



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2157 OF 2014

ERWAN LANOECLAIMANT

VERSUS

FIVE FORTY AVIATION LIMITED.....RESPONDENT

M/s Guserwa for Claimant

Mr Kimeto for Respondent

JUDGEMENT

1. The suit was lodged vide a statement of claim on 4th December 2014 following dismissal of Claimant by the Respondent on the 13th November 2014.
2. The Claimant seeks;
 - a. A declaration that the Claimant's dismissal by the Respondent is unlawful and unfair.
 - b. Payment of benefits set out at paragraph 19 of the statement of claim totaling to Kshs 227,209,410.40.
3. The Respondent filed a statement of defence on the 20th March 2015 denying the particulars of claim.
4. The following issues are for determination;
 - a. Whether the dismissal was for a valid reason?
 - b. Whether the dismissal was in terms of a fair procedure?
 - c. What remedies if any are payable to the Claimant.
5. The Claimant is a pilot and a French national who was employed by the Respondent vide a contract of Employment dated 15th June 2010. In terms of the Agreement the claimant was required to have and maintain in good and serviceable condition an own headset and navigation instruments together with the following documents;
 - a. a valid Kenya Commercial Pilot's Licence with instrument rating and multi-engine rating
 - b. a valid passport
 - c. Certificates of vaccination/inoculation necessary and was to be subjected to comprehensive medical examination.
6. The Claimant was to be paid US £6,000 per month net of taxation and was to report to the Chief pilot

who was the departmental head.

7. Upon completion of three months' probation, the contract was terminable by either party giving a one month notice or payment in lieu thereof.

8. Under clause 20 titled Force Majeure, where the contract shall be rendered unworkable for reasons of change of government policy or suspension of the company's activities by authorities or by declaration of a state of emergency or war, riots or acts of God, no party shall be held responsible for the performance of the contract. The contract was signed by both parties on 15th June 2010.

9. By an addendum to the contract signed on 24th January 2012, by both parties the Claimant was appointed Training Captain CRJ at a basic salary of Kshs 540,000 net of tax. The Claimant was in terms thereof entitled to incentive calculated at Kshs 10.00 per nautical mile above 40 flight hours flown. The document read "*(This has been reduced due to the misrepresentation of flight hours by some crew members).*"

10. In terms thereof, the Claimant was expected to report to work 45 minutes prior to the scheduled departure time. The document also provided "*anytime you are allocated standby duty you are to remain in contact and be ready to fly within 1 hour of activation, failure to report on time during standby duty will not be tolerated.*"

11. The Claimant states that during his tenure, he was a hardworking and dedicated employee and he met targets. That he was recognized by the Respondent as seen in annexures EL-3 which are copies of the letters of appreciation sent to the Claimant by the Respondent. The Claimant's performance was reviewed regularly based on his performance as both the pilot and chief pilot by the company during the years 2010 -2014.

12. The Claimant surpassed the hours scheduled for his assignment which entitled him to payment of incentives but this was only paid for on three occasions leaving the outstanding payment as set out in paragraph 7 of the memorandum of claim in the sum of Kshs 2,293,962 illustrated under Annex EL-4.

13. On or about 1st October 2014, the Claimant wrote to the Respondent requesting for the processing and payment of the outstanding incentives. The Respondent responded to the email correspondence by stating that the incentive claim was invalid and further that the Claimant was no longer a Chief Pilot (see Annex EL-5, a copy of the email correspondence.)

14. On 27th October 2014, the Respondent wrote an email to the claimant accusing him of inciting other pilots and the Respondent issued a further email to the Claimant asking for his immigration status. The claimant responded to the request by supplying the requested information vide annex EL-6.

15. On 28th October 2014, the Claimant was issued with a letter of warning and a threat to be reported to the immigration department by the Respondent's Chief Executive Officer. (see EL-7 copies of email exchange.) On 30th October 2014, the Claimant received an email from the Respondent's Violet Achola informing him that his flying incentives were ready for collection. The claimant sought to be advised of the amount payable, but he received no response.

16. On 6th November, 2014 the Respondent threatened to terminate the service of the Claimant if he did not produce his work permit within two days of the letter of request. The Claimant responded to the Respondent's demand on the 7th November 2014 enclosing the required documents (see Annex EL-8.) On 13th November 2014, the Respondent terminated the Claimant's services for the reason that, the Claimant had failed to provide the Respondent with a valid work permit authorizing the claimant to work as a pilot for the Respondent despite being requested to do so. That the Claimant's insistence that entry permit is synonymous to a work permit did not hold water because that entry permit required the Claimant to do business with "M/s Higher Power Service Limited" and not to work as a pilot for Five forty Aviation Limited.

17. That the contract of employment dated 15th June 2010 signed between the Claimant and the Respondent on the basis of the said Entry Point was therefore illegal and no longer tenable under the Kenya Citizenship and immigration Act, 2011. With that, the contract of employment was brought to an end by the Respondent who requested the Claimant to return to the company any company property in his possession as Chief Pilot of the Respondent.

18. The Claimant aggrieved by the decision to terminate his employment on what he considered unlawful and unfair reasons wrote a demand letter by J. A. Guserwa & Co Advocates which was responded to by Mugu Kimeto & co Advocates denying any liability.

Defence

19. The Respondent filed a statement of defence on 20th January 2015 and the nub of the defence is as follows;

- i. That the Claimant is a dishonest person. He misrepresented his status and misled the Respondent to believe that he had legal capacity to sign contract of employment dated 15th June 2010 for purpose of being employed as a pilot.
- ii. That the Claimant a non-citizen of Kenya, acquired an Entry Permit class H for the purpose of "Business with M/s High powers Services Limited" his own company and was therefore not authorized by immigration officer as was required under immigration Act to engage himself in any employment in Kenya particularly with the Respondent. FFA - 2 is a copy of the impugned entry permit.

20. The Respondent further avers that the Claimant is a registered director and a shareholder of High Power Services Limited where he appeared to have misrepresented himself as a Kenyan. (See Annex FFA 3).

21. The Respondent states that the said class H entry permit did not authorize the Claimant to seek any employment with the Respondent. That the Claimant had no legal authority to seek employment in Kenya and or sign any contract of employment particularly with the Respondent. That the contract entered into between the parties on 15th June 2010 is in contravention of section 6 (1) of the Immigration Act, Cap 172 Laws of Kenya (the same provision is found in Section 411(1) of Kenya Citizenship and Immigration Act 2011. That the contract was illegal abinito and untenable in law.

22. That the Respondent was entitled to terminate the employment of the claim immediately upon his failure to provide the required work permit and the suit be dismissed with costs. In the alternative, the Respondent pleads under paragraph 14 of the statement of defence that;

- i. The Claimant did not have good work record and the Claimant had a second warning letter at the time of termination of contract.
- ii. That the Claimant's performance is not in issue as his contract was terminated on grounds of illegality.
- iii. That the Claimants salary was Kshs 540,000/= Net of tax and the claim of US \$6,000 or Kshs 925,560 is not supported by any documentary evidence.
- iv. That it is immaterial that the Claimant was a dedicated employee who met his targets because he was working illegally in Kenya and this is the reason of termination of his contract of employment.
- v. The Respondent denies the incentive claim set out under paragraph 7 of the statement of Claim and states that the incentive claim was fictitious and false and should be rejected.

Determination

Issue I

23. It is common cause that the Claimant worked for the Respondent as Pilot/Chief Pilot for a continuous period from 16th June 2010 until the Employment was terminated on 6th November 2014, a

period of four (4) years and five months. It is also apparent from the face of the contract of employment between the Claimant and the Respondent in the position of Pilot dated 16th June 2010 under Clause headed “Terms and conditions of Employment” the consolidated salary for the Claimant was US\$6,000 per month net of taxation and overtime/incentive flying provided for “any hours worked over and above 65 hours per month shall be compensated at the net of US\$100 per hour”

24. The contract document is silent on the requirement for a work permit. However, it is common cause that under the Kenya immigration law, a prospective employer of a foreign national is required to apply for and obtain on behalf of the prospective employee a valid work permit to enable the foreign national to work in Kenya. It is also common cause that justification must be given by the prospective employer the reason why, it is intended to employ a foreign national.

24. At the time, the Claimant sought employment with the Respondent, he was already a resident of Kenya courtesy of entry permit class H granted to the Claimant by the Principal Immigration Officer on 10th November, 2009 for a period of two years. This permit was granted in terms of section 5 of the Immigration Act and part III of the regulations for the purpose of Employment/Business/profession of Residence.

25. From the face of the document, the Claimant had presented himself to the Immigration office as a French National and there is no evidence that he had misrepresented himself as a Kenyan, as alleged in the statement of defense. It is apparent from the oral and documentary evidence adduced by the Claimant which the court finds credible and probably true, that the Claimant had presented the said entry permit to the Respondent as the basis of his legibility to work as a pilot in Kenya as a Director of a duly registered company M/s Higher Power Services Limited, in which the Claimant was a director and shareholder.

26. It is also not in dispute that upon expiry of this entry permit, the Claimant obtained extension for a further two years and at the time his employment was terminated on 6th November 2014, the Claimant still held a valid class H permit. It is the court’s considered view, which view is supported by documentary and oral evidence before court that at all material time, the Respondent was aware that the Claimant remained in Kenya as a residence on the basis of class ‘H’ permit and was able to work in Kenya on the strength of that permit. It is also clear that the claimant did not misrepresent his status in Kenya to the Respondent at any one time and in particular at the time he obtained the initial engagement and during the subsistence of the contract of employment and subsequent renewal of the entry permit.

27. What is also evidently clear is that the Respondent began to question the validity of the class H permit once the Claimant demanded to be paid arrear incentives for overtime flying in the sum of Kshs 2, 293,962. The Claimant has established on a balance of probability that he was in Kenya legally. That he had registered a company in Kenya, which company had one of its objective to engage in aeronautical business which included servicing and flying of aeroplanes in Kenya.

28. That as a director of the company he could be contracted to fly aeroplanes in Kenya lawfully. That it was in that capacity as a qualified pilot that he was contracted by the Respondent as a pilot and Chief Pilot to fly the Respondent’s planes for a period of four (4) years and five (5) months. That the Claimant met all requirements set out in the contract of service dated 16th June 2010.

29. That the Claimant did not breach any of the express terms of the said contract up until the date of the said termination. It is the court’s considered view from the totality of evidence before Court that the Respondent was unwilling to pay the accumulated incentive arrears and began to threaten the Claimant, once he demanded to be paid his duly earned dues.

30. It is also the court’s considered view that the issue of the permit was only raised as a smokescreen for the Respondent to avoid its contractual obligation to pay duly earned incentives to the claimant. The alleged addendum to the contract which purports to reduce the salary of the Claimant to a basic net salary of Kshs 540,000 instead of US\$ 6,000 provided for in the initial contract of employment and to vary the incentive provision to the detriment of the claimant does not on the face of the document expressly refer to the initial contract of employment. The purported addendum does not expressly state that it is intended

to vary the initial contract of employment. The Respondent in the statement of defense appears to proceed on the basis that the only contract of employment signed between the claimant and the Respondent was the one dated 16th June 2010 and signed on the same date.

31. The Respondent does not refer at all to a later addendum meant to vary the terms of the initial contract of employment. The Respondent only challenges the validity of the agreement due to the alleged lack of legal capacity by the claimant to enter into that contract which view the court finds to be unfounded and only preferred by the Respondent to deny the Claimant the fruits of his labour as a Chief Pilot of a major airline in Kenya today Fly 540. It is the court's further finding that the Claimant's remuneration was US \$6,000 (925,560) and not Kshs 540,000 as alleged by the Respondent.

32. In view of the foregoing the court finds that the termination of the employment of the Claimant was in breach of the contract of employment dated 16th June 2010 and contrary to section 43 as read with Section 45 of the employment Act 2007 in that the termination was for no valid reason.

Issue II

33. The termination of the employment of the Claimant from the evidence before court was summary in nature and effected in a malicious manner following the demand by the Claimant to be paid in arrears overtime flight incentives in terms of the contract of employment. No disciplinary hearing was held prior to the termination. The Respondent indeed admits, no disciplinary hearing was necessary because the termination was effected upon failure by the claimant to provide a valid work permit.

34. The court finds that the conduct by the Respondent was mischievous having employed the Claimant in the year 2010 on basis of class H permit a fact which at all material times was in the knowledge of the Respondent. It was not illegal for the Claimant to provide flying services to the Respondent on the basis of a valid class H permit there being no evidence before court to the contrary.

Issue III

a. Notice

35. The Claimant has satisfied the court that his employment was terminated without notice and no payment in lieu of notice was made by the Respondent.

36. The Court finds that the Claimant is entitled to Kshs 925,000 in lieu of notice.

b. Salary for 13 days worked in November 2014

37. The Claimant was not paid salary for the 13 days worked in the month of November 2014. This is a manifestation of *mala fides* on the part of the Respondent. The Claimant is granted Kshs 501,480.40 being salary for the period duly worked.

c. Accrued incentives for extra flight hours between 2010- 2014

The Claimant requests to be paid the incentive duly earned in respect of many extra hours flown by the Claimant led to the termination of his employment. The Court finds that the Claimant has established on a balance of probability that he had flown the claimed extra hours and was entitled to be paid the incentive accordingly in the sum of Kshs 2,293,962.

d. Payment for unserved term of contract

The contract of employment between the Claimant and Respondent dated 16th June 2010 was not for a defined term of service. It was an open ended contract. The contract could be terminated in terms of Employment Act 2007 for a valid reason and in terms of a fair procedure upon giving the other party one month notice or payment in lieu of notice.

38. The court has found that the contract was terminated for no valid reason and the termination was not done in terms of a fair procedure. Section 49 (1) (c) provides for an award of maximum compensation equivalent to not more than 12 month's salary in the event the court finds that termination was wrongful and unfair.

39. It is not appropriate in the circumstances to award the Claimant payment of the remainder of 10 years left for him to serve before reaching retirement age because firstly, the Claimant is not a Kenyan national and his employment in Kenya depended on provision of a work permit which was not an automatic right to him. The grant of a two years permit at any one time was dependent on the various consideration by the responsible officer.

40. Secondly, there was no guarantee that the Claimant would work for the 10 years remaining to the retirement age of 60 years. Under section 49 (4) of the Employment Act is provided consideration the court should take into account in determining the award of compensation in terms of Section 49 (1) (c). In this regard the court has considered that the Claimant was a Pilot/Chief Pilot for the Respondent for a period of four (4) years and five (5) months. The Claimant has demonstrated that he had the intention to continue serving the Respondent provided he obtained entry permit from the responsible minister.

41. The Claimant has also demonstrated that he had a good record of service as a pilot and leader of his team until the relationship between him and the employer became sour due to the non payment of duly earned overtime incentives by the Respondent.

42. The Respondent acted maliciously by failing to give the Claimant notice or pay in lieu of notice upon termination. The Respondent also failed to pay the claimant for days worked. This aggravated the loss and damage suffered by the Claimant. The Claimant was unduly embarrassed being a senior member of staff and a senior resident as such. The ruse used by the Respondent to get rid of the Claimant unlawfully and unfairly is a further aggravating factor in the circumstances of this case.

43. Accordingly, the court awards the Claimant eight (8) months salary being compensation for the unlawful and unfair termination of employment in the sum of Kshs 7,406,480.

44. In summary, the award to the Claimant as against the Respondent is as follows;

- i. Kshs 925,560 in lieu of notice
- ii. Kshs 501,480.40 for 13 days salary arrears
- iii. Kshs 2,293,962.00 being accrued arrears incentives
- iv. Kshs 7,406,480 being 8 months compensation for unlawful and unfair termination of employment

Total Award Kshs. 11,130,483

45. The award is payable with interest at Court rates from the date of filing suit till payment in full. The Respondent is also to pay the costs of the suit.

Dated at Nairobi this 9th day of December, 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE