



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1586 OF 2010

MBARUK AD-HAM BASTY.....CLAIMANT

VERSUS

FIVE FORTY AVIATION LIMITED..... RESPONDENT

JUDGEMENT

Mr Thuita for Claimant

Mr Kimeto for Respondent

1. The Claimant brought this suit vide a memorandum of claim dated 2nd December 2010, seeking maximum compensation for alleged unlawful termination of employment and payment of terminal benefits to wit;
 - i. 3 months salary in lieu of notice.
 - ii. Rent
 - iii. Salary for February 2010
 - iv. Outstanding 30 days leave
 - v. Underpayment due to currency exchange and;
 - vi. Refund of salary deduction

Facts of the claim

2. The Claimant was employed by the Respondent as a pilot pursuant to a contract of employment executed on 1st September, 2007. The claimant earned a net monthly salary of USD 3,500 with effect from 1st October 2008.
3. In addition, the Claimant was entitled to incentive flying paid for hours flown in excess of 65 hours in a month as per appendix 13 to the contract at the rate of USD 50 net per hour.
4. The contract provided for termination upon giving either party three months' notice in writing or payment in lieu provided the pilot had served for at least two years. The contract document is silent on the issue of accommodation and/or rent during the period of service.
5. On 17th February 2010, the Respondent terminated the contract of employment via a letter of same

- date. The reasons given for the termination were that;
- i. On 12th January 2010, the Claimant failed to resume flight duties contrary to instructions given by captain, Andrew Adembesa
 - ii. On 18th February 2010, the Claimant again failed to resume flight duties in violation of express instruction from the captain on the excuse that he had not completed the English Examination necessary to renew his licence; and
 - iii. The Claimant was off duty over two months and had failed to ensure his license was in order;
 - iv. The Claimant was reluctant to resume duty hence disrupting Respondent's operations
6. The Claimant denies the allegations by the Respondent and states that he was not afforded an opportunity to explain his case especially because the claimant had an injured ankle which forced him to be off duty and also needed to sit for the English Examination to renew his flying licence.
 7. That the termination was without notice and therefore was unlawful and unfair. Furthermore, the Respondent did not pay the Claimant terminal dues.
 8. The Claimant further stated that the Respondent unlawfully deducted Kshs 100,000 from his salary given to the Claimant as imprest from traveling to Spain which the Claimant had properly accounted for.
 9. Finally, the Claimant also claims loss of salary incurred by him due to wrong conversion of the salary paid to him by the Respondent to Kenya Shilling notwithstanding that the contract of employment provided for payment in USD dollars. The Claimant relies on average dollar exchange rate for the period September 2007 to January 2010 gathered from the Central Bank website.
 10. The Claimant seeks an award of Kshs 6,324,633 plus interest and costs of the suit.
 11. The Claimant testified under oath in support of the aforesaid particulars of claim.
 12. In his oral testimony the Claimant was on standby at the time he is alleged to have failed to fly because he had incurred an ankle injury and the plane he flew had been hit by a bird in the Mara and was grounded. The Claimant stated that from 20th February 2009, to end of January 2010, he was not called upon to fly.
 13. The Claimant added he was wrongly accused of failing to renew his licence and failing to report for duty in the termination letter yet these issues were never raised with him prior to the termination. That he was ready and willing to renew his licence anytime as it only took a few days to do so.
 14. That he had never been charged with any offence or given a warning prior to the termination letter. That he was requested to fly to Libya at a time when his licence would have expired before his return trip and he raised this concern with the employer. This was not a scheduled flight but was assigned the flight by the Captain. The Claimant stated that he did not refuse to go to Libya. The Claimant accepted that it was his responsibility to renew his license and had not failed to do so.

Response

15. The Respondent avers that it had residual powers in law to dismiss the Claimant summarily in the event of gross misconduct. That the contract had no provision for accommodation or provision of payment of house allowance or rent over and above the net salary paid to the Claimant.
16. The Respondent denies that it breached terms of the contract as alleged by the Claimant or at all and states that the Respondent terminated the employment of the Claimant summarily for taking

leave of absence from work on grounds that he was unwell but failed to provide medical reports to justify his leave of absence.

17. Furthermore, the Claimant was asked to resume flight duties during the period but failed to do so as he had not completed his English Examination which was a prerequisite for the renewal of a Kenya Commercial Pilot's Licence.
18. The contract of employment was thus frustrated by the fact of failure by the Claimant to obtain a valid Kenya Commercial Pilot's Licence because he could not perform his duties. The Respondent therefore denies all the claims put forth by the Claimant.
19. The Respondent was however silent in the statement of response regarding the claim for payment in lieu of 30 days leave; the claim for refund of Kshs 100,000 deducted from the Claimant for failing to account for it and the claim for payment of loss in lieu of 30 days leave days not taken.
20. Nixon Ouko, RW1 for the Respondent, told the court that the Claimant failed to produce a sick note to justify the days he was off duty yet he failed to fly on 12th January 2010 to Libya. That the Claimant had also failed to renew his licence hence frustrating the operations of the Respondent.
21. That the Claimant made excuses for failing to fly and was therefore in breach of his contract. The witness said that a pilot who fell sick was entitled to one full month with pay and ½ month with half pay subject to production of a doctor's certificate.
22. The Claimant therefore absconded from work and was lawfully summarily dismissed and was not entitled to payment in lieu of notice and unpaid salary for days worked except for the 17 days worked in February 2010.

Determination

23. The Respondent has failed to justify the summary dismissal of the Claimant from his employment since the Claimant did not misconduct himself. The Claimant has therefore established on a balance of probabilities that the summary dismissal was not justified in the circumstances of the case.
24. It is the court's view that the Claimant was lawfully under rest, having incurred ankle injury and had not committed any misconduct that warranted the Respondent to dismiss him summarily from work.
25. The Claimant was not subjected to any disciplinary process to prove any misconduct on his part. However, the court has carefully evaluated the evidence by the parties and is of the considered view that the Respondent has provided justification to terminate the employment of the Claimant in terms of the provisions of the contract of employment for failure to renew his pilot licence timeously, which was his responsibility to do.
26. The Court therefore commutes the summary dismissal to a normal termination of employment and awards the Claimant three months' salary in lieu of notice in the sum of Kshs 840,000 (\$ 3,500x3).

Leave days

27. The claim for payment in lieu of 30 days untaken leave was not specifically responded to in the statement Response. The Claimant has adduced sufficient evidence to show that he did not take leave during the final year of service and the court awards him one month salary in lieu of leave days not taken in the sum of Kshs 280,000 (\$3,500).

Salary for February 2010

28.The Respondent admitted during the trial that it did not pay the claim salary of 17 days worked during the month of February 2010, the court awards the Claimant Kshs 158,660 accordingly.

Underpayment due to currency exchange

29.The claim has not been sufficiently proved by the Claimant. The court is satisfied that the Respondent used exchange rate provided by the bank from time to time in a period of six months. That reasonable adjustments were done to mitigate any drastic fluctuations in the dollar rate. The claim is dismissed.

Claim for the deduction of Kshs 100,000

30.The Respondent did not specifically respond to this claim in the statement of response. The court is satisfied that the money was expended lawfully as imprest on a trip to Spain by the Claimant and the same was accounted for by the Pilot. No satisfactory evidence to the contrary was adduced by the Respondent. The court awards the Claimant Kshs 100,000 being refund of money unlawfully deducted from him by the Respondent.

Rent

31.The Claimant failed to prove that he was entitled to payment of house allowance over and above the net salary paid to him by the Respondent. The contract document had no provision for payment of house allowance or house rental on behalf of the Claimant by the Respondent.

32.In the final analysis the Court awards the claimant as against the Respondent as follows:

- i. Kshs 840,000 in lieu of three months' notice
- ii. Kshs 158,550 being 17 days salary for the month of February 2010
- iii. Kshs 280,000 in lieu of 30 days leave not taken
- iv. Kshs 100,000 refund for unlawful deduction of imprest taken

Total award is 1,378,660

- v. The Award is payable with interest at court rates from the date of filing the suit till payment in full.
- vi. The Respondent to pay the costs of the suit.

Dated and Delivered at Nairobi this 31st day of July, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE