



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 110 OF 2013**

**ALPHONCE SULPICE MZENGE.....CLAIMANT**

**v**

**MOMBASA AIR SAFARI LIMITED.....RESPONDENT**

**JUDGMENT**

1. Aphonce Sulpice Mzenge (Appellant) was employed by Mombasa Air Safari Limited (Respondent) as an aircraft attendant under a contract of service dated 21 September 2001.
2. On 28 January 2013 the Respondent wrote to the Claimant informing him that he was being summarily dismissed from employment on the ground of serious gross negligence.
3. The Claimant was dissatisfied with the dismissal and on 18 February 2013 his legal advisers wrote a demand letter to the Respondent stating that the summary dismissal was unlawful. The demand was followed by the filing of a Memorandum of Claim on 10 May 2013.

**Claimant's pleadings and case**

4. In the Memorandum of Claim it was pleaded that the Claimant was wrongfully dismissed without notice and that he was not legally dismissed nor declared redundant. It was submitted that the termination was not in accord with the Constitution, the Employment Act, International Labour Laws and the letter of appointment, because no notice was given and gratuity and overtime /public holidays were not paid.
5. The Claimant testified that he was employed by the Respondent in 1999 until 28 January 2013 as an aircraft technician and he produced his letter of appointment (exh 1). At the time of dismissal his salary was Kshs 15,500/-.
6. Regarding the reasons for dismissal the Claimant stated that on 23 January 2013 he was asked by the Respondent's Operations Assistant David Nyambu to go and purchase distilled water but he could not go to purchase the water because he was not provided with transport as the pickup he normally used was away with the Engineering Department.
7. By this time, there was only one drum of distilled water remaining. The next day there was still no transport and the Claimant informed a Mr. Benson to bring some 3 drums of distilled water which were available with the Engineering department.
8. The witness also stated that because there was no progress, he took a *tuk tuk* on Saturday and went to purchase the distilled water and kept the water where he could take it to the Respondent's

- premises the next day, on Sunday, which he did using the Respondent's pickup.
9. According to the Claimant, when he reported to work on Monday he was asked to bring the change from the purchase of the distilled water after which he was asked to leave and was later given a termination letter by the Accountant and offered Kshs 10,330/- which he rejected.
  10. On why the dismissal was wrongful, the Claimant testified that his letter of appointment provided for two months pay in lieu of notice and that he was not given a hearing.
  11. In cross examination, the Claimant stated that he did not inform the Respondent's directors of the transport problem but informed the Operations Assistant who informed him to use all available means to get the distilled water.
  12. The Claimant therefore seeks a declaration that the dismissal was unlawful, severance pay of Kshs 201,500/-, pay in lieu of notice of Kshs 31,000/-, pending leave payment of Kshs 201,474/-, overtime of Kshs 349,221/60, public holidays of Kshs 33,579/-, specific performance and costs.

### **Respondent's pleadings and case**

13. The Respondent filed a Response on 5 June 2013 and it stated that the Claimant commenced employment on 9 January 1999 and that the dismissal of the Claimant was for gross misconduct and was lawful and in terms of the Employment Act. 6 particulars of the gross misconduct were pleaded.
14. In justification of the dismissal, the Respondent pleaded that the Claimant was given Kshs 6800/- to purchase distilled water but he failed leading to the use of the wrong liquid in an aircraft's water injection system which damaged the aircraft and further that the Claimant had been issued with warning letters
15. The Respondent denied declaring the Claimant redundant and further pleaded the Claimant owed it Kshs 810/- and that it offered the Claimant Kshs 10,331/- which he has refused to go and collect. The Respondent denied that the Claimant is entitled to all the other reliefs sought.
16. The Respondent called its Managing Director Mohamed Harunany to testify on its behalf.
17. The witness testified that the Claimant had been issued with warning letters on 14 April 2008 and 5 December 2011. On the question of the termination of the Claimant, the witness testified that on 26 January 2013 the Respondent gave the Claimant money to go and purchase distilled water but he failed to do so and that on 26 January 2013 the Respondent's engineering department went looking for distilled water and found what they believed to be distilled water in a drum and used it on an aircraft only for the liquid to turn out to be acid.
18. This discovery was after the Flight Captain of the aircraft detected unusual residue in the water injection reservoir and made a Safety Hazard or Occurrence report and investigations were commenced.
19. On the issue of availability of transport for the Claimant to go purchase the distilled water, the witness stated that there were vehicles available and that the Respondent had several vehicles but that the Claimant brought the water only on Sunday.
20. The witness further stated that the Claimant was not denied an opportunity for a hearing but he was negligent in his duties. He also testified that two other employees were also dismissed because of the incident.
21. The Court directed the Claimant to file and serve his submissions within 10 days of 30 September 2013. The submissions were filed on 10 October 2013. By the time of preparation of this judgment, I had not seen the Respondent's submissions.

### **Questions for determination**

22. There are majorly two issues arising, from the pleadings, testimony and submissions filed are whether the termination was in accord with the Employment Act and if not, what would be the appropriate remedies.

### **Whether the dismissal was in accord with the Employment Act**

#### ***Procedural fairness***

23. Section 41 of the Employment Act requires an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language the employee understands the reasons for the termination. The employee is entitled to have another employee or union shop floor representative present.
24. And if it is a case of summary dismissal the employer is under a legal obligation to hear and consider any representations which the employee or his representative may wish to make.
25. In effect, an employer is required by law to observe what is referred to in administrative law as *audi alteram partem* rule. The *audi rule* is part of the rules of natural justice. Before the advent of the Employment Act, 2007 the *audi rule* or procedural fairness was not part of employment contract/law in Kenya unless the employment contract expressly incorporated it into the contract. The Constitution has now also enshrined employees' justiciable right to fair labour practices.
26. Prior to the Employment Act, 2007 an employer could dismiss an employee for a bad reason or no reason at all, provided it was on notice. That has now changed. Section 45 of the Employment Act has made serious inroads in regard to dismissals. An employer is under an obligation to prove the existence of good and valid reasons for dismissal even if he gives notice.
27. The employer is also under an obligation to hear the employee before dismissing him. An employee is entitled to be heard before dismissal because the dismissal will adversely affect his rights and source of livelihood. The ordinary employee now has security of tenure. There has been a fundamental shift in the employment relationship in Kenya.
28. In the case under discussion, the Claimant stated he was not heard before the decision to dismiss him was taken. The Respondent's witness in his evidence did not state whether the Claimant was informed that his dismissal was being considered and whether and how he was given an opportunity to make any representations. The Claimant was simply given the dismissal letter by the Accountant.
29. It is the duty of an employer to establish that it complied with section 41 of the Employment Act. No material was placed before Court to show whether and how the Claimant was heard.
30. In my view the Respondent's dismissal of the Claimant was procedurally unfair because he was not given an opportunity to be heard.

### ***Substantive fairness***

31. Section 43 of the Employment Act require an employer to prove the reasons for terminating the services of an employee, section 45 require the employer to prove that the reasons were valid and fair reasons while section 47(5) of the Act expect an employer to justify the grounds for termination to remove the dismissal from the ambit of unfair termination/wrongful dismissal.
32. It is not disputed that the Claimant was required to go and purchase distilled water for use in the maintenance and servicing of aircraft. It is also not disputed that the Claimant did not purchase the distilled water in good time. It is also not disputed that an aircraft was fed with acid and not distilled water. It is also not disputed the acid was put in the aircraft by two other employees who were sacked. The two employees drew the acid from a drum thinking it was distilled water.
33. The question is whether the Claimant was facilitated with transport to go and purchase the distilled water. The Claimant's evidence was that the pickup he was to use was with the Engineering department. The evidence of the Respondent's witness was that it had several vehicles which the Claimant could have used. The Respondent's case was also that in failing to purchase the distilled water in good time, the Claimant had failed or negligently performed his duties.
34. In my view the Claimant had performed the duties for a very long time and he must have known how critical the distilled water was in the operations of aircraft. This evidence was not challenged. A serious disaster was in the offing.
35. In the circumstances I find that the Respondent has proved the reasons for the dismissal of the Claimant and that the reasons were valid and fair reasons. The dismissal was substantively fair.

### **Relief**

### ***Severance pay***

36. The Claimant was not declared redundant and severance pay is neither appropriate nor available to him. This prayer is dismissed.

### ***Pay in lieu of Notice***

37. Though I have found that the dismissal was substantively fair the Respondent did not comply with procedural fairness requirements of section 41 of the Employment Act.

38. Clause 11 of the letter of appointment provided for termination of the contract by the giving of two months written notice or payment of two months' salary in lieu of notice. The Claimant was earning Kshs 15,500/- per month and is therefore entitled to Kshs 31,000/- as pay in lieu of notice.

### ***Pending leave***

39. The Respondent produced leave records for the Claimant. These records included approved leave applications for 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2008, 2009 (paid in lieu of leave), 2010 (paid in lieu of leave) and 30 days in 2012. The leave application for 2012 shows that the Claimant had outstanding 30 days leave and he went on leave from 1 April 2012 until 30 April 2012.

40. In the circumstances, I find no basis or foundation for awarding the Claimant Kshs 201,474/- claimed as pending leave payment. In any case the contract provided for 21 annual leave days with full pay and it was not his case that he was not paid or that he was entitled to a leave allowance. This head of claim is dismissed.

### ***Overtime***

41. Although it is the duty of an employer to keep employment records and produce the same in legal proceedings, the Claimant did not lay any contractual or legal basis on his work hours or how he arrived at the sum of Kshs 349,221/-. The Claimant had the benefit of legal advice and I dismiss this head of claim.

### ***Public holidays***

No evidence was led on which public holidays or which years the Claim for Kshs 33,579/- related to. This head of claim is also dismissed for similar reasons as those detailed in the preceding paragraph.

### ***Specific performance***

42. Section 12(3)(iii) of the Industrial Court Act empowers the Court to make an award of specific performance. Section 49(4)(d) of the Employment Act requires the Court to take into account the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

43. The Claimant did not present any exceptional circumstances to enable the Court exercise its discretion in his favour. This head of claim is also dismissed.

### ***Compensation***

44. Section 49(1)(c) of the Employment Act provides the equivalent of a number of months wages not exceeding twelve months gross wages as one of the primary remedies for unfair termination or wrongful dismissal. The remedy is discretionary. The Claimant in his prayers did not seek this remedy though there were references to it in the body of the Memorandum of Claim.

45. The Claimant did not lead evidence as to which of the thirteen factors set out in section 49(4) of the Employment Act the Court should consider.

46. Considering the length of service of the Claimant with the Respondent, I would award the equivalent of two months gross wages in the sum of Kshs 31,000/- as compensation.

### ***Costs***

47. Costs do not follow the event like is provided for under the Civil Procedure Rules framework. I was not addressed on the issue and therefore I decline to exercise my discretion in awarding costs.

### **Conclusion and Orders**

48. From the foregoing it is my finding and I hold and declare that although the dismissal of the Claimant was substantively fair the Respondent failed to comply with the requirements of section 41 of the Employment Act and therefore the dismissal was procedurally unfair.

49. In the circumstances I award the Claimant

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|-------------------------------------|---------------|
| a. Two months pay in lieu of Notice | Kshs 31,000/- |
| b. Two months wages as compensation | Kshs 31,000/- |

TOTAL	<b>Kshs 62,000/-</b>
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50. The prayers for severance payment, pending leave, overtime and public holidays are dismissed.

51. There will be no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 1<sup>st</sup> day of November 2013.**

**Radido Stephen**

**Judge**

**Appearances**

**Ms. Ogombe instructed Menezes, Oloo & Chatur Advocates for Claimant**

**Mr. Ngetich instructed by Timamy & Co Advocates for Respondent**