IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

P.P. Ooko & A.K. Kerich, Members.)

CAUSE NO.32 OF 1998.

KENYA AIRLINE PILOTS' ASSOCIATION .....Claimants.

- v -

KENYA AIRWAYS LTD.....Respondents.

Issue in Dispute:-

"Wrongful termination of services of Captain Theophilus Murimi Mwangi" (hereinafter called the grievant).

Gerald G. Asuna-Odero, Executive Secretary, for the Claimants (hereinafter called the Association).

Kiragu Kimani, Advocate, of Hamilton, Harrison & Mathews, Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

The Notification of Dispute in Form 'A', dated 9th March 1998, together with the statutory certificates from the Labour Commissioner and the Minister for Labour, under Section 14, subsections (7) and (9)(e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 8th April, 1998. The dispute was then listed for mention on 22nd April, 1998 and the representatives of the parties were notified to attend. On this occasion, Mr. Paul Ndivo appeared for the Company, but there was no appearance for the Association. In the circumstances, the matter was listed for another mention on 14th May, 1998, when Messrs. Odero and Kimani, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 12th June and 3rd July, 1998, and the dispute was fixed for hearing on 15th July, 1998. Mr. Odero belatedly submitted his memorandum on 2nd July, 1998, while Mr. Kimani filed his reply statement on 15th September, 1998. Consequently, the case was heard on diverse dates between 17th March, 1999 and 16th June, 2000, i.e. on 17th March, 4th and 11th June, 1st, 2nd and 7th September, 1999 and 17th March, 5th May, 9th and 16th June, 2000. The Company called three witnesses, namely, Mr. Rino Njoroge, Cabin Attendant, R.W.1, Capt. Joseph D. Kinuthia, R.W.2 and Capt. Patrick G. Musyoki, R.W.3, to testify on their behalf, but the Association did not call any witnesses.

I need not recount or refer to the mass of allegations in the parties' written memoranda or statements as they are not relevant

for consideration and determination of this case. Therefore, the issue in dispute is kept free from the chaff.

It was common ground that the grievant was initially employed by the East African Airways as a First Officer I (Co-Pilot) on 4th March 1977. He rose through the ranks from First Officer I on F.27 to a Captain on A310-300 at the time of his dismissal on 27th April 1995, allegedly on the ground that he unprofessionally operated flight No.KQ 103 from London to Nairobi on 20th October 1994, contrary to the required practice and without due regard to safety. He was also a senior Trustee of the Association at the time of his dismissal from service. The letter of his dismissal dated 28th April 1995, Ann. Q, states in *extenso* as follows:-

"Dear Capt. Mwangi.

Appeal Against Demotion.

I am instructed by the Board of Directors to convey to you the Board's decision on your appeal against demotion from Capt. A310 to F/O A310.

At its meeting held on 27th April 1995, the Board received and considered a report on the deliberations of the Staff Committee of the Board which heard your appeal on 12th April 1995.

The Board have discussed and reviewed this report in detail and also considered your exceedingly poor service record.

As a result, the Board was of the view that the disciplinary measure of demotion imposed on you by the Management was inappropriate and did not reflect adequately the gravity of your misconduct and your previous record. Consequently it was decided to terminate your services with effect from 27th April, 1995.

In view of the above you should contact the Head of Flight Operations to make arrangements to obtain company clearance so that any monies due to you can be paid.

Yours faithfully

For and on behalf of

Kenya Airways Ltd.

(Sigd.)

Brian Davies,

Managing Director".

The said Staff Committee of the Board had, after lengthy deliberations on this matter, upheld the decision of the Managing Director of the Company to uphold the demotion of the grievant. The relevant part of the Staff **Committee of the Board's report at page 8 states thus:-**

"Following lengthy consultations and review of evidence the Committee was of the opinion that there was no basis for interfering with the decision of the Managing Director to sustain the demotion of F/O Mwangi. In particular whatever substance there may be in the allegations of defective procedure and denial of natural justice, it was the view of the Committee that no miscarriage of justice had arisen as a result and that F/O Mwangi had been given ample opportunity throughout the enquiry and appeal process to assert and prove his defences to the allegations of having operated flight KQ 103 without due regard to safety of passengers".

The report of the Staff Committee of the Board was a culmination of a long series of purported enquiries, hearings and appeals arising from the recommendation of the airline's Fleet Manager in charge of Airbus A310 fleet, Capt. Joseph D. Kinuthia, that both the grievant and his Co-Pilot, First Officer, William P. Kehara, should undergo retraining and fly with an instructor as a result of their alleged poor airmanship with regard to handling of a scheduled flight KQ 103 from London (Heathrow Airport) to Nairobi on 20th October, 1994, Ann. B.

The Association took up the matter, on behalf of the grievant, with the Company; and consequent upon a failure of bilateral negotiations and agreement between the parties, they reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted or took cognizance of the dispute and appointed Mr. G.A. Omondi of Nyayo House Labour Office to act as the Investigator; and on the basis of the investigation report, Ann. C, which was released to the parties on 9th September, 1997, the Minister found, *inter alia,* and recommended as follows:-

"FINDINGS.

…….both parties are in agreement that Capt. Mwangi was employed by the Company as an Officer I on 4/3/77 though previously he was working for the then East African Airways in the same capacity. Between 1977 and 1987 Capt. Mwangi's file shows four cautions mostly concerned with duty relief and delaying of
flight. These however fade into inconsequence for the purposes of this case when viewed from time lapsed, the Limitation of

Actions Act as well as the Employment Act.

……between 1977 and 1987 Capt. Mwangi was upgraded/promoted six times from First Officer on F.27 to Captain A310-300 as at the time of his termination. He was in addition a senior trustee of his union namely Kenya Airline Pilots Association.

Capt. Mwangi was initially dismissed from the Company's service on 15/12/94 on the allegation that he operated flight KQ 103 from London to Nairobi on 20/10/94 in a manner contrary to the required practice and without due regard to safety.

…….upon arrival to Nairobi Capt. Mwangi was grounded by an Officer other than his Fleet Manager which is contrary to normal procedures though the latter had recommended for a retraining. His appeal against grounding led to several disciplinary measures which included *inter alia,* dismissal, suspension, demotion for six months on reinstatement to demotion for one year and finally to termination of service which was effected on 27th April, 1995.

……

…….this particular Aircraft had faulty fuel system and indeed the Chief Pilot issued flight notices advising all the pilots on the same. Though fuel spillage had been noticed at Heathrow Airport, the Aircraft had enough fuel for a normal flight directly to Nairobi and so was cleared by the Ground Engineers. However, during the flight, bleed valve no.2 malfunctioned thus forcing the Aircraft to be flown at a lower attitude (read altitude) with consequent increase in fuel consumption. Capt. Mwangi's decision in both cases have never been questioned or faulted. To that extent it would be misleading to impute that he showed poor airmanship.

Turning to the disciplinary measures meted upon Capt. Mwangi, it was noted that he was grounded for four months and any appeal only led to the enhancement of the punishment. Such increases in punishment on appeal and without introduction of new evidence is obviously not an act in good faith and in fact is contravention of the common law and the rules of natural justice. The Management has a right to discipline an employee but when the disciplinary measures become excessive and punitive, then the competent authority has a responsibility to take corrective measures. In this instant case, investigations found the management's action as too punitive and unfair labour practice therefore wrongful.

RECOMMENDATION.

……..I find the Management's decision to terminate Capt. Mwangi's services as too harsh and ought to be set aside. Consequently I recommend Capt. Mwangi's dismissal be reduced to normal retirement without loss of benefits for the period he has been out of employment to the date of recommendation".

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Association accepted the recommendation, but the Company rejected it on the ground that the Investigator did not take their submission into consideration, Anns. D and K.20. The Management of the Company, however, expressed some willingness to discuss the matter further with the Association with a view to reaching an amicable solution; but at a meeting held on 6th March 1998, the management stated that the decision to terminate the grievant was made by the Board and in the circumstances they had no powers to reverse or review the Board's decision. Hence this dispute for consideration and determination.

It was the case of the Association that during this period of the flight under consideration the relationship between them and the Company was poor and unfavourable for peaceful industrial co-existence due to a stalemate in the negotiations of their 1994 collective agreement which was pending in Court. Therefore, the officials of the Association were prime targets for unnecessary and unwarranted victimisations or disciplinary actions. Mr. Odero submitted that while refueling the aircraft, flight No. KQ 103, on the material day, i.e. 20th October 1994, at the parking bay at Heathrow Airport, London, the grievant, his Co-Pilot, F/O William P. Kehara, and the ground engineers noticed some fuel spillage from the valve tanks "due to a stuck auxiliary transfer valve", and any attempt to refuel it through the centre tank caused the fuel to spill via the vent tanks. It was, therefore, decided that so long as no attempt was made to refuel the trim tank, no spillage would occur; and since enough fuel for the flight was available in the wing tanks, the aircraft was declared safe or serviceable for the flight. As a result of the difficulty encountered while trying to refuel the aircraft, the flight was delayed and the cause of this delay was accordingly communicated to the passengers. During and after engine start and later on during push-back and taxing, no fuel spillage from the aircraft was noticed or observed by the ground engineers, who were better placed to notice such an occurrence because they were in continuous or constant radio contact with the flight deck (cockpit). Mr. Odero contended that had there been a fuel spillage from the aircraft, then there would have been a report from either the Air Traffic Control (ATC) ground inspectors or other aircrafts at the holding area (a place just before take-off point where aircrafts are normally stopped in close proximity to each other to await take-off clearance) since Heathrow Airport was a very busy and well-run airport.

Mr. Odero submitted further that the report alleging fuel spillage after engine- start was made by a nervous passenger through the Purser, who in turn informed the grievant. The grievant and the First Officer checked but did not notice any fuel spillage even upto the aircraft take-off. After all, the flight was at night and any untrained eye of a nervous passenger would mistake even a reflection from the tarmac or any other source for fuel spillage. It was, therefore, decided that the aircraft was safe for the flight, and there was no fuel spillage from take-off to the first landing at Rome, otherwise repairs to stop the fuel spillage would have been required and carried out at Rome. However, during the flight a valve known as "bleed valve No.2" failed, and the aircraft was, therefore, restricted to a flight ceiling of 29,000 ft. or below instead of the intended flight ceiling of between 33,000 ft. and 37,000 ft. In the circumstances, the fuel on board was found to be insufficient for a direct flight to Nairobi because an aircraft flying at such a low altitude would consume more fuel and obviously run out of it on the way and probably crash before landing in Nairobi. There were two safe options for the grievant – either to go back to London or to land at an enroute airport so as to pick up some more fuel for the rest of the flight to Nairobi. The latter was a more logical option, hence the landing in Rome, and this decision has never been proved wrong. He went on to submit that after landing in Rome, the aircraft developed some other unrelated technical snags or problems which had to be cleared as required by the regulations before continuing the flight to Nairobi; but there was no licenced engineer at the time to clear the aircraft after the "overweight landing", and the flight had to make an overnight stop (unscheduled technical stop) at Rome. The passengers were happy with the way they were treated by the grievant and the crew; and in order to appreciate this mood, I reproduce below a letter, dated 7th November 1994, Ann. A, from one of the passengers, a Mr. J.R. Davis, to the General Manager of the Company. The relevant part states:-

"We recently returned to Kenya on Kenya Airways flight no KQ 103, leaving London on the evening of Thursday 20th October. This aircraft was diverted to Rome for mechanical reasons and we would like to express our sincere thanks to Captain Mwangi and

his crew for all the trouble they took to see that we

…… were made as comfortable as possible in extremely difficult circumstances.

On arrival in Rome the Italian ground staff were on strike and consequently not at all sympathetic or co-operative. However, despite this Mr. Kamau of the Kenya Airways staff there, managed to arrange accommodation for some of us well after

midnight…….until we were ready to continue at 1.15 p.m. Friday 21st. The next day the crew had to clean the aircraft, load the food e.t.c., prior to departure…….

…….

We would be grateful, therefore, if you could express our thanks to all Kenya Airways Staff concerned and in particular Captain Mwangi, his crew and Mr. Kamau, for all trouble in seeing that their passengers…… were looked after so well under such difficult circumstances".

This letter was copied to Dez Etherington and the Chief Pilot of the Company. Mr. Odero said that had the grievant returned the aircraft to London, it would have been much more heavier than when it landed in Rome. The grievant procedurally reported the matter to the Engineer on duty in Nairobi; and on the following day, the aircraft was cleared by the ground engineers at Rome and the flight proceeded to Nairobi without any hitch or impediment.

Mr. Odero pointed out that on arrival in Nairobi on 21st October 1994, no repairs of fuel spillage were undertaken, and certainly no punitive measures were or were contemplated against the grievant by his Fleet Manager, Airbus A310. But on or about 9th November, 1994, he was removed from flight duties, without any communication to him, on the ground of poor airmanship. The Fleet Manager, Airbus, had actually recommended that both the grievant and the First Officer, William P. Kehara, should undergo retraining, which was quite normal for pilots, and it is normally done at least 3 times in a year. During the retraining, a pilot is required to fly with an instructor until the latter is satisfied that the pilot is quite competent to fly the aircraft on which he was being retrained. The grievant requested for a hearing so as to clear himself against certain statements contained in the Fleet Manager's letter, Ann. B, but the result of the subsequent enquiry and all appeals thereafter attracted punitive disciplinary measures, culminating in his dismissal on 28th April, 1995, with effect from 27th April, 1995.

Mr. Odero contended further that the management of the Company were, throughout the entire period of this episode, in breach of every rule of the industrial relations practice in the book. In particular, all the crew of flight KQ 103 were not suspended pending investigations as provided for under Clause 23(a) of the parties' collective agreement; and the purported subsequent enquiries led to unwarranted punitive disciplinary measures, without affording the grievant an opportunity, or proper opportunity, to defend himself, Ann. E. He stated that before, during and after the enquiry, the crew were never asked, contrary to normal procedure and standard practice, to furnish a report on flight KQ 103. After the grievant had asked for a hearing to clear his name against certain statements contained in the Fleet Manager's letter, Ann. B, the management of the Company suddenly turned the hearing to an enquiry, thereby suspending him from service, and he was not even given a copy of the precise charges against him prior to the enquiry, contrary to the provisions of Clause 23(a) of the parties' collective agreement. Mr. Odero averred that the Fleet Manager, Airbus A310, had taken action against the grievant without seeking clarification from, or audience with him, but he (Fleet Manager) consequently attempted to exonerate himself from any disciplinary action against the grievant, Ann. F. Furthermore, the composition of the Company technical enquiry panel was improperly constituted because the two officers who chaired it were not technically qualified, and also one of the technical members of the panel, i.e. Capt. Peter Mwaura, only appeared once
during the three sessions of the enquiry, leaving the Manager, Flight Training and Standards, as the only qualified pilot. In the circumstances, there was nobody to cross check the technical observations, findings and conclusions of the panel, and there is also no evidence that Capt. Mwaura's opinion of the enquiry was taken into consideration prior to the conclusions and recommendations arrived at by the technical enquiry panel. In any case, his (Capt. Mwaura's) signature does not even appear thereon, Ann. G.; and although the Manager, Flight Training and Safety, was not the chairman of the technical enquiry panel, he unilaterally compiled a report which was not countersigned by any of the other members of the panel, especially Capt. Mwaura, who is a qualified pilot. Therefore, the accusations and assertions contained in the report were never made available to the grievant before the appeal to the Managing Director; and he (grievant) was not given an opportunity to defend himself at the right time, Ann. H. It is stated that the said Manager verbally denied compiling the report, thus raising fears that he was used as a rubber stamp. The recommendations of the said enquiry, which was ordered by the Head of Flight Operations, Ann. I, were irregularly and unprocedurally sent direct to the Managing Director, by-passing both the Head of Flight Operations and the Technical Director; and there is no evidence to show that the Head of Flight Operations was consulted at all prior to the implementation of the recommendations. These recommendations were approved by the Managing Director; and if the grievant had been informed in time, he would have appealed directly to the Board. Mr. Odero went on to submit that, contrary to the rules and principles of natural justice and despite several requests, the enquiry report was never made available to the grievant, Ann. J, to enable him meet the charges; and when the Association interceded on his behalf for correction of certain omissions and errors in the report, their request was ignored, Ann. K. He emphatically contended that the Manager, Air Safety, was provided with facilities to travel to the scene of the alleged incident at Heathrow Airport, London, to conduct investigations and compile a report thereof, but no official of the Association was given such an opportunity or facilities to travel along with him as required under Clause 24(d) of the parties' collective agreement. Furthermore, the witnesses whose statements were solicited and considered by the Company from which the recommendations were made were not availed to the grievant for cross-examination, contrary to the provisions of sub-clause(b) of the said Clause; and the said investigations and findings were not concluded within 30 days, as provided for under Clause 23(d) and (f) of the parties' collective agreement. Therefore, the action taken against
the grievant should be treated as null and void. The said Manager, Air Safety, attended the first session only of the enquiry to

take minutes, but surprisingly he was included as a panelist in subsequent sessions. As regards the grievant's appeal to the Managing Director, Mr. Odero averred that the Association were surprised to learn that the Technical Director was instead used as, or assumed the role of, an investigating officer, contrary to the rules of natural justice, Anns. L and M.

Alluding to the state or condition of the aircraft, Mr. Odero submitted that, before and after the grievant's flight on 20th October, 1994, there were reported problems associated with the fuel system of this particular aircraft – e.g. the voyage reports, Anns.NI and N2, which were prepared by Capts. Mwaura and Musyoki, who participated in the grievant's enquiry, show that the aircraft had some serious hydraulic fuel problem but this did not warrant a disciplinary action against them because a professional pilot would be able to handle the problem satisfactorily. In this case at hand, therefore, the right action which would have been taken against the grievant was to retrain him, like any other pilots who had or would encounter similar problems. He pointed out that this particular technical problem had persisted because the
Technical Department had ignored for years to carry out modifications on the aircraft; and it was only after a near disaster, when on 3rd November, 1995, the same aircraft landed at Kilimanjaro Airport, with only 550 kgs. of fuel (1100 pounds) remaining, that the modifications were carried out, Ann.N3, and the Chief Pilot/Head of Flight Operations also issued a Fleet Notice, approving the action taken by the grievant of making a stop-over at Rome to uplift some more fuel. However, he said, the notice was hurriedly removed from the Notice Board because of the bearing and implication it would have on this case, but more notices have since been issued, advising pilots on fuel systems in this particular type of aircraft, Ann. O. Mr. Odero opined that it might have been the fear of victimization, like the grievant's, which made the pilots of the flight on 3rd November, 1995, not to make an enroute stop-over to uplift some more fuel; but, in the circumstances, ran out of fuel and only managed to make an emergency landing at Kilimanjaro Airport by the grace of God. No disciplinary action was, however, instituted against them.

Mr. Odero went on to submit that as an honest and responsible professional officer or pilot, the grievant personally reported the alleged fuel spillage or discrepancy, Ann. P, otherwise he would have kept quiet about it so as to escape any punitive action against him. Capts. Mwaura and Musyoki also reported the same defect, Anns. NI and N2, but no disciplinary action was taken against them. According to the letter of the dismissal, the grievant was dismissed for "exceedingly poor service record" and "the gravity of your misconduct and your previous record", Ann. Q; and this shows that the grievant was dismissed for other reasons, for which he was not given any warning letters, other than the alleged incident involving this particular flight under consideration. He pointed out that the grievant has had a good employment record as First Officer since the inception of the Company on 1st March 1977, and has since earned several promotions and commendations due to his good airmanship, Anns. A, R, S, T, U and V. The Association could not, therefore, understand why the grievant was blamed for diverting to Rome to uplift more fuel, and yet Capt. Musyoki, the then Manager, Training and Standards, who faced a similar problem and also diverted to the same station, was let scot-free, Ann. N2. Mr. Odero stated that since the alleged incident, the grievant has suffered the following excessive and unwarranted punishments:-

(a) he was grounded, i.e. removed from flying, for over four months;

(b) he was suspended on half pay for two months and yet the suspension period in terms of Clause 23(d) of the parties' collective agreement is 30 days;

(c) he was demoted five ranks since 15th February 1995 on flimsy and unproven allegations, and

(d) he lost his prestige on baseless allegations that he had knowingly flown an aircraft which was spilling fuel throughout from London to Rome.

On realising that the disciplinary procedure was not followed, the Company attempted to reduce the dismissal of the grievant to suspension, Ann.W, and consequently some members (pilots) of the Association interceded on behalf of the grievant, but the Company did not accede, Ann.X. Therefore, the dismissal of the grievant was against the labour laws, conventions and norms governing industrial relations practice.

In conclusion, Mr. Odero urged the Court to find that the enquiries and appeals were conducted contrary to the laid down procedure in the parties' collective agreement and without due regard to the rules and principles of natural justice; that the grievant's decision to commence the flight and divert it to Rome in order to uplift some more fuel was technically correct; that the grievant, who was a senior Trustee of the Association, was dismissed for his legitimate trade union activities; that the Company should apologise to the
grievant for wrongful accusation, character assassination and loss of reputation, and that the dismissal of the grievant was too

harsh, punitive and amounted to unfair labour practice.

Accordingly, Mr. Odero prayed that the grievant be reinstated forthwith to his command position in A310 fleet, without loss of benefits, privileges and fixed allowances e.t.c., from the date of his dismissal to the date of the Court award. Furthermore, the grievant be reimbursed all the amounts he has spent to-date to revalidate his licence.

In reply , the learned counsel for the Company, Mr. Kimani, strongly denied that the grievant was capriciously and maliciously dismissed by the Company for his legitimate trade union activities as he was only a Trustee of the Association whose responsibility was to oversee the functions of the Executive Council, Ann. KI. Admittedly, the trim tank could not have been refueled and any attempt to do so through the centre tank caused the fuel to spill via the vent tanks; but he averred, on the contrary, that the push-back was normally done by a tow truck, and it was not possible for the grievant to make any observations on fuel spillage during taxing. The engineers, he said, could not also tell whether or not there was any fuel spillage during taxing; but they

were best placed, during start-up and push-back, to observe whether there was any fuel spillage. Mr. Kimani pointed out that there are normally two groups of Air Traffic Controllers, namely, the ground controllers with binoculars, and those in the control tower, who rely on communication from the pilot through radio. The Air Traffic Controllers are normally busy looking after a number of aircrafts, and they will only keep a close watch on a particular aircraft if the pilot is a stranger to the airport or if the carrier (airline) does not ordinarily fly to Heathrow Airport. Therefore, they would not be able to see any fuel spillage as they are normally too far away from the aircraft. However, it would be possible for other aircrafts to observe heavy fuel spillage, but it would be very difficult to notice it at night due to impaired visibility, changing weather conditions and the nature of the fuel spillage, which would ordinarily be in a spray form.

In this particular case, Mr. Kimani submitted that the Senior Flight Steward (Cabin Attendant) on the flight, Mr. Rino Njoroge, R.W.I, was informed by a group of passengers, who were sitting at the rear of the aircraft, about some fluid that was running off the aircraft during taxing, and when he looked out of the window he saw a heavy flow of fluid. He immediately informed the Purser, the late Margaret Wamboi, who in turn reported to the grievant. But the Purser informed him, R.W.I., that the grievant was “very abrupt” with her as he was very busy preparing for a take-off, Ann.K2. There was no attempt by the grievant or the then First Officer, (now Capt.) William P. Kehara, to establish whether there was any spillage, contrary to the normal practice that a pilot should exercise extreme caution before take-off and indeed at all times. He stated that it was usual for the fuel to go down by between 250 kgs. and 300 kgs. before take-off, but in this case the voyage report, Ann. P, showed that over 400 kgs. of fuel was not accounted for while the aircraft was on the runaway, Ann.K3. In this case, he said, it would only have been safe for the grievant to take-off if he knew the source of the problem and how to arrest it; and since there is no evidence that the cause of the abnormal loss of fuel was established or ascertained before take-off, the grievant should have aborted the flight. Mr. Kimani submitted further that flying at a lower altitude would lead to an aircraft burning more fuel; but in this case, the fuel that the aircraft had at Heathrow Airport was meant for a flight at an altitude of between 33,000 ft. and 37,000 ft. above sea level. Therefore, if the grievant had carefully considered the situation while still at Heathrow Airport, then he would not have put himself, when he was airborne, in a position of having to either fly back to London or land at Rome, particularly when it is a fact that fuel leaks are dangerous and fire hazards, whether an aircraft is on the ground or in the air.

As regards the warning that the “bleed valve No.2” had failed, which came on while the aircraft was overflying Paris, Mr. Kimani contended that the grievant ought not to have proceeded to Rome in view of the fact that he was aware that this problem was not among the “acceptable deferred defects”, Anns.K4 and K5. He averred that the usual practice relating to flights is:-

(a) The Company’s Operations Department plans the flight;

(b) The pilot and the First Officer board the aeroplane for up to an hour before take-off.

(c) The pilot pulls out the acceptable deferred defects list which is on the plane for purposes of, *inter alia,* familiarising himself or herself with the peculiar problems of the particular aircraft.

(d) The pilot confirms that everything in the flight plan has been complied with before take-off.

(e) If the pilot considers it necessary, he will take up any point with the Operations Department.

In the light of what is stated hereinabove, the grievant ought to have known, therefore, that he would probably have to land in Rome; and it was for him to advise the Operations Department that he could not fly from London to Nairobi direct or non-stop.

On the disciplinary procedure, Mr. Kimani contended that the first enquiry was called at the request of the Association and the grievant, Anns.K6 and K7, at which it was decided to dismiss him, but the dismissal was suspended, Anns.K8 and K9. The grievant lodged an appeal to the Technical Director, who found that the dismissal was inappropriate and substituted it with, *inter alia*, a demotion of 6 months, Anns. K.10 and K.11. The Association and the grievant appealed against the Technical Director's decision to the Managing
Director, who decided to enhance the demotion from 6 to 12 months, Anns. K.12, K.13, K.14, K.15, K.16 and K.17. The grievant was dissatisfied with the Managing Director's decision and appealed to the Company's Board of Directors which, on consideration of the grievant's entire service or employment record, noted, *inter alia*, that on 24th January, 1978, the grievant failed to attend a link training; that on 19th November, 1978, he reported late for flight No. KQ.781; that on 18th November, 1979, the grievant could not be found at his house while he was on stand-by duty; that he was suspended for a while on 26th May, 1980; that he was absent from duty on 17th May 1981, and that he was not available for stand-by duties on 25th May 1981. Consequently, the grievant was dismissed from employment for "exceedingly poor service record" and "gravity of your misconduct and your previous record", on 28th April, 1995, with effect from 27th April, 1995, Ann.K.18. Mr. Kimani contended further that the appeal for clemency for the grievant by the 6 pilots to the Board of Directors did not affect the final decision arrived at by the said Board to dismiss him, and the same was accordingly rejected, Anns. X and K19; and that there is nothing in our industrial relations system to stop one tribunal from enhancing or altering a lower tribunal's decision. He denied that the Company hijacked the conduct of the enquiry or hearing, and the fact that the Fleet Manager, Airbus A310, Capt. Joseph D. Kinuthia, allegedly attempted to exonerate himself from subsequent disciplinary action against the grievant, was not borne out by his Internal Memo to Capt. R.N. Murani, which showed that the grievant had made a mistake, Ann. F. Mr. Kimani asserted that it was not for the Association to determine the composition of the panel of enquiry, and that Capt. Mwaura chose not to attend the other sessions of the panel largely due to the acrimonious manner in which they were conducted. In any case, he said, there is no evidence to suggest that the grievant was in any way prejudiced by the manner in which the panel conducted the enquiry, or that he was adversely affected because no representative of the Association accompanied the panel to either Rome or London, whose findings and recommendation were as follows Ann. G.:-

"(1) That the aircraft was operated in a manner contrary to the required practice and without due regard for safety. It is considered, therefore, that the crew (too) performed their duties wrongly.

(2) The behaviour of the crew towards their duty and the passengers they were carrying was such that it is considered that they willfully neglected the interests of the company and conducted themselves in a manner likely to bring the company's named into disrepute.
It is, therefore, recommended that Capt. Mwangi and First Officer Kehara be dismissed from the service of Kenya Airways".

Adverting or alluding to Clause 23 (d) and (f) of the parties' collective agreement, Mr. Kimani stated that the grievant, with the assistance of the Association, participated at all the stages of the enquiry, and it was for the Association to produce minutes which reflected the correct position if those produced by the panel were considered unsatisfactory, Ann. K.20A. He argued that there was nothing wrong for the Managing Director to seek the Technical Director's views on technical points when dealing or considering the grievant's appeal, and it is incorrect to suggest that the latter acted as an investigator. Mr. Kimani observed that, considering all the circumstances of this case, the grievant was "found wanting" and it was not enough to say that "other people have had similar problems and they were not dismissed". On fleet notices, he pointed out that the same are not placed on any notice boards, but are meant for pilots, and they are placed on the aircraft and in the operations room where pilots check in. Therefore, there is no question for them (notices) being removed. As regards the incident involving flight KQ 113 on 3rd January, 1995, Mr. Kimani stated that the same was investigated by the Manager, Air Safety, Mr. Ng'eny Biwott, who concluded that it was caused by:-

"(a) The loss of approximately 2,610 kgs. of fuel through the fuel vent system as a result of the failure of one or more of the non-return-valves on the right tank engine fuel-feed line or the right outer wing canister check valve or thermal expansion valves on the engine fuel-feed system.

(b) The non-availability of navigational aids adequate for CAT I operations and the failure of Air Traffic Controllers to provide prompt air traffic control services at Jomo Kenyatta International Airport".

He said that the acknowledgement of the extension of duty hours showed that the Company was not malicious, but appreciated good work or deeds of their pilots, whether or not they were union officials. On job appraisals and disciplinary procedure, Mr. Kimani submitted that an employee's record has to be looked at in its entirety, and the grievant's record was not an exception, considering that the industry is one that calls for the highest standards in the performance of one's duties, and pilots have an exceedingly sensitive job on which many lives and property of great value are always at stake whenever an aircraft takes off.

Finally, Mr. Kimani urged the Court to find that the incident which gave rise to this case was serious, and the grievant should

not have disregarded his Purser, and that he should have landed immediately while airborne as fuel leakage or spillage is a fire hazard. The Company was, therefore, entitled to dismiss the grievant in accordance with, or under, Clause 29(a) (c) and (e) of the parties' collective agreement.

Mr. Rino Njoroge, R.W.I, who was a Cabin Attendant and an Assistant Purser at the material time in charge of economy class, told the Court in his examination-in-chief, *inter alia,* that the flight was an evening one, which was to depart at 7.15 p.m. but it departed one hour later, i.e. at 8.15 p.m., presumably because of heavy fuel leakage or spillage from the tip of the left handside wing. He said that a passenger, who was a member of Spanish tourists in the economy class and sitting on the rear left-hand side behind the wing, called him and drew his attention to the fuel leakage or spillage. He informed the Purser, the late Margaret Wamboi, about it, who told him that she would inform the grievant. The Purser informed him, R.W.I, later that the grievant was aware about it. He, R.W.I, went to the said passenger and assured him that there was nothing to worry about; but about 45 minutes after take-off, the Purser informed him, R.W.I, that there would be a stop-over at Rome because of a technical problem, and this was confirmed by the grievant who also made a similar announcement.

On cross-examination, Mr. Njoroge told the Court that he had witnessed some fuel leakage or spillage before, i.e. when an aircraft was being refueled. In the instant case, he said that he did not notice the leakage or spillage during taxing, but it was the passenger who had alerted him about it at the take-off point. The leakage or spillage was coming from the tip of the wing; but since the flight was at night, he was unable to see whether the leakage or spillage had stopped. When he was asked who between him and the grievant had a better view of the alleged fuel leakage or spillage, he said that he would not tell or did not know. He, however, said that he did not notice fuel leakage or spillage between London and Rome, and he was not aware whether some repairs were carried out on the aircraft at Rome. Mr. Njoroge stated further that the passengers stayed over-night at Rome and that the aircraft was refueled thereat, but he did not notice any fuel leakage or spillage either at Rome or during the entire flight from London/Rome/Nairobi. On a question put to him by Capt. Ngunjiri, the witness told the Court that one cannot differentiate between water and fuel on the ground when one notices it from inside an aircraft; but the ground engineers would be in a better position to tell the difference between them. He was not, however, aware whether the ground personnel monitored the movement of the aircraft before take off, but opined that the ground engineers must have told the grievant about the leakage or spillage while the aircraft was at the barking bay, and he saw the leakage or spillage at the holding ground. On another question put to him by Capt. Mutungi, the witness said that he concluded that the leakage or spillage was fuel because it was coming from the same place where it had leaked at the barking bay; but since the flight was at night and winter, he was unable to see any leakage or spillage during the flight.

Capt. Joseph D. Kinuthia, R.W.2, told the Court in his examination-in-chief that he was employed by the Company as a Cadet Officer in May 1978, although he had been flying since 1976. He became First Officer in the same year and a Capt. in 1983. He has had 12,000 hours flying experience to his credit, and in 1994 he was the Fleet Manager in the airbus A310 fleet, with about 70 pilots under him, including the grievant. He had flown airbus A310 for 7 years, and his duties included being in charge of the pilots and aircrafts, and also to propagate the Company's policy as regards safety. He said that Ann. B of the Union's submission was a summary of his views on the alleged incident at Heathrow Airport and the voyage report, wherein he decided and recommended that the grievant should undergo retraining as a corrective, and not punitive, measure. He pointed out that the First Officer, Mr. William P. Kehara, went for retraining but the grievant did not take it immediately because he wanted to attend to a domestic problem first. Consequently, the Association requested for an enquiry in this matter, but he did not participate in it. He, however, came to learn later that the grievant's services had been terminated. Capt. Kinuthia deponed further that he wrote Ann. F. of the Association's submission because he believed that the problem could have been sorted out by retraining the grievant, and he has not changed his mind about it. After all, he said, pilots go for retraining as a matter of normal procedure. Regarding the incident that took place at Kilimanjaro Airport on 3rd November, 1995, Capt. Kinuthia told the Court that it involved the same aircraft whose pilots were Capts. S.F. Mwangi and D.N. Kandia. The aircraft had lost fuel while airborne and the pilots could not land in Nairobi because of bad weather, but they had enough fuel to eventually fly back to Nairobi. Capt. Kinuthia said that the difference of the two incidents was that in this case the aircraft lost fuel while on the ground; and in the Kilimanjaro case, the aircraft lost fuel airborne. On a question put to him by Capt. Mutungi, he said that he had been an instructor on four different aircrafts for about 13 years; and regarding minimum fuel, he said that it was up to the pilot to ascertain that he had enough fuel to cover the flight, otherwise he should pick up or lift some more fuel. Capt. Kinuthia said that "venting" means fuel coming overboard, but he has never heard of an aircraft consuming 100 kgs. of fuel between barking bay and take-off points.

On cross-examination, Capt. Kinuthia told the Court that there were three types of aircraft during his tenure as Fleet Manager, and there were also cases of fuel problems at the same time associated with them. He said that the grievant had more hours than himself (witness) at the time of his dismissal. On the fleet notices, Capt. Kinuthia deponed that the same were issued to all the pilots when the need arose, and his job was only to convey the Company policy to them and advise on remedial measures. He, however, conceded that there were no repairs to the aircraft consequent upon the problem that the grievant had at Heathrow Airport and the same was not also withdrawn. Regarding Capt. Mwaura's voyage report, Ann.NI, Capt. Kinuthia said that he did not take any action because it was not brought to his attention; and he confirmed that the First Officer, Mr. (now Capt.) William P. Kehara, went for the retraining and was still in employment, but the grievant was suspended before he was able to undertake the retraining. He explained the implications of fuel policy, e.g. taxing, contingency and ghost, venting fuels, but stated that if a pilot has a minimum fuel he can take-off. Capt. Kinuthia did not, however, understand why the grievant was suspended and finally dismissed and yet he had agreed to undergo retraining.

Capt. Patrick G. Musyoki, R.W.3, told the Court that he was employed by the Company in 1977, although he had been flying

since 1970. He was now a Captain on airbus fleet, A310. In October 1994, he was the Manager, Training and Standards. He said that the yardstick of a pilot's experience was the number of hours flown, and he himself had flown approximately 13,000 hours, out of which 5,000 hours were in the airbus since August, 1985. He said that he was a member of the enquiry panel which visited all the stations, i.e. London, Paris and Rome, and compiled a report, but the Association objected to it. He said that the grievant was wrong to have left London (Heathrow) with minimum fuel and flown at 29,000 ft. when the fuel was leaking or spilling. In his opinion, he said, the grievant, though his performance was wanting, should not have been terminated from service but retrained. Capt. Musyoki said he faced the same problem airborne, but the
leakage or spillage from the bleed valve was stopped. He pointed out that retraining of pilots was not punitive, but a normal procedure, and it did not cost them anything.

On cross-examination, Capt. Musyoki said that he had trained the grievant; and although he did not see any report on the alleged incident, he felt that there was no need for an enquiry. The grievant was, however, given an opportunity to appear and defend himself before the enquiry panel.

Accordingly, Mr. Kimani prayed that the demands by the Association be rejected.

In this case, the services of the grievant, who was one of the senior pilots in the Company's establishment and a Trustee of the Association, were dispensed with on 28th April, 1995 with effect from 27th April, 1995, consequent upon the Board of Directors' meeting held on the previous day, i.e. 27th April, 1995, that was apparently convened to receive and consider a report on the deliberations of the Staff Committee of the Board (hereinafter referred to as the Committee), which heard the grievant's appeal on 12th April, 1995, R. Exh.I. During the course of the proceedings of the said Committee, the grievant and Capt. Kinyanjui were excused from the meeting and the Committee invited the Managing Director, Mr. Brian Davies, to the meeting and sought his comments on various allegations made to it (Committee) by the grievant and Capt. Kinyanjui. The Managing Director responded as follows:-

(a) "There is no substantive difference between fuel venting and fuel spillage. Loss of one ton of fuel is excessive by a large margin considering that APU burn-off could not have exceeded 150 kg. in the period between push-back and take-off.

(b) The A310 Fleet Manual recommends investigation of any suspicion of fuel loss on the ground before take-off and during flight. Clearly the report by cabin crew should have been investigated.

(c) The aircraft had been repaired to rectify the fuel spillage problem by replacing the unserviceable transfer valve.

(d) An overweight landing must be recorded in the techlog by the Captain. Not to do so is a serious omission. He is not aware that
F/O Mwangi had been forgiven by the Technical Director for the omission and such "forgiveness" could not constrain him or the Board from taking action on the matter.

(e) F/O Mwangi's service record is not as good as asserted by him and he would provide the Committee with a summary of F/O Mwangi's service record.

(f) F/O Mwangi's assertion that it was he or KALPA who initiated the enquiry is not correct. He recalled having instructed A310 Fleet Manager Capt. Kinuthia to review the flight but admitted Capt. Kinuthia's investigation was not exhaustive.

(g) F/O Mwangi did not consult Station Manager Rome regarding a nightstop instead of a refuel techstop and walked off the aircraft and went to the crew hotel".

In conclusion, the report of the Committee ran as hereunder:-

"The Committee thereafter excused the Managing Director from the meeting in order to consider and deliberate on the several grounds of appeal and the evidence adduced in support thereof. Following lengthy consultations and review of evidence the Committee was of the opinion that there was no basis for interfering with the decision of the Managing Director to sustain the

demotion of F/O Mwangi. In particular whatever substance there may be in the allegations of defective procedure and denial of natural justice, it was the view of the Committee that no miscarriage of justice had arisen as a result and that F/O Mwangi had been given ample opportunity throughout the inquiry and appeal process to assert and prove his defences to the allegations of having operated flight KQ 103 without due regard to the safety of passengers.

It was agreed that as soon as the record of the proceedings was ready, including additional comment by Management on the appeal documentation, M/S. Kilonzo and Kapila would prepare a recommendation to the Board on that basis……".

There is no evidence on the record to show what "additional comment by the Management on the appeal documentation" and "recommendation" were made by the Committee to the Board of Directors. But it would appear that the only relevant comments made by the Managing Director to the Committee, which weighed heavily in the minds of the members of the Board of Directors, were allegedly the gravity of the grievant's misconduct and also his exceedingly poor past or previous service or employment record, Ann. Q.

It is not, however, shown how the grievant's past or previous service or employment record became "exceedingly poor", except that at page 26 hereinabove the Company alleged that the Board of Directors noted, *inter alia*, that on 24th January, 1978, the grievant failed to attend a link training; that on 19th November, 1978, he reported late for flight No.KQ 781; that on 18th November, 1979, the grievant could not be found at his house while he was on stand-by duty; that he was suspended for a while on 26th May, 1980; that he was absent from duty on 17th May, 1981, and that he was not available for stand-by duties on 25th May, 1981. There is no evidence on the record to support these allegations; but if indeed the grievant committed the alleged offences or misconducts, then presumably disciplinary action was taken against him in each case, and the same are, therefore, not relevant in the present case because these offences or misconducts were allegedly committed over 20 years ago. It is clear that the Committee, the Board of Directors and the Managing Director, engaged in a combing or searching spree of the grievant's past or previous service or employment record and attempted to gild the lily and dredge up all sorts of shortcomings in order to justify the dismissal of the grievant. There are dangers in this approach, as shown by *Smith v. City of Glasgow D.C. (1987) I.R.L.R. 326, HL.* Here the employers alleged that the employee had been dismissed for incapacity, evidenced by three specific allegations of incompetence. The employment tribunal considered that one of these allegations could not be substantiated. In these circumstances, the House of Lords held that the dismissal was unfair: the employers had not shown that the unsubstantiated allegation did not form a main part of their reason for dismissal, and it could not be reasonable to dismiss an employee for a reason which could not be supported. In any case, the letter of dismissal to the grievant did not contain any particulars of the alleged past or previous offences, and it was, therefore, not possible for him to meet the charges, if any, as regards his alleged past or previous misconduct. In the circumstances, it is not possible for me to uphold the action taken by the Management of the Company against him on the ground of his past or previous service or employment record.

The learned counsel for the Company submitted that the grievant was dismissed in accordance with or under Clause 29(a)(c) and (e) of the parties' collective agreement, which state as follows:-

"29. Dismissal.

The Company may dismiss an employee from service if it is satisfied that the employee has committed, *inter alia*, the following offences:-

a) Wilfully neglecting the interests of the Company.

b) ……

c) Conducting himself in a manner likely to bring the Company's name into disrepute.

d) ……

e) Neglecting to perform Company's duties or performing them wrongly.

f) ……

g) …….

h) ……".

The grievant was suspended, demoted and finally dismissed for poor airmanship or on the ground that he unprofessionally operated or handled flight No.KQ.103 from London to Nairobi on 20th October, 1994, contrary to the required practice and without due regard to safety of the passengers. According to the learned counsel for the Company, Mr. Kimani, some of the instances of the alleged negligence were that the grievant did not heed the warning by the Purser that fuel was heavily leaking or spilling from the aircraft; that he did not utilize ground aids, especially the ground engineers, to assist him in finding out, or to establish, the abnormal loss of the fuel; that he risked a crash and loss of life by continuing with the journey or flight with a defective or unairworthy aircraft; that he should have aborted the flight; that he flew at a low altitude, thus burning more fuel; that he should not have diverted to Rome without informing the Operations Department that he was unable to fly from London to Nairobi direct or non-stop; that the grievant should have returned to Heathrow Airport; that, on official enquiry, the grievant was found not to have consulted the Station Manager, Rome, regarding a nightstop instead of a refuel techstop, and that he walked off the aircraft and went to the crew hotel, e.t.c. All the above allegations were strenuously denied by the Association; and, on the contrary, maintained that the plane or aircraft was mechanically perfect and fully airworthy when it left London for Nairobi as it was certified and cleared by the ground engineers who found and declared that the plane or aircraft was serviceable and safe to depart. While airborne, however, bleed valve No.2 failed or malfunctioned, thus forcing the grievant to fly at a low altitude, with consequential increase in fuel consumption.

The alleged incident was investigated by a panel of enquiry, comprising of Head of Personnel, Mr. B. Mtuweta, Manager, Fleet Standards, Capt. Musyoki, and Manager, Air Safety, Mr. N. Biwott, who visited London and Rome, without the inclusion and participation of a representative of the Association, Ann. G., contrary to the provisions of Clause 24(d) of the parties' collective agreement, which states as follows:-

"24. Inquiry and Accident Investigation.

a) ……

b) ……..

c) ……..

d) A nominee of the Association who is an employee of the Company will be given normal facilities to travel to the scene of the incident under investigation by the relevant aeronautical authority, and will in this respect, be eligible for duty travel allowance as if he was on duty. However, if the nominee is not an employee of the Company, the Company will provide him with an air ticket on Kenya Airways services up to the airport nearest to the scene of the incident. Such nominee, shall be afforded access to any information in possession of the Company's investigation team at all times".

The Association contended that, contrary to the rules and principles of natural justice and despite several requests, the enquiry report was never made available to the grievant to enable him meet the charges, and the Company also ignored their request for correction of certain omissions and errors in the report. But the Company argued that there was no evidence to suggest that the grievant was in any way prejudiced by the manner in which the panel conducted the enquiry, or that he was adversely affected because no representation of the Association accompanied the panel to either Rome or London.

A perusal of the said Clause 24(d) of the parties' collective agreement would show that it was mandatory that a nominee of the Association be entitled to normal facilities and be eligible for duty travel allowance; or, if the nominee was not an employee of the Company, that he would be entitled to an air ticket and be afforded to any information in the possession of the Company's investigation team at all times. In this case at hand, the question for determination is the validity of the dismissal of the services of the grievant.

Undoubtedly, it was a matter of a *quasi*-judicial character. Moreover, minimum norms of justice and fairplay are not confined to proceedings in the corridors of Courts of law only. They extend to, as was said in relation to a right of hearing by the late and noble Lord of the Supreme Court of Pakistan, **Mr. Justice M. Shahabuddin,** who later on became the Chief Justice of Pakistan, in the case of *Chief Commissioner, Karachi and another v. Mrs. Dinah Sohrab Katrak, P.L.D. 1959 S.C. (Pak.) 45,* all proceedings, by whomsoever held, which may affect the person, the property or other rights of the parties concerned in the dispute. In the Privy Council case of *Tumahole Bereng and others v. The King, P.L.D. 1949, P.C. 47,* a person expecting to be called as an assessor, in good faith, went to see the physical features of the spot and material aspects of the case with one party in the absence of the other, and his subsequent participation in the proceedings was held to invalidate the trial. **Lord MacDermott** held that:-

"as has been so often said, justice must not only be done but must manifestly be seen to be done. In their Lordships' opinion, Mr. Driver's conduct was such as to cause doubt in the public mind as to the complete impartiality of the proceedings in which he subsequently took part. As counsel for the Crown said when dealing with this aspect of the case, it has not been shown that what Mr. Driver did before the trial prejudiced the appellants. But it might well have been thought, when his activity became known, that he had come to Court with a biased mind in the sense of having a definite view as to what had occurred or as to the credibility of the witnesses whom he had observed or questioned. It might also have been thought that he had been told more than could be legally proved, or that his interrogation of an accomplice might have had an effect upon the story as told by that witness afterwards at the trial. All these, of course, is in the realm of conjecture, but where the irregularity complained of may reasonable engender suspicions of this nature, it cannot be left out of account, particularly when as here, the opinion of the officer could have been communicated to the Judge in private".

In my view, the contention of the Association has great force because it is obvious that the investigation by the management's panel of enquiry, without the inclusion and participation of the Association's nominee, certainly engendered suspicion in the minds of the grievant himself and the Association that he was not being meted out even-handed justice.

Turning now to the disciplinary procedure as a whole, the grievant was removed from flight duties for over four months, suspended on half pay for two months on the ground of poor airmanship, contrary to the provisions of Clause 23(d) and (f) of the parties' collective agreement, demoted and eventually dismissed from service, on 28th April, 1995, with effect from 27th April, 1995, without being furnished with a copy of the precise charge or charges and also without being accorded or afforded an opportunity, or a reasonable opportunity, to defend himself; and all subsequent enquiries and appeals attracted punitive disciplinary measures or enhanced punishment. But the learned counsel for the Company, Mr. Kimani, averred on the contrary that the grievant was given every and ample opportunity to appear and defend himself, and no manner of injustice was done to him, and that the grievant has no legitimate ground for any complaint.

In all the recognised elementary disciplinary rules applicable in departmental enquiries, the first requirement at the commencement of the enquiries is that in order to make aware the person affected, a preliminary enquiry should be conducted through an independent enquiry officer and then proper or specific charge or charges be framed against the accused officer. Clause 25 of the parties' collective agreement deals with disciplinary measures. It runs as follows:-

"25. <u>Disciplinary Measures.</u>

Where the charge(s) against an employee is/are proved, the Company may, inter alia, impose the following measures:-

a) Issue the employee with a warning letter.

b) Deferment, stoppage or withholding of an increment for 12 months.

c) Demotion in rank.

d) Suspension on half pay for one month.

e) Termination.

f) Dismissal."

The word "may" in between the words "Company" and "inter alia, impose", according to its natural meaning is a permissive or enabling word and imports discretion. Therefore, when the Management of the Company decided to institute enquiries against the grievant for the sake of justice, then it was also obligatory or mandatory on them to prepare precise or specific charge or charges against him, and the word "may" under reference should read as "shall" so as to include some other essential steps in the enquiries on the grounds of the principles of natural justice, which have been crystallised into four principles of justice, namely, (1) opportunity for both the contesting parties to be heard, (2) hearing before an impartial tribunal so that no man can be a judge of his own cause, (3) decisions made in good faith, and (4) an orderly cause of procedure. It would, therefore, be sufficient requirement of the principles of natural justice and the law if an employee is informed as to what is or are the charge or charges against him; that he is given a copy of the enquiry report and an opportunity to be present at the time when the witnesses for the employer are examined against him; that he is allowed to cross-examine the witnesses against him and to produce his own witnesses and to say whatever he wants to say in the light of the evidence against him, and that he should be heard in person before the impugned final order of dismissal or termination is passed.

I have carefully read and given anxious thought to the submissions of the parties, and the documents on the record, especially the enquiry proceedings, and I find that there was no proper enquiry and no precise or specific charge or charges were framed against the grievant; that every appeal lodged by the grievant attracted enhanced and punitive punishment without giving him an opportunity or sufficient opportunity to personally defend himself; that the Company relied heavily on past and stale service or employment record of the grievant to justify his dismissal; that the dismissal of the grievant was clearly discriminatory and selective as his First Officer, William P. Kehara, who has since been promoted to a Captain, and the crew, and Capts. Joseph D. Kinuthia, R.W.2, and Patrick G. Musyoki, R.W.3., who were faced with a similar problem on 3rd November, 1995, were not subjected to any disciplinary action and are still in employment; that the Company negligently omitted to maintain or rectify the defects in this particular plane or aircraft, which had a history of air unworthiness due to perennial fuel problem, in good and sound condition; that the entire evidence on the record does not cast any aspersion against the grievant, and in fact Capts. Kinuthia and Musyoki admitted that the decision to dismiss him was not the right one; that the unsubstantiated allegation of heavy fuel leakage or spillage, especially during the flight from London to Rome, was not supported by any evidence worth its name, e.t.c. In its report, the Committee, recognised or acknowledged the fact that there might have been some "substance…… in the allegations of defective procedure and denial of nature justice" to the grievant during the course of the enquiry, and the grievant was denied a copy or copies of "the record of the proceedings" and "additional comment by the Management on the appeal documentation" and "recommendation by the Committee to the Board of Directors", who eventually decided to dismiss the grievant from service. The Managing Director did not also afford the grievant an opportunity of being heard, or to defend himself before he was finally dismissed from service.

The maxim: *audi alteram partem* (no man shall be condemned unheard) is one of the golden threads of our jurisprudence, and is not confined to proceedings before the Courts of law only, but extends to all proceedings, by whomsoever held, which may affect the person or property or other rights of the parties concerned in the dispute. As a just decision in such controversies is possible only if the parties are given the opportunity of being heard, there can be, as regards the right of hearing, no difference between proceedings which are strictly judicial in nature and those which are in the nature of judicial proceedings though administrative in form. This rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases, this requirement is to be implied into it as the minimum requirement of fairness (see *Halsbury's Laws of England, 3rd Edition, Vol.II, pp. 55-56* and *Mrs. Dina Sohrab Katrak, P.L.D. 1959 S.C. (Pak.) p.45 at p.50 (supra)).* The principle was restated in *Grimshaw v. Dunbar (1953), I.Q.B. 408 at page 416,* by **Jenkin, C.J.** in the following words:-

"A party to an action is *prima facie* entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses and he is entitled to call his own witnesses and give his own evidence…….. *Prima facie* that is his right, and if by mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to the other parties, but that that litigant ……. should be allowed to come …… and present his case."

In this case, the Committee members, who made a recommendation to the Board of Directors, were also members of the said Board, which decided to dismiss the grievant without giving him an opportunity or a reasonable opportunity to state his case, or to be heard, before the final punishment of dismissal was passed. *In Rex v. Sussex Justices, Ex Parte McCarthy, (1927), 2 K. B. 476,* **Swift J.,** observed that "nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice". It would be asking too much from a person placed in the position of the grievant not to have had a suspicion that he was not getting justice when the proceedings against him were conducted in that fashion. The panel of enquiry, Management of the Company, Committee and the Board of Directors broke or ignored every rule in the book.

For the foregoing reasons, I set aside the dismissal of the grievant, and in accordance with the powers conferred upon this Court by Section 15(1)(i) of the Act, I AWARD and ORDER as follows:-

(a) That the grievant be reinstated forthwith and unconditionally to his job, with continuity of service and seniority, including promotion, with effect from 27th April, 1995.

(b) That he be paid his full salary and be accorded all other benefits, allowances and privileges with effect from the said date.

(c) That he be reimbursed any expenses incurred by him in revalidating his licence to-date.

Before I part with this case, I wish to observe that the grievant would appear to be a talented pilot who has made significant contribution to the success of the Company during its initial and most difficult stages of development, and I am inclined to believe that whatever may have been his shortcoming in the past, the suffering he has undergone during the period of absence since his suspension and subsequent wrongful dismissal must have had a chastening and beneficial effect on him. In the circumstances, I am confident that given the proper guidance, sympathy and encouragement by his superiors he would be able to make greater contribution to the success of the airline.

I have sought and considered the advice or opinion of both members of the Court in making this decision.

DATED and delivered at Nairobi this 29th day of November, 2002.

Charles P. Chemmuttut,

JUDGE.