



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 648 of 2010

OSBORNE ASHIONO MUTUMIRA.....CLAIMANT

VERSUS

ETHIOPIAN AIRLINES (S.C.) LIMITED.....RESPONDENT

Parekh, Advocate for the Respondent

AWARD

The Claimant filed a suit against the Respondent on 9th June 2010, seeking for unconditional reinstatement to his job that was terminated by the Respondent on 9th July 2008. In the alternative the Claimant sought damages for wrongful and unlawful termination and/or maximum compensation.

Furthermore, he sought terminal dues including one month's salary in lieu of notice, one month's salary in lieu of leave, severance pay for overtime for work done during public holidays and weekdays and leave travelling allowance.

The Respondent filed its defence and counter claim on 28th July 2010. In the main claim, the Respondent deny all the particulars of claim and in particular that the services of the Claimant were unlawfully and unfairly terminated asserting that the Claimant was dismissed for theft in the cause of duty in that on 19th January, 2008 the Claimant in his capacity as the Transportation Manager of the Respondent received U.S. Dollars 4241 for and on behalf of the Respondent being payment in respect of Airway Bill Number 0711355475 attached to the Memorandum of Defence as Appendix 'A'.

That it was the duty of the Claimant to deliver the said sum to cash custodian, Mrs. Dorcas Mwanga and/or bank the same on behalf of the Respondent but the Claimant failed to pay or hand over the said money. Accordingly the Respondent claims from the Claimant a sum of US Dollars 4241 (Equivalent to Kshs.347,762 converted at the rate of Shs.82/= per dollar).

The Respondent further, sets off Kenya Shillings 75,953 against the Claimant's claim and claims Shs.271,809/= from the Claimant.

The matter was firstly heard by Justice Stewart M. Madzayo and judgment was delivered on 29th June 2011. The decision made by Justice Madzayo was however set aside and the matter commenced afresh.

The matter was set for hearing before Justice Makau on 5th November 2012 but the matter was not listed and therefore did not proceed. The file was brought before me for allocation of a fresh hearing date

but at that time, Mr. Ashimoshi Advocate for the Claimant had left. Mr. Parekh appeared for the Respondent. I granted the matter a hearing date on 8th and 9th May 2013 and directed the Respondent to serve hearing notice to the Claimant.

The court noted that the witness for the Claimant had travelled from China and Congo hence the decision to grant the said hearing date.

On 8th May, 2013 the Claimant failed to appear in court and the Advocate for the Respondent produced Affidavit of Service of the hearing notice filed on 2nd May, 2012. From the said affidavit, it was clear that the hearing notice for the 8th and 9th May, 2013 had been served upon M/S Ashimosi Shitambis & Associates by one Alexander Nelson Mwaura, a Litigation Clerk in the employment of M/S Shah & Parekh Advocates. He is a duly authorised Court Process Server.

Given that the Respondent had once again brought its witness from Congo the Court proceeded to hear the matter in the absence of the Claimant having failed to attend or given explanation for failure to attend. Furthermore, the matter was on the Cause List for the day duly circulated by the Court.

The Court proceeded to dismiss the claim by the Claimant which is hereby dismissed and entertained the counter claim by the Respondent as particularized in the Statement of Defence and counter claim aforesaid.

Mr. Yinnesh Fekadeneh testified in support of the counter claim and told the court that he was employed as the area manager by the Respondent situated in the Republic of Congo since the year 2009. That he had travelled to Nairobi for purposes of testifying in this matter.

That between the years 2003 and 2009 he was the Airport Manager of the Respondent at the Jomo Kenyatta International Airport. That he knows the Claimant very well as he was his supervisor at the time. That the claimant worked in the capacity of Chief Transportation Agent and part of his responsibility was to issue Air Bills with respect to excess baggage among other responsibilities.

That in May 2008, he got a report from Addis Ababa to investigate Loss of US Dollars 4,241 received by the Claimant with respect to Airbill No.071-13554752. In the course of his investigations, he was able to establish that the said Airbill was issued by the Claimant on 19th January, 2008 as reflected by the Customs Authority Stamp but the various duplicates of the document were altered to reflect that the document was issued on 19th January, 2007.

That this was done with the intention of concealing that the US Dollars 4,241 was received by the Claimant on 19th January, 2008. The Claimant had then proceeded to file the duplicate in 2007 file and did not remit the money received by him to the detriment of the Respondent. The witness, sought an explanation from the Claimant and no satisfactory answer was given. As a result, the employment of the Claimant was terminated and the Respondent lost the sum of US Dollars 4,241 received by the claimant.

That the matter was reported to the police who investigated the forgery but were not able to recover the money on behalf of the Respondent. That after termination the witness held a meeting with the Claimant on the matter in which meeting he stated that he was willing to refund the money provided he was reinstated to his former job. The Respondent rejected the offer because it could no longer trust the Claimant.

The Respondent prays that the court allows the counter claim and order the Claimant to pay US Dollars 4,241 with interest at 14% per annum or at court rates and condemn the Claimant to pay the costs of the suit.

The court has considered the counter claim as pleaded together with the evidence by Mr. Yinnesh Fekadeneh and is satisfied that the Respondent has proved on a balance of probabilities that the Claimant received US Dollars 4241 in respect of Airway Bill Number 071-13554752 on behalf of the Respondent

in the course of his employment as a Transportation Manager. That he dishonestly retained the money and falsified the said Waybill in order to conceal the receipt of the said money. That the Respondent in its counter claim has converted the said amount at the rate of Kshs.82/= per dollar to get a total claim of Kshs.347,762/=.

Furthermore, in the counter claim is conceded that the Respondent owes the Claimant Shillings 75,953/= and the said amount is set off against the amount of the counter claim to get Kshs.271,809/=.

Accordingly, the court finds that the Claimant, Osborne Ashiono Mutumira, owes the Respondent Kenya Shillings 271,809 thousand and directs the Claimant to pay the said amount to the Respondent forthwith. The court finds that the said amount has been held by the Claimant unjustly since 19th January, 2008 and directs that the said sum be paid with interest at court rates from the date of filing this suit to date of payment.

The Claimant is also ordered to pay the costs of this suit.

It is so ordered.

Dated and Delivered in Nairobi this 20th day of May, 2013.

Mathews N. Nduma
PRINCIPAL JUDGE
INDUSTRIAL COURT