



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 52N OF 2010**

**EMMA CAROL WANJIRU ..... CLAIMANT**

**VERSUS**

**AIRWORKS (K) LIMITED ..... RESPONDENT**

Mr. Stephen Kimanthi for Claimant

Mr. Ongoto for Respondent

**JUDGMENT**

1. By a statement of Claim dated 19<sup>th</sup> January 2010 And filed on 28<sup>th</sup> January 2010, the Claimant seeks general damages for unlawful and unfair termination of employment and payment of special damages to wit;
  - i. Salary for September 2007 in the sum of USD4000; and
  - ii. One month salary in lieu of notice in the sum of USD4000,
2. The claim is premised on the following set of facts;
3. The Claimant was employed by the Respondent as a pilot at a monthly salary of USD1800 per month in terms of a contract of employment attached to the statement of claim and marked Appendix 'I'. She commenced employment in April 2005. The salary later increased to USD4000 per month.
4. The Claimant served the Respondent in that capacity continuously until 26<sup>th</sup> September 2007 when her employment was terminated by the Respondent on allegations that she had abdicated her duties as a pilot.
5. The Claimant alleges that the termination of employment was malicious and without cause in that;
  - a. There were no ascertained reasons for termination;
  - b. The Respondent misled the Claimant to forward a request in writing for re-assignment of duties due to pregnancy when the Respondent had no intention of acting on it;
  - c. The Respondent failed to provide notice or warning of the intention to terminate the employment;
  - d. The Respondent failed to afford the Claimant a hearing.
6. The Claimant states that by reason of the aforesaid matters she suffered loss, pain and emotional distress for which she holds the Respondent liable.
7. The Claimant testified in support of the particulars of claim and produced her payslips for May

- and June 2007 of Kshs.293,700 and 291,475 respectively. The amount varied according to the USD exchange rate. She also produced the contract of employment containing the terms and conditions of employment.
8. In the year 2007, the Claimant had just upgraded from 1<sup>st</sup> officer to Captain. She had a valid pilot licence and was flying planes belonging to the Respondent.
  9. The Claimant became pregnant in 2007 and continued flying until July 2007, when she went to see her Aviation Doctor, Dr. Kako. She was examined and given a certificate to take to the Kenya Civil Aviation Authority. The certificate was produced as exhibit '2'.
  10. At the time she was expectant for 20 weeks and would be unfit to fly after 28 weeks. A licence would not be given upon attaining twenty eight (28) weeks pregnancy. The Claimant also produced her commercial pilot licence as an exhibit. The licence covered eight (8) weeks only due to her condition.
  11. The Claimant stated that the Respondent was informed of this condition. The Claimant was stationed at Juba, when she started suffering acidity and got two weeks rest period.
  12. On 12<sup>th</sup> September 2007, the Claimant called the Finance Director by the name Margaret and requested her to arrange for her replacement. Margaret sounded upset and promised to send a relief crew the following day comprising of two persons, a captain and 1<sup>st</sup> officer.
  13. Margaret arranged for the Claimant to take a world food programme flight to Lokichogio and take East African Airline to Nairobi. The Respondent was to foot the cost of Claimant's travel. The Claimant met the replacement pilot, Mr. Jonah Kanina at Lokichogio on his way to Juba.
  14. The Claimant then visited Margaret to get reimbursement for the travel and fourteen (14) days off. The Claimant wanted to do ground duties due to her condition at the time. She took fourteen (14) days from 14<sup>th</sup> September 2007.
  15. The General Manager Mr. Kavindu then requested the Claimant to write a request to be put on ground duties which she wrote on 5<sup>th</sup> October 2007. The letter was received by the General Manager on 8<sup>th</sup> October 2007.
  16. Thereafter, no communication was forthcoming from M/S Margaret or Mr. Kavindu. The office Secretary prevented the Claimant from seeing either of them. The Claimant was seven (7) months pregnant at the time.
  17. Claimant's efforts to get an explanation from the Respondent were futile.
  18. The Claimant did not hear from the Respondent again. She denied that the Respondent served her with a letter of termination dated 28<sup>th</sup> September 2007.
  19. The Claimant further denied that on 13<sup>th</sup> September 2007 she had left a plane unmanned and without a crew stating that her flight from Juba to Nairobi was arranged by the Respondent. The Claimant seeks to be awarded as prayed.

### **Statement of Response**

20. The Respondent filed a statement of Response dated 16<sup>th</sup> April 2010 in which it admits having employed the Claimant as a pilot but disputes the salary paid to the Claimant was USD4000 but USD1800 per the contract of employment attached.
21. The Respondent denies that the claimant's employment was terminated and states that the employment ended upon expiry of a contract term between the Respondent and the Claimant. The respondent relies on a memo dated 28<sup>th</sup> March 2007, written to 'Flight Crew' by the General Manager Mr. Erick Kivindu titled "Notice of Renewal of Contract."
22. The memo reads as follows;

*"Reference is made to the above matter and to the notice of termination of contract that commenced on the 1<sup>st</sup> April 2006 and terminates on the 31<sup>st</sup> March 2007. We are pleased to inform you that our client UNWFP has extended the contract for six (6) months up to the 28<sup>th</sup> September 2007.*

*Crew that wish to continue working with the company for six (6) months extension are requested to remain in their respective work stations, while those that are unwilling to*

*continue in our employment your contract with the company terminates as earlier notified i.e. 31<sup>st</sup> March 2007, and the company takes the early opportunity to thank you for your services and wish you all the best in your future endeavours.”*

23. It is the Respondent's case that the Claimant's contract of service expired when she declined to take the six (6) months extension offer made to the crew in the aforesaid memo.
24. The Respondent added the company was not aware of the Claimant's pregnancy until the expiry of her contract. The medical notes that the Claimant forwarded to the company dated 6<sup>th</sup> July 2007 did not reveal her pregnancy. The notes are attached to the statement of Response.
25. Furthermore, the Respondent states that the Claimant left a company Aircraft unmanned and without crew on 13<sup>th</sup> September 2007 which amounts to improper performance, carelessness and or neglecting work which entitled the company to summarily dismiss the Claimant though the company did not do so.
26. The Respondent further avers that it gave the Claimant thirty (30) days notice of termination of contract on 26<sup>th</sup> August 2007 as per the aforesaid memo with an option to renew the contract but the Claimant showed no interest.
27. The Respondent concludes that this suit is brought maliciously with the aim of defaming the company.
28. These averments by the Respondent were supported by RWI Mr. Eric Mutinda Kivindu, the General Manager of the Respondent except an admission that the salary of the Claimant was later reviewed to USD4000 contrary to the averment in the statement of response that she earned USD1800.
29. RWI told the Court that all the pilots including the Claimant were reminded on 27<sup>th</sup> September 2007, the six months contract with WFP was due to expire, however on 1<sup>st</sup> October 2007, the company had secured a new contract with WFP and the pilots needed to sign a six (6) months contract extension.
30. RWI further stated that the respondent had lost a contract with UNHCR, which contract the Claimant was also serving due to non performance. The Claimant according to the witness left the Respondent's plane unattended in Juba on 13<sup>th</sup> September 2007 and did not return until early October 2007 by which time her contract had lapsed on 28<sup>th</sup> September 2007.
31. The crew who showed interest had their contracts extended including the Claimant's husband who also worked for the Respondent.
32. RWI emphasized that it was the claimant's responsibility to secure a replacement crew for the plane before she departed for Nairobi on 13<sup>th</sup> September 2007. She did not hand over to an incoming pilot.
33. RWI stated that the claimant was not issued any letter of dismissal but her contract simply lapsed and she failed to renew the same.
34. RWI further stated that he had no knowledge that the Claimant was pregnant until she came back to the office in October 2007 when she requested to be allocated ground duties but did not state reasons for the request. By that time her contract had expired. The witness was not aware that her licence had expired at that time.
35. RWI denied that, the Claimant's employment was prejudiced by her pregnancy. He added that the Claimant was not a good performer in terms of reporting to work. She had warning letters in this respect but was not sacked because there was a scarcity of pilots especially those required to work in Southern Sudan.

### **Issues for determination**

1. Was the Claimant unlawfully dismissed from her employment or did her contract of employment end by effluxion of time?
2. Is the Claimant entitled to salary for September 2007 in the sum of USD4000 and a similar amount in lieu of notice?

### **Issue I**

36. Both the claimant and the Respondent annexed to their papers a copy of unexecuted contract of employment document which they agree constitutes the contract of employment for the Claimant as a pilot.
37. It is also not in dispute that the Claimant was initially paid USD1800 per month but at the time of termination of the contract she earned USD4000 per month.
38. The contract of employment was not a fixed term contract. The Claimant was on a permanent employment and the contract document provided for termination by either party giving the other one month notice.
39. The contract under Clause I (a)(i) – (vi) and (b) (i) – (ii) provides circumstances and reasons for which the contract may be terminated.
40. Under Clause J is provided reasons for which the Claimant may be summarily dismissed from employment.
41. This is a contract protected by the provisions of The Employment Act, 2007. This means, it could only be terminated or the Claimant dismissed for a valid reason and the termination or summary dismissal could only be effected in terms of a fair procedure.
42. The provision of one month notice is just one element of the procedural fairness provided in the contract itself, which is also a minimum statutory requirement under the Employment Act, 2007.
43. Different versions of the circumstances under which the Claimant left employment have been told by the Claimant herself and RWI.
44. What is not in dispute is that the Claimant had become pregnant and was given a limited pilot licence of eight (8) weeks period because she could not fly upon attaining twenty eight (28) weeks of pregnancy.
45. On 13<sup>th</sup> September 2014, she left Juba for Nairobi, because she was suffering acidity as a result of the pregnancy.
46. It is her testimony, which the Court believes, that she had notified the Financial Director, M/S Margaret of the intended leave and had made travel arrangements from Juba to Nairobi and also, the Respondent had arranged that Captain Jonah Kanina take over the plane from her.
47. The Court does not believe the version told by RWI, that the Claimant simply deserted her work station at Juba and left the plane unattended. This is a most unlikely scenario given that, the Claimant's husband also worked for the Respondent and the personal circumstances that led to the travel by the Claimant.
48. The Court believes that the flight from Juba to Nairobi was secured from World Food Programme and East African Airline by the Respondent on behalf of the Claimant and was actually paid for by the Respondent.
49. The Claimant took fourteen (14) days off after which she requested to be placed on ground duties in view of the pregnancy and expiring pilot licence.
50. The Court believes that the General Manager RWI, requested the Claimant to make the request to be placed on ground duties in writing but did not act on the request at all.
51. The notice allegedly sent to all crew, to renew their contracts for a further six (6) months dated 28<sup>th</sup> March 2007 is but a red herring.
52. It is the Court's considered view that the contract of employment of the Claimant had not expired as alleged by the Respondent or at all. No notice of termination with reasons for that purpose was produced by the Respondent.
53. The credible version is that told by the Claimant that the Respondent, realizing that the Claimant was pregnant, and could not secure a pilot licence for the period of advanced pregnancy, simply abandoned her to her own devices.
54. The Claimant lost her job for an unlawful and unfair reason, being, her pregnancy. The Respondent was under an obligation to put her on ground duties for the short period she could not fly and during her maternity leave.
55. Instead the Respondent chose to evade its statutory obligations and ditched a pilot that had given it service under difficult circumstances at Lokichogio and Juba.
56. The Claimant was not paid salary for September 2007, a period she was simply kept in the dark, having left Juba on 13<sup>th</sup> September 2007, went on fourteen (14) days off and was thereafter not recalled back to work, having requested to be put on ground duties.
57. **Remedies**

- i. The Claimant is entitled to salary for the month of September 2007 in the sum of USD4000.
- ii. The claimant is also entitled to payment of USD4000 in lieu of termination notice which she did not receive.
- iii. The Claimant lost her job simply because she fell pregnant and could not get a pilot licence after eight (8) weeks of pregnancy.
- iv. The Respondent acted in an unreasonable and unlawful manner by abandoning the Claimant when she needed her remuneration most.

58. There is a trend by certain employers to terminate employment of pregnant women to avoid the obligation to pay them remuneration during the three months' maternity leave.

This is a trend, the Court greatly frowns upon and ought to be discouraged.

59. The Respondent in the case did not want to keep the Claimant after eight (8) weeks of pregnancy and the consequent maternity leave hence the termination for no valid reason and without according the Claimant a hearing at all.

60. The termination of the Claimant violated Section 41 of the Employment Act which mandates a fair hearing before termination of employment.

61. The Respondent also violated Section 43 as read with Section 47(5) of the Act, which mandates the employer to have a valid reason and justification for termination of employment.

62. This termination was therefore contrary to Section 45(1) as read with section 45(2)(a) & (c) of Employment Act, and the Claimant is entitled to compensation in terms of Section 49(1) and (4) of the Act.

63. The Claimant lost her employment for no valid reason at all. She was victimized for falling pregnant. Was not given any notice of termination but was simply ignored and not communicated to at all.

64. The Claimant is a young pilot, and had career prospects with the respondent for a long period to come. The claimant clearly had desire to continue serving the Respondent.

65. The Respondent did not pay her salary for days worked and as a matter of fact treated the Claimant in a contemptuous manner.

66. Respondent compounded this conduct by spinning a story around the termination which to all intent and purpose is not probably true.

67. The Court awards the Claimant eight (8) months' salary for the unlawful and unfair termination of employment in the sum of USD32,000.

68. In the final analysis the Respondent is to pay the Claimant as follows;

- i. USD4000 salary for September 2007;
- ii. USD4000 in lieu of notice;
- iii. USD32000 compensation ;
- iv. **Total Award USD40,000;**
- v. the Award is payable with interest at Court rates from date of this judgment till payment in full.
- vi. the Respondent is to pay the costs of the suit.

**Dated and Delivered at Nairobi this 21<sup>st</sup> day of August, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**