



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 417 OF 2013

CAPTAIN EVANS NYARANGA KUNDUCLAIMANT

VERSUS

KUSH AIR LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has sued the respondent claiming USD84000 being one month salary in lieu of notice and compensation for unfair termination of employment by the respondent. The suit is based on Section 35,41 and 43 of the Employment Act of Kenya 2007.

The respondent did not file defence or attend hearing of the case. The case was heard *ex parte* on 12/6/2014 when the claimant testified as CW1.

CLAIMANT'S CASE

CW1 produced a written contract of employment signed between him and managing director of the respondent. The contract is not dated but it was to commence on 1/12/2012. He however produced a copy of logbook to show that he started flying the respondent's aircrafts on 28/11/2012. He confirmed from the contract that his salary was USD6000 per month. He was entitled to a notice of 2 months before termination. In addition he was entitled to 2 weeks off after every 2 months and a return ticket from Juba.

In April 2013 CW1 took his 2 weeks off and asked for one extra week to enable him renew his licence. After the end of the 3 weeks he called Mr. Magdi, one of the Respondent's Directors and asked for a return ticket. Mr. Magdi did not send CW1 the return ticket but only disconnected the phone after CW1 called the second time.

As a result of the conduct of Mr. Magdi, CW1 concluded that his employment had been terminated although no dismissal letter was served on him. He later learned from other pilots that the respondent had employed another captain. CW1 contended that the termination of his employment was unfair because he was never served with notice before termination or accorded any hearing.

He prayed for 2 month salary in lieu of notice plus 12 months salary as compensation for wrongful termination totalling to USD 84000. In conclusion CW1 contended that the respondent has an office in Nairobi and did repairing of her aircrafts at Mombasa.

After the hearing, the claimant filed written submissions.

ANALYSIS AND DETERMINATION

After perusing the pleadings, and after considering the evidence, submissions and the law cited, the following issues arose for determination:

1. **Whether the court has jurisdiction to determine the suit.**
2. **Whether the termination of the claimant's employment was unfair.**
3. **Whether the reliefs sought ought to issue.**

Jurisdiction

The claimant believes that this court has jurisdiction to determine this suit because the respondent allegedly has an office in Nairobi and has her aircrafts repaired in Mombasa. No evidence was tendered to prove the existence of the respondent's office in Nairobi or repair works in Mombasa. The court is however of a different view based on the following reasons. Firstly, the respondent is a foreign entity and no evidence was tendered to confirm the allegation by the claimant that the respondent has an office and does business or anything in Kenya.

Secondly, the cause of action is alleged to have occurred in Southern Sudan where Mr. Magdi declined to send return ticket to the claimant and disconnected the telephone call. Thirdly, clause 18(e) recognized southern Sudanese law as the law applicable to the contract of employment between the parties herein. Lastly, the copy of logbook produced by the claimant as exhibit 2 does not show that the claimant used to fly to Kenya in the course of his employment. Indeed the contract of employment did not indicate that part of CW1's duties were to be done in Kenya.

As a result of the foregoing reasons, the court finds that it does not have jurisdiction to determine this suit under the Kenyan law. Consequently the court must down its tools at this point and advise the claimant to seek relief before the correct forum.

DISPOSITION

The suit is struck out without costs.

Dated, Signed and delivered this 25th July 2014

O. N. Makau

Judge