employer does terminate employee sections 43 and 46 of the Employment Act applies. In this case section 43 is clear that;

43. *(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

50. section 46 particularly for this case at paragraph (h) provides;

46. *The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—*

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;

51. For an employer to terminate an employee there must be a reason or reasons for the termination and where there are no such reason or reasons this amounts to unfair termination. Such reasons that necessitate a termination must be matters that an employer genuinely believes to exist hence the termination. Therefore without such ingredients as valid and genuine reasons a termination becomes unfair. Also where an employee who feels aggrieved by the decision of the employer and wishes to initiate a suit and does initiate such a suit against the employer and the employer as a result does terminate the employee, such termination is in law unfair. This is unfair on a simple logic that in labour relations, disputes may arise which disputes do not as of necessity lead to a termination. There can be a sanction such as a warning or verbal reprimand commensurate with the act complained about. For an employee to thus initiate a suit or propose to initiate a suit, there must be a valid claim that is responsible and with foundation. Such are matters that the court can arbitrate upon and make a finding. Therefore the circumstances within which a termination or resignation may occur are by law regulated. Parties can agree on the terms and conditions for the termination but cannot go below the legal minimum conditions set out under any law particularly the Employment Act.

52. Both claimants upon employment by the respondent were issued with letters of appointment. Max Masoud Roshankar received his letter of appointment on 1st May 2013 which was for a fixed term of five (5) years. The appointment letter also spelt out various terms and conditions of service and at clause 20 made provisions for termination of employment thus;

(a) *notwithstanding any other provision hereof, your employment post the probationary period may be terminated by either party giving to the other three (3) months' notice or by the payment of three (3) month's salary in lieu of such notice. The company need to give no reason for terminating your employment by notice or by payment in lieu of notice.*

(b) *This contract may also be summarily terminated for misconduct or breach thereof. Any other matters hereinafter mentioned amount to misconduct justifying the termination by the company or your appointment and your summary dismissal without notice*

(i) Any of the matters specified in the Employment Act of 2007 as amended from time to time; or

(ii) Any serious breach of any breach continued after due warning from the company of your obligations; or

(iii) Any conduct by you tending to bring you, your position with the company, or the company into disrepute; or

(iv) …

53. Such provisions were available to both parties. However with regard to the clause above cited, the employer must give reasons for termination as by law regulated. Even in the case of summary dismissal, written notice is required. Such notice is important as upon receipt of such written notification an employee has the right under section 47 of the Employment Act to challenge the validity and fairness of such reasons. Beyond the normal and or ordinary termination, an employer can also summarily dismiss an employee for gross misconduct as set under section 44 of the employment Act. I note the contract issued to the claimant had such provisions. The respondent terminated Max Masoud Roshankar without the application of their own policy or the applicable law. This is an unfair labour practice.

Mariana Onica was appointed on 19th April 2013 and her agreement of service made various terms and conditions of her service as a consultant. Clause 9 related to termination by notice and provided that;

> *Either party may terminate this agreement by giving the other two months' notice in writing. However, should the consultant terminate this agreement prior to the expiry of thirty-six months of continuous service then the consultant agrees to forgo any issue of share options provided for by Sky.*

54. The contracts of employment for both claimants [letter of appointment and consultant agreement respectively] spelt out the conditions pertaining to termination. This was given consent by either party signing to the contract.

55. Apart from termination, constructive termination is a concept now appreciated and applied by the Industrial Court as it occurs within employment and labour relations. Constructive dismissal, also called Constructive discharge, occurs when employees resign because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge. In the case of **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011** the court held that the basics are that constructive dismissal may be defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.

56. In the South African case of ***Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721 (LAC)***, the Labour Appeals Court has stated that the first test in a case for constructive dismissal was whether, when resigning, there was no other motive for the resignation in other words, the employee would have continued the employment relationship indefinitely had it not been for the employer's unacceptable conduct. It went further to state that when any employee resigns and claims constructive dismissal, he is in fact stating that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employer's behaviour amounts to a repudiation of the employment contract. So in view of the employer's repudiation, the employee terminates the contract.

57. the Court further held that in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that indeed there were intolerable conditions, frustrations, breaches that trust and confidence supposed to be enjoyed in a conducive workplace environment dissipated and thus repudiation of the contract.

58. The above position is also buttressed in the case of **Maria Kagai Ligaga versus Coca Cola East and Central Africa Limited, Cause No. 611 (N) of 2009** and further quoted with authority in the case of

Marete versus Attorney General [1987] KLR 690 where the court held;

> *… While under section 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are: that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.*

59. In the Australian case of ***Mohazbad versus Dick Smith Electronics [1995] IRCA 272***, the Industrial Relations Court of Australia stated that an important feature is that the act of the employer results directly or consequentially in the termination of employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.

60. Therefore constructive termination can be summarised as that In the absence of any justifiable reasons for dismissal, the employer proceeds to "construct" circumstances that will bring about a dismissal. the employer, without reasonable and proper cause, conducts itself in a manner calculated or likely to destroy it, or seriously damage the relationship of confidence and trust between employer and employee.

61. Having outlined the law regarding constructive dismissal the question the Court requires considering at this point is whether the circumstances that led to the claimant to resign from his employment could reasonably be construed as meeting the threshold of constructive dismissal outlined above.

62. In this case, the respondent in defence outlined various allegations said to have arisen with regard to Max Masoud Roshankar employment and outlined under paragraph 4 of the response noting that he was negligent and in breach of his contract. A warning letter was issued and dated 5th June 2014. However the outlined allegations are in their nature matters grave as they to touch on performance, absconding duty, insubordination, unauthorised travel and freelancing and moonlighting and bringing the respondent into disrepute. Under the contract of employment these allegations where committed warranted summary dismissal. But the respondent did not use that provision. In evidence, the claimant outlined matters that led to his resignation particularly the issue of not having a work permit to work in Kenya as the base for respondent's operations and non-payment of his salaries and other dues. His accommodation as rented by the respondent was also terminated. He had security and safety concerns with regard to the respondents air crafts which matters he had written to the respondents about but were never addressed. Such serious were his concerns over security and safety that he did not feel confident in taking such flights as a responsible pilot as this would endanger innocent passengers, fellow co-workers and himself. However, despite raising these concerns and writing to the respondent, nothing was done to address the same. he remained without a work permit, his salaries were not paid, he had no house or accommodation and the security and safety of the air crafts remained unattended to. Therefore on 10th June 2014 the claimant tendered his resignation notice giving of three (3) months as under his contract but also noting that he had raised safety concerns with the respondent which concerns were not addressed. On 20th June 2014, the respondent acknowledged receipt of the letter of resignation and noted;

> *In accordance with your contract of employment you have given three months' notice, but you have unilaterally removed yourself from the flying roster and therefore are not available for any flying duties then the termination date shall be the date of your resignation letter.*

63. In essence, an employer allocates an employee work to be done and not vice versa. Where the claimant failed to undertake work allocated to him by the employer due process required that such action be dealt with as provided for under the letter of appointment. To wait for an employee to resign then accept the resignation conditionally is not a practice acceptable under any labour practice or procedure. The claimant as a First Officer had duties under his employment and was supposed to undertake those

duties and where there were justifiable concerns with regard to safety, security or other factors, the respondent as the employer should have addressed these issues accordingly. As held in **Mohazbad versus Dick Smith Electronics** cited above had the employer addressed the concerns raised by the employee, such an employee would have remained on the job. By accepting the resignation of the claimant, the respondent was in essence avoiding due process where disciplinary action should have been taken against the claimant where the alleged removal from the duty roster meant the claimant could not undertake any of his allocated duties.

64. .The respondent in accepting the resignation of the claimant failed to address the issue of the work permit that was a tool necessary and vital for continued work by the claimant within the Republic of Kenya and other countries as a pilot whose nature of work required him to take flights from one county to the other. This was an issue the claimant severally addressed with the respondent and also reiterated in his letter emailed to the respondent and dated 4th July 2014. a situation in the workplace therefore arose, which was created by the employer, and which rendered the continuation of the employment relationship for the claimant unbearable to such an extent that the employee had no other option available but to resign. This effectively became a case for constructive dismissal. This is an unfair labour practice under article 41 of the Constitution and unfair under the provisions of section 45 of the Employment Act.

65. With regard to Mariana Onica, though no defence was filed to controvert her claims she gave evidence that she was coerced to resign by the respondent which she refused to do as she demanded for the payment of her owing dues settled first. I particularly take note of the email dated 21st August 2014 by the claimant to Shaun Dewey and John Clarke;

> *I am ready to sign my resignation letter as soon as I see the money are transferred to my account, referred to your agreement from beginning of August that my payments was going to be transferred no later than 15th of August.*
>
> *According to my contract I'm still employed by Sky aero and I can resume my office duty only when I have a work permit.*
>
> *If you want to discuss you can email me. I expect Sky Aero to respect the terms and conditions which are mention[ed] in the contracts.*

66. The claimant thus raises the issue of her outstanding payments and work permit. But while this was ongoing, the claimant gave evidence that she was replaced at her work place by Serge Leroy and her lease was terminated with effect from 24th August 2014. The letter of termination was issued on 25th August 2014 noting;

> *For the avoidance of doubt your contract was terminated by your voluntary resignation effective 15th August 2014, which regretfully the company has accepted. At that time the contrast for your accommodation was also terminated effective 24 August 2014, of which you have previously been informed.*
>
> *The company has on at least three occasions offered you a one way air ticket to Bucharest, however you have declined to state a day of travel or indeed to execute the termination letter, and however you have now agreed the termination summary. …*

67. I have perused the entire record and do not find a letter of resignation by the claimant. a resignation is not a matter verbal. It more serious and has to be done in writing. The respondent to rely on such a letter so as to declare the claimant summarily dismissed ought to have attached such a resignation letter. In the absence of such an important and crucial record, the law is clear. The respondent terminated the claimant without notice and without due process under the mistaken belief that she had resigned. Where such resignation was discussed as evidenced by the various emails exchange, there were set conditions that the respondent as the employer was to meet. There is no indication that before the claimant came to court her terminal dues had been settled despite the termination letter by the respondent dated 25th August.

68. In any event before the termination of the claimant, she had been replaced at her workplace, her accommodation terminated and her dues and arrears not paid. This left the claimant desperate as she had no work permit to permit her to work in Kenya, had no money for sustenance and for taking new accommodation and thus destitute. This is unfair labour practice and cannot be sanctioned or justified under any legal regime. Where the respondent felt aggrieved by any actions of the claimant with regard to her work, performance or conduct, the respondent had the agreement with the claimant and where this was not adequate this Court was available to file such claims. I therefore find the claimant was unfairly terminated.

70. On the question as to whether there was discr5imiantion against the claimants, this court in the case of **Collins Osoro Lukhele versus AAA Growers Limited, Cause No. 100 of 2012** held;

… where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.

71. This decision was further reaffirmed in the case of **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No. 60 of 2013.**When there is a claim that a claimant has been discriminated against**,** effort must be put in giving evidence in this regard. So serious is such an allegation that where cited, the court must look at the intricacies at the work place to ensure that such an unconstitutional practice is not taking place within the private and public spheres of life and where this relates to a work environment section 5 of the Employment Act apply. At section 5(1) and (2) provides;

> ***5.*** *(1) It shall be the duty of the Minister, labour officers and the Industrial Court—*
>
> *(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and*
>
> *(b) to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.*
>
> *(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.*

72. Therefore a party who claims that they have been discriminated against must outline the circumstances for such a claim and clearly make a distinction as to how those circumstances as contradistinguished create a scenario for discrimination. both claimants had their contracts of employment with terms and conditions outlined. Max Mansoud Roshankar gave evidence that he worked with 4 other pilots who were allowed to work for more hours and earn more allowances than him, that the respondents allowed the pilots to freelance but when he did freelance he was deducted monies that other pilots were not subjected to. Though the claimant has claimed for such deductions, he failed to outline as to how he arrived at these computations, the hours flown and the type and number of freelancing as against the other pilots wh did similar work but were retreated favourably. Even where there was indirect discrimination, the circumstances must be clear and unambiguous to enable the court arrive at a concise and precise decision.

73. Equally for Mariana Onica, the fact that another engineer was hired to replace her and paid higher than she was does not in itself amount to discrimination against her. Parties to a contract are allowed to negotiate their terms and where there is no particular schedule, class or indication that a particular position is to be paid a set amount, then the negotiation skills are at play for each employee to bargain

their terms favourably.

74. I find no good grounds to infer discrimination against the Claimants in the cited circumstances. However, where such a practice exists within the respondent company, even with lack of evidence in this particular case, such a negative practice must be addressed as a matter of priority, and with finality.

75. During the pendency of this case it has emerged that the respondent is hell-bent on frustrating the claimants. These are two foreign national one from Sweden and the other from Romania. Both were unfairly terminated and have not been able to secure new employment due to the fact that as they were serving the respondent, their work permits were not procured. They remained in Kenya upon appointment by the respondent ion the basis that they will procure their work permits. These work permits were never procured causing the claimants distress, anguish and unable to earn a living so as to support themselves and live in dignity. The termination of their rented premises occurred before termination putting the claimants in a most precarious position the respondent being well aware that they are foreign nationals and have no family or relatives to take them in and were at the mercy of friends and well-wishers. An employee can only be pushed this far before breaking down and in this case, the respondent must have pushed the claimant to this extent so as to abandon their claims or return back to their countries without access to justice. This in itself is illegal and the respondent cannot enjoy labour from the claimants and then discard them to the wind and wish them away. It is imperative that the claimants came to Kenya to serve their contracts of employment with the respondent and should have been facilitated to return home upon termination as soon as practically possible but upon payment of their terminal dues and salary arrears. These dues had to be paid through court directions. The court also had to direct the respondent to pay subsistence allowances for the claimants who remained without accommodation after termination by the respondent. This is tantamount to subjecting the claimant to a life of desperation, render then destitute, which is inhuman, degrading, unjustified punishment which amounts to torture. This is a court of equity and justice where noting the circumstances of the claimants, the respondent should have acted expeditiously with regard to payment of their dues. The claimant ought to have been back in their countries on new employment as Employment enables a person to earn a living and live decently and in dignity as noted above. Apart from unfairly terminating the claimants, the respondent has reduced the claimants into destitute in a foreign country. This is uncalled for and unreasonable and noting the circumstances of this case especially for Max Mansoud Roshankar who gave evidence that as a pilot, having not been able to fly the required hours so as to be able to renew his licence, it is apparent he will take time to adjust back to his career and be able to secure new employment. for Mariana Onica, her situation was even direr where she had to be arrested and detained for a day by immigration officials for being in the country without a work permit. Damages are therefore payable to both claimants.

Remedies

76. With regard to Upon the finding that the claimants were constructively terminated and that the same was unfair there are remedies available in this regard. I also note that before the claimant’s commenced employment with the respondent, there were back and forth negotiations on the salaries, allowances and benefits. At the time the contracts of service were executed, all these negotiations were factored and both parties singed the contract. I take it the figures with regard to salaries and allowances under the contracts are the agreed sums that the court will adopt in addressing the remedies herein. However in the case on Mariana Onica, though her contract was agreed at $3000 salary per month, there was an increment by $1000 that came after the contract had been signed and thus her salary was $4000 per month while the monthly salary for Max Mansoud Roshankar was agreed at $4500 per month. This are the agreed figures that the court will use.

a) Max Mansoud Roshankar

77. The respondent at paragraph 8 in the statement of response admits owing 3 months’ notice pay. This is confirmed at $13,500.

78. The letter of appointment for Max Mansoud Roshankar at clause 8 outlined the dues he was entitled to. Where there are salary arrears, whatever mode of termination, the employee has earned the same and

should be paid. He is therefore owed $66,450 in salary arrears and an amount of Kshs.546, 000.00.

79. The claimant served for over a year and did not take his annual leave and the same is an entitlement in law. He is therefore awarded $4500 being one month salary where leave was not taken or paid for.

80. Gratuity was due and agreed upon for each year served at 5%. The claimant served for over one year and is owed $2250.

81. Salaries due for and unpaid from April to June 2014 is due as the claimant was at work within these months. he is awarded $13,500.

82. The claimant is seeking monies deducted while he was freelancing. As noted above, this was a requirement that the claimant agreed to and hence not due. This claim is declined.

83. Per Diem was payable under the claimants contract. Where is was earned and not paid it became due. The claimant is awarded $3,200 of accrued per Diem.

84. Where statutory dues for any employee working in Kenya are not paid, the employer is responsible. In this regard and in reference to section 35 of the Employment Act, the claimant is entitled to service pay at 15 days' pay for each year worked. On a salary of $4500 the claimant is awarded service pay for one complete year served at $2,250.

85. Part of the contract terms was for the claimant to get an air ticket home to Sweden after every 6 months. where this was not grated it became due. He served the respondent from 1st May 2013 to 20th June 2014 when he was terminated. This is a period of 11 months. The claimant had thus earned two return tickets for his break to Sweden and with the termination he is entitled to a ticket back to his country. I find an award of $4500 being fair and reasonable in this regard.

86. The claimant is also seeking mileage allowance from February to June 2014. He confirmed in evidence that this was due and owing due to the nature of his work. A sum of Kshs.61, 440.00 is awarded.

87. Accommodation/ house allowance from July to December is claimed. He is also seeking daily allowances as directed by the court on 9th September 2014. These claims are on the basis that the court directed the respondent to make payments for the sustenance of the claimant pending hearing and determination of the matter herein. Looking at the records of the court on 9th September 2014 when the court gave directions with regard to these payments, further direction were that the matter would be placed for mention on 16th September 2014 for the court to confirm compliance and to give further directions. On 16th September 2014, the matter came up in court but both parties were absent. the file was before court on 7th October 2014 when both parties were absent. On 23rd October 2014 the file was before court and counsel for the claimants request was to get a hearing date on priority basis noting that their visas had expired. Consequently, the orders of 9th September 2014 lapsed at of 16th September 2014 as they were not extended or renewed on subsequent dates when the matter came up in court. To claim the subsistence allowances after the 16th of September 2014 would be an outright illegality. This will be declined.

b) Mariana Onica

88. The claimant in her evidence admitted that her contract was reviewed and it was agreed that her salary would be increased by $1000 to make it $4000 and her termination period was also reduced from two months to one month. I take it then the claimant is clear on her work terms and conditions as agreed with the respondent. On the finding that there was constructive dismissal that was also unfair, she was entitled to notice before the termination or payment in lieu of such notice. I award one month pay at $4000.

Upon the claimant's salary increment as agree and noted above with regard to termination notice, the payable increment was not paid and this is due. The claimant is awarded $10,000 arrears on her salary.

90. Where the employer failed to make statutory deductions and remit them according to applicable law, service pay is due at 15 days' pay for each full year worked. In this regard the claimant is awarded $2000.

91. Leave is due as under the claimants contract and in law. Before the claimant was terminated she had applied for her annual leave but this was not granted as she was terminated before she could travel home. For the one year and six months worked she was entitled to $6000 pay in lieu of taking her leave days.

92. The claimant gave evidence that she travelled to South Africa on respondent's business, the meeting took longer than expected and had her visa extended which she had to pay for. Equally she incurred expenses with regard to dinner while meeting conducting respondent's business. This is clearly spelt out in her agreement of employment that the respondent would meet all costs incurred with regard to business undertaken by the claimant on their behalf. The sum of $350 is awarded.

93. As noted above with regard to the case of Max Masoud, the orders made on 9th September 2014, for the claimant were to be reviewed on 18th September 2014. In the subsequent appearances, the issue of extending these orders, renewal or review did not arise. Provisions that were sanctioned by the court related to the period of 9th September to 18th September 2014 only. The claimant cannot therefore claim what was legally not apportioned to her. This is declined.

94. In the penultimate, the claimants were left exposed for the periods on 16th September 2014 and 18th September 2014 respectively as there were no interim orders that guaranteed any provisions for them. Equally the extension of stay in Kenya was jeopardised when counsel for the claimants failed to ensure that that particular order and direction was renewed at every court appearance.

95. Section 12 of the Industrial Court Act at section 3(viii) give powers to this court to award damages, compensation, reinstatement and any other appropriate relief as the court may deem fit. It is therefore appropriate and deemed fit for the court to award the claimants damages with regard the inhuman and degrading treatment that amounts to torture inflicted by the respondent before and after their termination. Max Mansoud Roshankar had a contract of 5 years but only served less than two years. He has remained in Kenya without any means of sustenance or support for the last 6 months until his case was heard. he is awarded $30,000 in damages. Mariana Onica had an agreement was to be terminated upon notice. Such notice was not issued before her termination was effected and she has been forced to remain in Kenya from August 2014 until December when her case was heard. She is awarded $20,000 in damages.

96. Compensation is also due in a case of unfair termination. This case calls for the maximum payable under section 49 of the Employment Act. The claimant will be awarded 12 month gross salary pay in compensation.

In conclusion therefore judgement is entered for the claimants against the respondent in the following terms;

1) A declaration that the claimants were constructively terminated from their employment by the respondent;

2) A declaration that the claimants were unfair terminated;

a) Max Mansoud Roshankar

i. General damages at $30,000 being Kshs.2,724,666.00[1]

ii. Compensation at $54,000 being Kshs.4,904,398.80;

iii. Notice pay at $13,500 being 1,180,686.00;

iv. Leave pay at $4,500 being Kshs.408,699.90;

v. Gratuity at $2,250 being Kshs.204,349.95;

vi. Salary due from April to June 2014 at $13,500 being Kshs.1,226,097.00;

vii. Per diem unpaid at $3,200 being Kshs.290,631.04;

viii. Service pay at $2,250 being Kshs.204,349.95;

ix. Rebated tickets at $4,500 being Kshs.408,699.90; and

x. Mileage allowance at Kshs.1,440.00

b) Mariana Onica

i. General damages at $20,000 being Kshs.1,816,444.00;

ii. Compensation at $48,000 being Kshs.4,359,465.60;

iii. Notice pay at $4,000 being Kshss.363,288.80;

iv. Salary arrears at $10,000 being Kshs.908,222.00;

v. Service pay at $2000 being Kshs.181,644.40;

vi. Leave pay at $6000 being Kshs.544,933.20;

vii. Visa and dinner expenses at $350 being Kshs.3,437.77

3) Claimants are awarded costs

4) The amounts payable above will be less what the claimants have received in settlement of their terminal dues and not inclusive of the provisional allowances awarded by the court on 9th September 2014.

Dated and delivered at Nairobi in open court this 22nd January 2015.

M. Mbaru

JUDGE

in the presence of:

Court Assistant: Lilian Njenga

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[1] Exchange rate at 90.8222, Central Bank of Kenya rates accessed on 6th January 2015.