



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1692 OF 2012**  
**MARY NDUKU MUMO.....CLAIMANT**  
**VS**  
**ALS LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. ALS Limited, an airline company operating in Kenya appears to have flown into headwinds with its former cabin crew, Mary Nduku Mumo. Following the termination of her employment, the Claimant brought an action for unlawful and unfair termination of employment. In its defence, the Respondent filed a Statement of Response on 20th November 2012 to which the Claimant replied on 21st December 2012.

2. The Claimant testified on her own behalf and the Respondent called its Lead Crew- Irfan Shakil Ahmed, Captain Ali Mohamed Evans, Flight Engineer-Benson Lavatsa Mulama, Captain Randeep Singh Kalsi and former Human Resource Manager, Sophie Wanjiku Gathoni.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as a Flight Attendant effective 15th August 2010 at an initial monthly salary on Kshs.28,528.00 plus a transport allowance of Kshs.5,000.00. Her basic salary was increased to Kshs.62,000.00 from 1st January 2012. The Claimant pleads that she had an exemplary employment record for which she received positive appraisal reports, the last one being on 14th June 2012.

4. By letter dated 23rd July 2012, the Claimant was summarily dismissed. According to the Claimant, her dismissal was without lawful cause. Further, in effecting the dismissal, the Respondent did not follow due procedure.

5. The Claimant therefore claims the following:

- a. A declaration that her summary dismissal was unjustifiable;
- b. A declaration that the Respondent's conduct violated the Claimant's rights as guaranteed under Articles 28 and 41(1) of the Constitution;
- c. Compensation for violation of the Claimant's rights under Articles 28 and 41(1) of the Constitution;
- d. Damages for breach of employment contract;

e. Costs

### **The Respondent's Case**

6. In its Statement of Response filed on 28th November 2012, the Respondent admits the Claimant's employment particulars but denies that the review of her monthly salary to Kshs.62,000.00 was as a result of the Claimant's good performance.

7. The Respondent states that all its Flight Attendants earn a uniform salary and a review of the Claimant's salary was undertaken alongside her colleagues. The Respondent contends that the Claimant's relationship with her seniors, colleagues and clients was negative thus creating a toxic working environment.

8. Sometime in May 2012, while on duty in Addis Ababa in Ethiopia, the Claimant was involved in an altercation with a passenger prompting the Respondent to recall her to Nairobi for mandatory route checks and re-assessment of her work by the Training Flight Attendants.

9. The Respondent denies terminating the Claimant's employment without a justifiable cause and due procedure. According to the Respondent, the Claimant was informed of the reason for the termination of her employment and was issued with a certificate of service. The Respondent states that the Claimant has failed to return a clearance form issued to her in July 2012 to facilitate payment of her final dues.

### **Findings and Determination**

10. The issues for determination in this case are as follows:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in effecting the termination, the Respondent followed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

### **Reason for the Termination**

11. Section 43 of the Employment Act, 2007 provides that:

***(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.***

12. In *Jessy Olukutukei V Feed The Children Kenya & Another [2014] eKLR*

this Court held that the burden placed on an employer under Section 43 is to demonstrate a valid reason that would move a reasonable employer to terminate the employment of an employee. I will therefore examine the Claimant's termination in that light.

13. The Claimant's termination letter dated 23rd July 2012 states as follows:

***“A disciplinary hearing meeting was held on Friday 20th July 2012 with yourself and Senior Management team in which various incidents that border on your conduct and attitude were discussed and an opportunity was accorded to you to respond. However, the responses from you were unsatisfactory; moreover you did not show any remorse.***

*This is to inform you formally that Management has resolved to terminate your services with the Company with effect from Friday 20th July 2012.*

*Upon termination, you will be paid all the days worked upto 20-07-2012, any prorata leave due and a month's pay in lieu of notice.*

*Please note that it is a requirement that an employee leaving the company must clear before final dues are paid.*

*Yours faithfully,*

**ALS LIMITED**

*(Signed)*

*Cornwell Muleya*

**CHIEF EXECUTIVE OFFICER”**

14. From this letter it would appear that the Claimant was accused of several acts of misconduct. The details of the meeting held on 20th July 2012 are in contention. In her witness statement dated 21st March 2013, the Claimant admits attending a meeting chaired by the Human Resource Manager and attended by the Director of Operations, Ramesh Pashavaria. The Claimant however contests the record of the meeting as produced by the Respondent. She states that at this meeting she was pressurised to resign and later on the same day, the Human Resource Manager told her to write an apology letter. Instructively, the minutes were not signed by the Claimant.

15. According to the minutes produced by the Respondent, an incident involving Flight No. 5Y PRV (Addis Ababa-Dolo Ado) on which the Claimant was serving as Flight Attendant and other concerns regarding the Claimant's conduct were discussed.

16. With regard to the incident involving Flight No. 5Y PRV, the Claimant testified that a passenger who was seated at the emergency exit had declined to store away his hand luggage prompting her to seek the intervention of the Captain. It was agreed between the Claimant and the Respondent that the requirement not to keep baggage along the emergency exit was a crucial safety requirement. The issue was the Claimant's approach in dealing with the issue.

17. According to the Respondent's 2nd witness, Ali Mohamed Evans who was the Captain in charge of Flight No. 5Y PRV and the 4th witness, Randeep Singh Kalsi who was the First Officer on the flight, the Claimant's approach to the issue at hand was wrong. These witnesses also told the Court that there had been previous incidences in which the Claimant had exhibited a negative attitude towards passengers and other employees of the Respondent. This was corroborated by the 1st witness, Irfan Shakil Mohamed who was the Lead Crew and the 3rd witness, Benson Lavatsa Mulama who was a Flight Engineer.

18. From the testimony of these witnesses, it would appear that the Claimant had a difficult working relationship with her superiors and colleagues. The Court found the testimony of these witnesses consistent and found no reason why they would all gang up to give false testimony against the Claimant. It was also evident that a fair amount of tolerance had been shown towards the Claimant.

19. The aviation industry is extremely sensitive and all staff handling an aircraft from the Captain in command to the First Officer who assists the Captain and the Cabin Crew who conduct security checks and offer first line service must each do their part and work in harmony. No weak part in this chain should be allowed to persist.

20. I have evaluated the circumstances leading to the termination of the Claimant's employment and find that there were serious issues regarding her conduct which cumulatively constituted a valid reason for the

termination. The termination of her employment was therefore substantively fair.

### **Termination Procedure**

21. The procedure for handling cases of misconduct is contained in Section 41 of the Employment Act, 2007 which requires the following:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

22. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases. Clause 8 of the Respondent's Human Resources Policy Manual provides an elaborate disciplinary procedure which borrows heavily from the Employment Act, 2007.

23. The Claimant testified that she was summoned to a meeting without any prior notice on 20th July 2012. This was confirmed by the Respondent's 5th witness, Sophie Wanjiku Gathoni who was the Human Resource Manager at the material time. Gathoni admitted that in handling the Claimant's case, the Respondent failed to observe the formal disciplinary procedure set out in its own Human Resources Policy Manual.

24. This Court is unable to understand why an employer would spend resources to develop elaborate policies and then fail to use them when required. The dictates of Section 41 of the Employment Act and internal human resource policies at the work place are not ornaments; they provide essential safeguards to employees facing disciplinary action. Managers who issue disciplinary letters must understand that employee rights are not optional.

25. In *Bottomley Musamali Jumba v Defence Forces Canteen Organization [2014] eKLR* this Court held that an employer who requires an employee to respond to charges on the same day the charges are made cannot be said to have afforded the employee the right to be heard as required by Section 41 of the Employment Act.

### **Remedies**

26. For the foregoing reasons, the Court finds that the termination of the Claimant's employment was procedurally unfair and she is entitled to compensation. I therefore award her three (3) months salary in compensation. In making this award, I have taken into account, the Claimant's length of service and her conduct leading to the termination.

27. I have also considered the Respondent's violation of the law and its own Human Resources Policy in handling the Claimant's case. I further award the Claimant one (1) month's salary in lieu of notice. The Claimant's salary for days worked in July 2012 is due and payable.

28. Finally, I make an award in favour of the Claimant in the following terms:

- a. 3 months' salary in compensation for unfair termination...Kshs.201,000.00
- b. 1 month's salary in lieu of notice.....Kshs.67,000.00
- c. Salary for 23 days worked in July 2012.....Kshs.51,367.00

**Total.....Kshs.319,367.00**

29. The Respondent shall meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF JUNE 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Khasiani for the Claimant

Mr. Ashitiva for the Respondent