Kenya Airways Limited v Nyamor & another (Civil Appeal 332 of 2018) [2023] KECA 521 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 521 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 332 OF 2018

DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA

MAY 12, 2023

BETWEEN

KENYA AIRWAYS LIMITED ..... APPELLANT

AND

CAPTAIN JORAM NYAMOR ..... 1ST RESPONDENT

CAPTAIN ALI HERSI IDLE ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Monica Mbaru, J.) delivered on 12th June 2017 in E.L.R.C Cause No. 1621 of 2015.)

JUDGMENT

Introduction

1. This is an appeal from the judgment of the Employment and Labour Relations Court at Nairobi, (ELRC), (Monica Mbaru, J.) dated 12th June 2017. The background to that judgment is that, by a Statement of Claim filed on 17th September 2015, the respondents instituted a suit against the appellant seeking, inter alia, compensation for unfair termination of employment on account of alleged forced early retirement.

The Respondents' Claim before the Trial Court.

2. The 1st respondent further stated that they, on or about 29th May 1985, he was employed by the appellant as a pilot in the position of a second officer with effect from 2nd June 1985 at a starting salary of K£2,544 per annum plus a housing allowance of K£1,200 per annum, among other benefits. The 2nd respondent was employed on 3rd January 1984 on similar terms as the 1st respondent.

3. The respondents worked diligently over the years and were consistently rewarded for their good performance by their employer. They reached the position of Captain. The 1st respondent's

salary as of March 2015 was Kshs.1,387,431.00 per month while the 2nd respondent's salary was Kshs.1,396,579.00 per month. The respondents alleged that in February 2015, they got to know through a document known as "The Directors Bulletin" that the appellant was facing financial difficulties and had initiated measures to reduce its overheads. Among the measures contemplated was the sale of a part of the appellant's fleet known as Boeing 777 by May 2015. The said aircrafts were at time flown by the respondents and seven other pilots. The implication of the intended sale of the said aircrafts was that the services of the respondents would no longer be required by the appellant. The respondents therefore expected that they would be declared redundant as per the Collective Bargaining Agreement ("CBA") between the appellant and the pilots' union.

4. However, on 9th March 2015, the respondents received letters from the appellant retiring them forcefully before they attained the lawful retirement age of 65 years as stipulated in the CBA. At that date, the 1st respondent was 63 years old, whereas the 2nd respondent was 62 years old.

5. The respondents contended that there was no due process in terminating their employment, and, therefore, the termination was unfair and amounted to forced early retirement, and was in violation of their rights under the *Employment Act*.

6. Consequently, they sought the following reliefs:

For the 1st respondent

i. A declaration that termination of his employment as conveyed by the appellant in its letter dated 9th March 2015 was unfair, wrongful and unjust.

ii. An order that the appellant pays him aggravated damages for unfair termination of employment as contemplated in section 12 (3) (vi) of the *Industrial Court Act*.

iii. An order that the appellant pays him 12 months' salary at the rate of Ksh.1,387,431 per month.

iv. A declaration that the termination of employment amounted to redundancy and thus award the 1st respondent as per Clause 45 (c) of the CBA.

v. 6 months' salary in lieu of notice.

vi. Severance pay at 20 days' salary for the number of years worked, thus: 2/3 x 1,387,431 x 30 = 27,748,620.

vii. Prorated leave for 30 days-Kshs.1,387,431.

viii. Full Provident Fund benefits in accordance with Staff Provident Rules.

ix. Air passages on company routes for employee and his/her spouse, children and freight entitlement up to 1,000 kgs in accordance with the Staff Travel Regulations.

x. Rebated travel entitlement for himself, spouse and children in accordance with the Staff Travel Rules.

xi. Instruments rating renewal check or pay in lieu thereof.

xii. ESOP shares in accordance with the ESOP Rules.

xiii. Full salary from the date of breach of employment, contract to the date of intended retirement at 65 years; thus: 2 years left x 12 months, thus Ksh.33,298,344.

xiv. Costs of the suit.

xv. interests at court rates on all the above prayers.

For the 2nd respondent

i. A declaration that termination of his employment as conveyed by the appellant in its letter dated 9th March 2015 was unfair, wrongful and unjust.

ii. An order that the appellant pays aggravated damages for unfair termination of employment as contemplated in section 12 (3) (vi) of the *Industrial Court Act*.

iii. An order that the appellant pays him 12 months' salary at the rate of Ksh.1,387,431 per month.

iv. A declaration that the termination of employment amounted to redundancy and thus award as per Clause 45 (c) of the CBA.

v. 6 months' salary in lieu of notice.

vi. Severance pay at 20 days' salary for the number of years worked, thus: 2/3 x 1,387,431 x 30 = 27,748,620.

vii. Prorated leave for 30 days-Kshs.1,387,431.

viii. Full Provident Fund benefits in accordance with Staff Provident Rules.

ix. Air passages on company routes for employee and his/her spouse, children and freight entitlement up to 1,000 kgs in accordance with the Staff Travel Regulations.

x. Rebated travel entitlement for himself, spouse and children in accordance with the Staff Travel Rules.

xi. Instruments rating renewal check or pay in lieu thereof.

xii. ESOP shares in accordance with the ESOP Rules.

xiii. Full salary from the date of breach of employment, contract to the date of intended retirement at 65 years; thus: 3 years left x 12 months thus Kshs.1,387,431 Ksh.33,298,344 coming to Kshs.49,947,516.

xiv. Costs of the suit.

xv. interests at court rates on all the above prayers.

The Appellant's Defence before the Trial Court

7. The appellant filed a Statement of Response to the statement of claim under protest. It admitted that the respondents were pilots in B777 fleet of aircrafts and were also members of Kenya Airlines Pilots Association ('KALPA'); that the B777 aircrafts are the largest aircrafts among the appellant's fleet of aircrafts and their pilots are the longest serving and the best paid; that it was a matter of public knowledge that the appellant had been bedevilled by serious financial problems caused by a substantial

drop in passenger volume attributed to a number of factors, among them terrorist attacks in Kenya, intentional persistent campaigns by Western countries advising their citizens not to travel to Kenya, and Ebola epidemic scourge that afflicted West African countries, one of the major destinations of the airline and which had led to flight cancellations or withdrawals.

8. The appellant further stated that because of the slump in the volume of passengers, it became increasingly difficult for it to fill its B777 aircrafts with passengers, and therefore it became uneconomical to keep them in service. As such, a decision was made to dispose of the aircrafts; that the deterioration in the airline business performance and the decision to dispose of the B777 aircrafts was notified to KALPA as early as mid-2014; that the airline notified KALPA in writing of its intention to dispose of B777 aircrafts and terminate the services of their pilots; that the appellant intended to offer all B777 pilots employment in the next lower capacity aircraft in its fleets, that is B787 and B737, save for 4 pilots who were due for retirement in 2016.

9. The reason for not retraining the four pilots was stated to be that: "by the time they would have been trained to re-adjust to the lower capacity fleets four months would have elapsed and, even if there would be a few months for them to serve in the new fleet, the value of such service would not have justified the costs incurred in their retraining."

10. The appellant further stated that it intended to have the redeployed pilots paid salaries equivalent to that paid to pilots manning the new fleets, but if KALPA and the respondents were not willing to accept the reduced pay, they would be retired in accordance with Clause 34(b) of the CBA. KALPA opposed the payment of the lower salaries scale as proposed by the appellant. Negotiations went on between the airline and KALPA, but they were unsuccessful.

11. The appellant further stated that, by letters dated 9th March 2015 addressed to the respondents, they were retired under Clause 34(b) of the CBA. The Clause provides as follows:

> " Retirement
>
> a. Retirement age for pilots will be 65 years.
>
> b. An employee may opt to retire prematurely, or he/she may be retired by the Company prematurely with full retirement benefits after he/she has been in the service for continuous period of 10 years or more provided that he/she has attained the age of not less than 50 years."

12. The appellant argued that retirement of an employee by an employer is not synonymous to termination of an employee's services under Clause 29 of the CBA.

13. With specific regard to the 2nd respondent's claim, the appellant denied that the 2nd respondent was employed on similar terms as the first. He stated that the 2nd respondent had initially been employed on a temporary basis with effect from 1st March 1977; and that he resigned on 31st July 1978, and was later re-employed on 10th January 1984.

14. With respect to the 1st and 2nd respondents' monthly salaries of Kshs.1,387,431.00 and Kshs.1,396,579.00 respectively, the appellant stated that the said salaries include lay over allowance, which is not salary as defined in Clause 2 of the CBA, but that it is basic rate of pay plus all fixed allowances; and that the correct salaries were Kshs.1,204,431.00 and Kshs.1,213,579.00 respectively.

15. The appellant denied the contents of paragraph 13 of the statement of claim to the effect that the appellant had written to the respondents and other pilots affected by the retirement notice stating that it had reconsidered its position and averred that, on its own volition, it found alternative employment

for the retired pilots and informed KALPA of the same and copied the concerned staff. However, the respondents did not accept the said offer.

16. Regarding the respondents' contention that their retirement rendered them redundant or was unfair, the appellant stated that the respondents qualified to be retired under Clause 34(b), and that nothing prevented it from retiring them; that KALPA was engaged by the appellant prior to the issuance of the early retirement notice; that Clause 34(b) of the CBA does not provide for early retirement by consent of either party; and that, therefore, the respondents' retirement was done in accordance with the law.

17. The appellant denied having breached the rules of natural justice because all the affected pilots were given the opportunity, through KALPA, to be heard, but KALPA rejected that opportunity. Further, prior to their retirement, the respondents were given an opportunity to make any personal representations, but declined to do so.

18. The appellant denied that the respondents' employment was terminated on grounds of misconduct, poor performance or physical incapacity.

19. For those reasons, the appellant urged the trial court to dismiss the respondents' claims in their entirety.

The Trial Court's Judgment

20. Following a full hearing, the trial court held, inter alia, that the early retirement of the respondents amounted to substantive unfairness under section 45 of the *Employment Act*; that the early retirement of the respondents amounted to an unfair lay off, which was tantamount to a redundancy; that the applicable law in redundancy was not taken into account; and that the provisions of the CBA were selectively applied to the disadvantage of the respondents.

21. Consequently, the trial court entered judgment for the respondents as hereunder.

> "For the 1st respondent
>
> a. 4 months' notice pay;
>
> b. 25 leave days;
>
> c. Salary up to 15th April 2015=27 days;
>
> d. 3 accrued days;
>
> e. Own and employer contributions to provident fund;
>
> f. EASOP shares, if applicable in accordance with ESOP Rules.
>
> For the 2nd respondent
>
> a. 5 months' notice pay;
>
> b. 10 days' untaken leave days;
>
> c. Salary and allowances up to 31st March 2015= 22 days;
>
> d. Two (2) accrued days as at 31st March 2015;
>
> e. Own and employer contributions to the Provident Fund;
>
> f. ESOP shares if applicable in accordance with ESOP Rules."

22. Further, the trial court held that the respondents shall enjoy air passage on company routes for themselves, their spouses, children and freight entitlement up to 1,000 kgs in accordance with the appellant's travel regulations; that the respondents shall enjoy rebated travel entitlement for themselves, spouses and children in accordance with the staff travel rules; and that the respondents shall enjoy instrument rating renewal check in accordance with the appellant's rules and regulations set out under the 2012- 2014 CBA.

23. The judgment sums payable to the respondents were computed as follows

> "For the 1st respondent
>
> a. 4 months' notice pay – Kshs.4.817,724.00.
>
> b. Severance pay at 15 days for each year worked - Kshs.18,066,465.00.
>
> c. Untaken leave of 25 days – Kshs.1,003,625.50.
>
> d. Prorated 3 leave days – Kshs.120,443.10. (e) 37 days' pay- Kshs.1,485,464.90.
>
> For the 2nd respondent
>
> a. 5 months' notice pay, Kshs.6,067,985.00.
>
> b. 10 days' untaken leave – Kshs.404,532.35.
>
> c. 22 days salary due – Kshs.889,971.133.
>
> d. Prorated leave of 2 days -Kshs.80,906.50.
>
> e. Severance pay at 15 days salary for each year worked - Kshs.18,203,955.00."
>
> The respondents were also awarded costs of the suit.

Appeal to this Court

24. Being aggrieved by the said judgment, the appellant preferred this appeal. The memorandum of appeal raises ten (10) grounds. However, the appellant's advocates, Obura Mbeche & Company, in their written submissions identified three main issues for determination which are as follows:

> a. "Whether the Appellant had the right to retire the Respondents under Clause 34(b) of the CBA.
>
> b. Whether the Appellant followed due process before retiring the Respondents.
>
> c. Whether the retirement of the Respondents amounted to unlawful redundancy and violated sections 43 and 45 of the *Employment Act*."

25. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and satisfy itself whether the decision was well founded. We must, however, warn ourselves that we did not have the benefit of seeing the witnesses as they testified as the trial court had, and must therefore give due allowance for that. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 the Court held:

> " ...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence,

evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

26. It is therefore necessary that we consider the evidence that was tendered by both parties before the trial court and analyse it with a view to arriving at our own independent conclusion.

27. The 1st respondent was employed by the appellant in 1985 as a Second Officer Pilot in training and acquired considerable experience of more than 30 years as a pilot. His last salary was Kshs.1,387,481.00. He testified that, by a letter dated 9th March 2015, he was forced to take an early retirement when he was 62 years old. Although the appellant cited the provisions of Clause 34(b) of the CBA, which we have already quoted, the 1st respondent testified that, for all the years that he was in employment, he had never seen that clause applied on any pilot. The 1st respondent said that he was not consulted by the appellant before his services were terminated. He further testified that the appellant had in its employment 55 pilots who were 50 years and above, but only a few of them were terminated. In his view, the manner in which his employment was terminated amounted to being declared redundant. He therefore stated that his prayers as contained in the statement of claim were justified.

28. In cross examination, the 1st respondent told the trial court that, under Clause 34(b) of the CBA, consent of an employee is not required before the employee is subjected to early retirement as long as the employee has attained the age of 50 years.

29. The 2nd respondent testified that he joined the appellant on 1st March 1977 after the collapse of the East African Airways. Shortly thereafter, he resigned and went to work for Sudan Airways, but he was re-employed by the appellant as a pilot in January 1983. He remained in employment until 9th March 2015 when he was forced by his employer to take an early retirement. Like the 1st respondent, he told the trial court that the application of Clause 34(b) of the CBA by the appellant was selective and discriminatory. In his view, he ought to have been declared redundant if the appellant was in financial crisis and could not continue to operate the B777 aircrafts. Both respondents sought to rely on their witness statements that had been produced and were on record.

30. In cross examination, the 2nd respondent stated that, at the time of his retirement, he was 62 years old; and that there were other pilots who were older than him but were not retired, and that is why he questioned the appellant's rationale of relying on Clause 34(b) of the CBA to retire him. He, however, admitted that Clause 34(b) did not address the question of redundancy, and neither did the clause provide that an employee's consent was a prerequisite to an early retirement at the instant of the appellant.

31. Regarding his claim for payment of provident fund, the 1st respondent said that he was paid Kshs.6,000,000.00 only.

32. On the part of the appellant, one witness Lucy Wangari Muhui, was the only witness who testified. Lucy was an Assistant Human Resource Director who had been in the appellant's employment since November 2005. She is a lawyer by profession and has considerable experience in human resource matters. She referred to the CBA that the appellant had with KALPA, citing Clause 34(b) which the appellant relied upon to retire the respondents. She told the court that, under that clause, an employee may opt to retire, or the airline may retire an employee after 10 years of service, provided that the employee is at least 50 years old. Under that clause, no consent is required, either of the airline or of an employee before it is operationalized.

33. The witness further testified that the appellant was not doing well financially and had been incurring massive losses for a number of years. She said that the respondents were retired in 2015 due to the financial position of the appellant as a result of a number of factors that adversely affected the

operations of the airline. That notwithstanding, the retirement was not unlawful as it was within the provisions of the said Clause 34(b) of the CBA, the witness argued.

34. The witness further testified that before the retirement of the respondents, the appellant engaged KALPA in negotiations regarding the fate of the affected pilots, but the negotiations were unsuccessful. Upon retirement of the respondents, they were paid all lawful dues by the appellant, the witness added. She denied that the respondents' constitutional rights were violated in any way, and neither was there any discrimination in retiring them.

35. In the impugned judgment, the learned judge appreciated that the provisions of Clause 34(b) of the CBA provided for optional retirement of an employee by either side without consent of the affected party as long as, in the case of an employee, he or she had served for at least 10 years and was aged 50 years and above. That notwithstanding, the learned judge went on to find that, in all instances, reasons for termination of employment must be clear. She stated:

> " 87. Whatever reason(s) that lead to termination of employment, the law is clear. Such reason(s) must be genuine, valid, fair and just. This is a subject the court has addressed in *Christopher Onyango & 24 others versus Heritage Insurance Co. Kenya Ltd*, Cause No.781 of 2015. On this subject, the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR held that in any termination of employment the employer shall prove the reason(s) for termination and outlined the same that;
>
> > Section 43(1) of the EA provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:
> >
> > "43. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. "
> >
> > Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:
>
> "(2) A termination of employment by an employer is unfair if the employer fails to prove-
>
> a. that the reason for the termination is valid;
>
> b. that the reason for the termination is a fair reason-
>
> i. related to the employee's conduct, capacity or compatibility; or
>
> ii. based on the operational requirements of the employer; and
>
> C. that the employment was terminated in accordance with fair procedure.

88. An employer faced with operational requirements and thus forced to restructure of (sic) terminate is by application of the law allowed to terminate employment. I take it, at the time the Respondent held the meeting of 14th January, 2015 with KAIPA, it was clear that the agenda and proposals made related to among other matters on the need to;

a. Make adjustments to its network plans which had dictated the 8777-200 fleet be exited;

b. The need to agree on what to do with 10 B777 captains;

c. A proposal to retire 4 of the 10 captains and accommodate 6 in B787 fleet with a negotiated pay;

d. In the alternative take the 10 excess captains into the B787 fleet but renegotiate their pay;

e. Third option to declare the 10 captains redundant; and

f. Where the options do not work to retire the 10 captains in accordance with the CBA.

89. Why was the Respondent considering all these options? Why consider the adjustments to its network and need to exit the 8777-200 fleet or seek to deal with 10 pilots or propose to retire 4 captains and renegotiate with 6 or consider declaring all 10 captains redundant or retire all the 10 captains?"

36. The learned judge further held that the appellant could not rely on the provisions of the CBA to terminate the respondents' employment; that irrespective of the mode of exist: "retirement at 65 years, at the option of an employee or employer such result into termination of employment."

Determination

37. Having summarized the evidence and the trial court's finding, we now turn to determine the first issue, that is, whether the appellant had the right to retire the respondents under Clause 34(b) of the CBA. Although we had earlier quoted that clause, given its primacy, it is necessary that we cite it again. It states as follows:

> " An employee may opt prematurely or he/she may be retired by the company prematurely with full benefits after he/she has been in service for continuous period of 10 years or more provided that he/she has attained the age of not less than 50 years."

38. In their submissions, the appellant's advocate submitted that the early retirement of the respondents was lawful in accordance with the aforesaid Clause 34(b) of the CBA and did not amount to redundancy; that under section 59(2) of the *Labour Relations Act*, the CBA continued to bind the respondents during the currency of their employment, and under sub-section (3) of the same section, the terms of the CBA and, in particular, Clause 34(b) thereof was "incorporated into the contract of employment of the respondents"; that Clause 34(b) does not require the appellant to take into considerations other clauses of the CBA, and neither does it give other conditions to be observed before an employee who has served for over 10 years and is over 50 years is given early retirement by the appellant. To that extent, the appellant faulted the learned judge for holding that Clause 34 cannot be read in isolation. In the appellant's view, that interpretation is tantamount to re-writing the

employment contract or the terms of the parties' engagement, which is contrary to law as held by this Court in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) & Another* [2001] eKLR.

39. The appellant's advocate further cited this Court's decision in *Kenya Chemical & Allied workers Union v Bamburi Cement* [2017] eKLR. In that appeal, the Court held that employment law in Kenya is governed by the general law of contract now contained in various statutes; that employment is essentially an individual relationship negotiated by the employee and the employer in accordance with their respective needs; and that where there is a negotiated collective bargaining agreement between a union and an employer, the unionisable employees of the employer who are members of the union become privy to the terms of the negotiated collective bargaining agreement, and are bound by it.

40. On the other hand, the respondents' advocates, Arwa & Change Advocates LLP, supported the learned judge's finding that the alleged incorporation of KALPA in the process of termination of the respondents' employment by way of early retirement did not empower the appellant to carry out whichever action it deemed fit on the affected pilots and, in particular, the respondents, without giving them notice and setting out a clear criterion for terminating their services.

41. They further submitted that the appellant converted a clear case of redundancy into a retirement, which is a fundamental alteration of the respondents' right as provided by Clause 45 of the CBA and section 40 of the *Employment Act*.

42. We have carefully perused the contents of the CBA. The respondents accused the appellant of selective reading and interpretation of the same, with specific reference to Clause 34(b) which they argued that it leads to a total misconception of the clause. They argue that the clause should be interpreted accordingly, but without overlooking other provisions of the CBA, *the Constitution*, the Employment Law, other undisputed facts of the case and common sense. We agree. However, that does not mean that the literal meaning of specific clauses of the CBA should be overlooked. The preamble of the CBA sets out the true purpose and intent of the parties. It reads as follows:

> "This Memorandum of Agreement on Terms and Conditions of Service is made on the 15th day of August 2011 between Kenya Airways Limited (hereinafter referred to as the Company) and Kenya Airline Pilots Association (hereinafter referred to as the Association) whereby the parties meeting together in free heart and voluntary association, have determined the terms and conditions of Service which shall apply to all employee who are in the service of the Company as pilots, except employees on specific contract terms."

43. The CBA spelt out each and every important term of engagement between the parties, and its intent and objects are clearly stated therein. Each provision of the CBA must therefore be interpreted in a manner that gives effect to its true content and objective. The CBA cannot be interpreted in a manner that amounts to re-writing the terms and conditions of service.

44. The respondents' main contention was that termination of their employment as conveyed by the appellant in its letter dated 9th March 2015 was unfair, wrongful, unjust, and amounted to selective application of specific clauses of the CBA. The appellant's letter to the 1st respondent regarding his early retirement read as follows:

> "Dear Joram
>
> Re: Early retirement
>
> Records held in our office indicate that you were born on 22nd November 1952. This is to inform you that the Company has decided to retire you from employment in accordance

with clause 34(b) of the Collective Bargaining Agreement (CBA) between the Company and KALPA.

We hereby give you 6 months' notice of retirement effective 10th March 2015.

However, you have 27 accrued leave days as at 28th February 2015. Consequently, you are required to proceed on 27 days' annual leave with effect from 10th March 2015 during the notice period. You will not be required to serve the entire notice, but you will be paid for the unserved notice period which shall amount to four months twenty-five days after expiration your annual leave period (sic). Your last working day will therefore be 15th April 2015.

Upon clearing from the Company and returning all Kenya Airways property that may be in your possession, going through exit medical check- up with KQ Clinic and signing all the necessary discharges, you will be paid the following final dues less any amount paid to the Company:

a. Salary and fixed allowances up to and including 15th April 2015;

b. Payment of four months, - 25 days' salary and fixed allowances in lieu of notice;

c. Three (3) accrued days as at 15th April 2015;

d. Your own and Company's contribution to the Provident Fund in accordance with the Staff Provident Rules;

e. ESOP shares, if applicable in accordance with the ESOP Rules.

You are also eligible to rebated tickets in accordance the Staff Travel Rules. Please contact HR Records office for advice on your retiree's letter.

We take this opportunity to thank you for the service you have rendered to the Company and wish you all the best in your future undertakings.

Kindly sign the duplicate copy of this letter in acknowledgment of receipt and return to the undersigned.

Yours faithfully, Alban Mwendar,

Group Human Resource Director."

The 2nd respondent was also issued with a similar letter on the same date.

45. It was not in dispute that, even as at the date of execution of the CBA, the appellant was facing serious financial challenges occasioned by various factors as were recounted by both parties before the trial court. Before the respondents were sent on early retirement, the appellant had engaged KALPA in negotiations which did not bear any fruit. The appellant was at liberty to explore lawful ways of reducing its operating costs, and one of them was to reduce its workforce, as long as that was done in accordance with the law and specifically the CBA.

46. In our view, the provisions of Clause 34 of the CBA are clear beyond any peradventure. It stipulates that the retirement age for pilots is 65 years. Secondly, the clause also enables an employee to retire prematurely or be retired by the employer prematurely "with full retirement benefits after he/she has been in the service for continuous period of ten (10) years or more, provided that he/she has attained the age of not less than 50 years." Both parties were in agreement that no consent was required, either from the employer or the employee, in case of an employee who had otherwise qualified to take early retirement or be retired prematurely.

47. In the circumstances, therefore, we do not see how the appellant's decision to retire the respondents prematurely could be construed as unfair termination of employment. Under the said clause, the respondents were equally at liberty to opt for early retirement with full benefits, and the appellant could not fault them for so doing or attempt to restrain their move even if they were going to be employed by a competitor airline.

48. Section 45 of the *Employment Act*, which defines unfair termination of employment states as follows:

> " 45. Unfair termination
>
> 1. No employer shall terminate the employment of an employee unfairly.
>
> 2. A termination of employment by an employer is unfair if the employer fails to prove-
>
> a. that the reason for the termination is valid;
>
> b. that the reason for the termination is a fair reason-
>
> i. related to the employee's conduct, capacity or compatibility; or
>
> ii. based on the operational requirements of the employer; and
>
> c. that the employment was terminated in accordance with fair procedure.
>
> 3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
>
> 4. A termination of employment shall be unfair for the purposes of this Part where-
>
> a. the termination is for one of the reasons specified in section 46; or
>
> b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
>
> 5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider-
>
> a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

b. the conduct and capability of the employee up to the date of termination;

c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee."

49. Clause 35 of the CBA stipulates the benefits that an employee who retires under Clause 34 is entitled to. We do not think that there was any allegation that the respondents were denied any of the stipulated benefits.

50. We find and hold that the appellant had the right to lawfully terminate the respondents' employment by retiring them in accordance with the provisions of clause 34(b) of the CBA, as long as the appellant was willing to accord them all their rightful entitlements under clause 35 of the CBA.

51. The second issue is whether the appellant followed due process before retiring the respondents. As we have stated earlier, before the respondents' employment was terminated, the appellant had engaged KALPA to discuss the fate of its members following the appellant's decision to exit the B777 aircrafts as a way of reducing the airline's expenses. The appellant's counsel submitted that the learned judge ignored the fact that, for the appellant to engage the respondents directly would have been a violation of the constitutional rights of the respondents on freedom of association and the right to conduct their employment issues through a trade union of their choice, contrary to Article 36 as read together with Article 41 of *the Constitution*.

52. The record of appeal reveals that the engagement between the appellant and KALPA over the fate of the respondents and other pilots who were to be affected by the sale of the said aircrafts commenced sometime in August 2014, and the respondents must have been aware of the same. Minutes of the various meetings that were held were produced before the trial court. Further, a letter dated 26th February 2015 by the appellant's Group Managing Director and CEO to the General Secretary KALPA states as follows:

> " Dear Ronald
>
> RE: BOEING 777 - 300 and BOEING 777 - 200
>
> I write to you further to the management meeting of 14th January 2015 chaired by the Group Human Resource Director, Alban Mwendar, in which you requested to have a meeting with me regarding the network plan and fleet impact. The next GMD quarterly meeting is due mid- March and it is therefore prudent that I update you now.
>
> The Board having taken the decision in November 2014 to sell excess capacity, I can confirm that the Boeing 777 - 200 fleet will exit the Airline by April / May 2015 and that we are also re-assessing our requirements for the Boeing 777-300.

The above decision has implications on manning levels on the fleet as we are now in surplus.

The Human Resource Department will be writing to you shortly to engage on the way forward."

53. There is also a letter dated 11th March 2015 addressed by the appellant's Group Human Resources Director to the General Secretary of KALPA regarding retirement of the said aircrafts. The appellant stated, inter alia, that:

> " The management of Kenya Airways is fully aware of the laws of Kenya and will always abide by them and the Collective Bargaining Agreement between the Company and KALPA.
>
> The meeting of 10th March 2015 was our regularly scheduled monthly management/ KALPA meeting for which you were rostered and refused to attend. It was not a meeting arranged to specifically seek concurrence on the application of Clause 34(b) as you allege in your letter. That notwithstanding, we would have used the meeting to discuss matters that you appear to be discontent with. Your refusal to meet with Management is not going to resolve any matters of misunderstanding between the Company and KALPA."

54. From the foregoing, it is evident that the respondents, through its representatives in KALPA, were all along involved in the discussions that preceded the appellant's decision to send them on early retirement in accordance with Clause 34(b) of the CBA. The respondents themselves were also served with advance notice. We therefore find and hold that due process was followed before retirement of the respondents.

55. The last issue for our consideration is whether the retirement of the respondents amounted to unlawful redundancy. Clause 45 of the CBA is about redundancy and stipulates, inter alia, that it is as defined in section 2 of the *Labour Relations Act*, 2007. The section defines "redundancy" to mean: "the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

56. Clause 45(b) of the CBA states that "in the event of any redundancy, the Company will whenever possible give consideration to offering alternative ground duties to the affected employees who will retain their former basic salary."

57. In the course of the six (6) months' notice period, the appellant's Group Human Resources Director wrote to the General Secretary, KALPA, a letter dated 15th March 2015 and copied to the respondents informing them that the appellant had "managed to secure alternative employment/opportunities for those B777 Captains who have been issued with a six months' notice period of early retirement in clause 34(b) of the Collective Bargaining Agreement." However, the offer was rejected by the respondents.

58. In finding that the early retirement amounted to redundancy, the learned judge delivered herself as hereunder:

> " 97. The conduct of the respondent before and after the claimants were retired early is also indicative that this was a redundancy and not anything else. There was a financial crisis before the early retirement. After retirement, on 18th March, 205 (sic) the respondent letter offering alternative employment (sic). Where the claimants had been found to warrant retirement for the reason of age and nothing else, the purported recall for alternative employment would

have been unnecessary. Since this was not the case and had been terminated due to operational requirements, the offer for recall and offer for alternative employment was thus found necessary. This was also an option that had been communicated to the Union, KALPA on 15th January, 2015 meeting as an alternative to the early retirement of the claimants."

59. The learned judge went on to state at paragraph 101 of the judgment thus:

> 101: "...The decision taken by the Respondent to retire the Claimants before attaining 65 years is not a genuine reason putting into account apparent financial crisis the Respondent was facing at the time. The retirement of the Claimants instead of taking the options ranking in priority and that of redundancy, and though retirement was found cheaper, it amounted to the Respondent using a reason that was not valid or fair."

60. Clauses 34 and 45 are on two different issues and cannot be read together. If any of the respondents had opted to take early retirement, the only benefit that they could have been entitled to are those stipulated under Clause 35 of the CBA, and the same applies to their premature retirement at the instance of the appellant. The financial challenges that bedevilled the appellant did not preclude it from operationalizing the provisions of Clause 34 rather than Clause 45. The appellant chose the one it deemed most appropriate in the circumstances.

61. In any event, the appellant made effort to comply with the provisions of Clause 45(b) of the CBA by securing alternative employment for the respondents, but the offer was rebuffed. We do not agree with the learned trial court's finding that the appellant's termination of the respondents in the aforesaid circumstances amounted to unlawful redundancy.

62. In conclusion, therefore, we are satisfied that the appellant's termination of the respondents' employment under Clause 34(b) of the CBA was lawful. Consequently, we allow this appeal and set aside the trial court's judgment dated 15th June 2017 in its entirety. The respondents will bear the costs of the appeal as well as the costs of the proceedings before the trial court.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY MAY, 2023.

D. K. MUSINGA (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR