IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GITHINJI, NAMBUYE & MAKHANDIA JJA]

CIVIL APPEAL NO. 276 OF 2017

BETWEEN

KENYA AIRLINE PILOTS ASSOCIATION.....APPELLANT

AND

KENYA AIRWAYS LIMITED.....RESPONDENT

(Being an appeal from the judgment and Orders of the Employment and Labour Relations Court

at Nairobi (**H. Wasilwa, J.**) Dated 1st March, 2017

in

Employment and Labour Relations Court Cause No. 433 of 2015)

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JUDGMENT OF THE COURT

This is a first appeal arising from the Judgment of the Employment and Labour Relations Court (ELRC) at Nairobi, **Hellen Wasilwa, J** dated 1st March, 2017.

The background to the appeal is that, the Respondent is a Corporation registered under the Companies Act Cap 486 Laws of Kenya and operating the business of Domestic and International Passenger and Freight Services, while the Appellant is a registered Association whose membership includes employees of the Respondent. It was in the course of the above mentioned operations that the Respondent engaged the services of thirty-nine (39) pilots in total among them the aggrieved pilots for purposes of flying the B777 Aircrafts.

In the year 2014, the Respondent suffered reduced business growth returns, and decided to exit its B777-2000 and B777-300 Aircraft Fleet and offer early retirement with full benefits to ten (10) pilots among them the aggrieved pilots effective May, 2015.

Between 14th January and 5th March, 2015, the Respondent severally invited the Appellant for meetings over the issue, which the Appellant neglected and or ignored forcing the Respondent to engage the 10 pilots individually. Only two (2) of the ten (10) pilots responded and after due deliberations with the two, the Respondent rescinded its decision to prematurely retire the two pilots. The Appellant, without any justifiable cause, withdrew the **"goodwill"** to negotiate with regard to the balance of the eight (8) pilotsand on 16th March, 2015, called for industrial action effective 18th March, 2015, prompting the Respondent to seek the court's intervention to have the industrial action declared illegal, which relief the court granted.

Particulars of justification for the Respondent's cause of action were as particularized in the claim and

which we find no need to rehash. The Respondent therefore sought from the courts:

> "*a declaration that the industrial action called for by the Appellant* was illegal and unlawful; a mandatory injunction prohibiting the Appellant either by itself, employees, agents or whatsoever from engaging in any industrial action howsoever intended; a mandatory order requiring the Appellant to retract its call for industrial action in relation to matters then in dispute and pending determination by the Court; compensation for loss of business and income to be tabulated at the hearing; a mandatory order that the Appellant bears all liability for financial loss occasioned due to the engagement of the claimant's employees in the industrial action; costs of the claim and interest on all the prayers hereinabove; and any other relief that the Court deemed fit to grant."

In rebuttal, the Appellant filed a memorandum of defence and counterclaim dated 16th June, 2015, contending *inter alia*, that: there was never any genuine, fair, legal and/or unprejudicial engagement of the Appellant by the Respondent on the fate of the aggrieved pilots. That it is the Appellant who made several efforts to engage the Respondent over the issue, but its efforts were always frustrated by the Respondent indifferent conduct; that the admitted unilateral decision by the Respondent to prematurely retire the aggrieved pilots was both substantively and procedurally illegal and therefore unfair as the circumstance resulting in the disputed premature retirement of the aggrieved pilots amounted to a redundancy. Also denied calling for industrial action and prayed for the Respondent's claim against them to be dismissed with costs.

In the counterclaim, the Appellant reiterated the content of their memorandum of defence that the Respondent unprocedurally, unfairly and illegally purported to terminate the contracts of service of the aggrieved pilots pursuant to **Clause 34(b)** of the Collective Bargaining Agreement "CBA", when the prevailing circumstances leading to the termination of the said contracts favoured a declaration of Redundancy as provided for under section of the Act and **clause 45** of the CBA. They prayed for:

> **A mandatory injunction compelling the Respondent to reinstate to employment and with full back salary and benefits to the aggrieved pilots. In the alternative, maximum compensation for unfair termination of employment as provided for under the Act as well as the dues and benefits attendant to termination by way of a redundancy; costs of the suit; interests on (c) and (d) above at court rates and any other further relief as this Honourable Court shall deem fit to grant.**

The Respondent filed a reply to the Appellant's memorandum of defence and defence to the counterclaim dated 14th August, 2015, joining issue with the Appellant on its memorandum of defence and counterclaim; denied that the retirement of the aggrieved pilots amounted to unfair termination and/or redundancy; that it followed all due procedures and met all the requirement of a premature retirement as set out in the CBA; that the Appellant by their conduct continuously frustrated all attempts made by the

Respondent at conciliation with a view to arriving at an amicable resolution of the matter; that the Appellant's claim was made in bad faith and prayed for the defence and counterclaim to be dismissed and Judgment to be entered in their favour for Kshs. 49,957,595/- as compensation for financial loss arising from the Appellant's call to industrial action; restitution of monies paid to the aggrieved pilots pursuant to the conditional court order of injunction, to be tabulated at the Hearing; interest on (1) above and any other orders the Court may deem fit to grant.

The cause was canvased by oral testimony. The Respondent called one witness **Mr. Alban Munyika Mwenda** (CW1), while the Appellant tendered evidence through two witnesses namely, **Henry Kinuthia Ithinga** (RW1) and **Isaac Godfrey Areri** (RW2.) In summary, **Mr. Mwenda** reiterated the averments in the Respondent's pleadings that the dispute arose in March, 2015 when the Respondent invoked **clause 34(b)** and offered early retirement to the aggrieved pilots all of whom were within the age bracket of 63- to 65 years; that the Respondent wrote to both the Appellant and the aggrieved pilots giving them the reasons for their proposed early retirement and invited them for meetings over the issue. Only two of the aggrieved pilots responded positively and after due deliberations with the Respondent over their personal circumstances, their early retirement letters were revoked. The other 8 did not revert back to the

Respondent prompting the Respondent to severally raise the issue with the Appellant who also declined negotiation for an amicable settlement of the issue, and instead withdrew the goodwill on 18th March, 2015 and called for industrial action, which adversely affected the Respondent's operations; that the court declared the industrial action wrongful and granted a conditional injunction which required the Respondent to continue paying salaries to the aggrieved pilots, which it complied with up to February, 2016. They sought recovery of the amount paid pursuant to the said court order as according to him, the aggrieved pilots were not entitled to the same.

On cross-examination, he stated that he had no evidence to show that scheduled flights did not take place nor that flights were cancelled due to the withdrawal of the goodwill; that the loss allegedly occasioned to the Respondent for which compensation was sought for accrued period between 8th March and 3rd April, 2015. Conceded that although Redundancy was an option open to the Respondent, it chose to invoke **clause 34(b)** of the CBA; that the B777 Fleet was never abolished as intended but they were in the process of abolishing them. Confirmed that the aggrieved pilots were fully paid salaries for the 6 months *status quo* period and that they were not entitled to payment of any leave days due as they were supposed to utilize their leave days during that period since they had not been assigned any duties to discharge on behalf of the Respondent.

For the defence, **Henry Kinuthia Ithingo** (RW1), stated *inter alia* that, they were never consulted nor given reasons for their early retirement as they were just called individually and handed their early retirement letters. He denied refusing to engage the Respondent, either individually or through the Appellant who had always been ready and willing to resolve the dispute amicably; and that it was the Respondent who frustrated the Appellant's efforts to negotiate for an amicable settlement.

On cross-examination, he conceded that the average age for the affected pilots as at the time they were served with their early retirement letters was 63 years; that **clause 34(a)** and **(b)** of the CBA makes provision for the retirement age for pilots to be 65 years, while early retirement age of 50 years is subject to having been in the service for 10 years. That all the six pilots had served the Respondent for over 10 years and therefore fell within the category of those who could be retired early under **clause 34(b)** of the CBA.

Isaac Godfrey Areri (RW2) on the other hand, admitted receiving the Respondent's decision to reduce the B777 Fleet in November, 2014, while the Notice to retire them was given in March, 2015; that in the meeting held on 14th January, 2015, there were options floated as to the appropriate action to be taken with regard to the balance of the employment service years of the affected pilots upon the exiting of the B777 Fleet. The Respondent floated the idea of retiring 4 and retaining 6 in another Fleet on a negotiated pay or retain all with renegotiated pay or declare all the aggrieved pilots redundant. The Respondent settled for early retirement, which the Appellant rejected in favour of a declaration of redundancy as the best option in the circumstances of this appeal.

At the conclusion of the trial, the trial Judge assessed and analyzed the record and arrived at the impugned decision whose reasons we shall revert to at a later stage of this Judgment. The Appellant was aggrieved and is now before this Court on a first appeal raising fifteen grounds of appeal, subsequently condensed into three in their written submissions dated 22nd November, 2017 and filed on 23rd November, 2017. It is the

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nt's complaint that the learned Judge erred:

1. In law by pronouncing that the pilots were fairly and lawfully terminated.

2. In law and fact by holding that only two (2) out of the six aggrieved pilots were entitled to be compensated for accrued leave days not taken.

3. In law and fact by failing to award compensation to the pilots for unfair and illegal termination of employment.

The Respondent filed a Cross-Appeal dated 17th October 2017 and filed on 19th October, 2017 raising four grounds paraphrased in their written submissions dated and filed on 20th December, 2017. It is the Cross-Appellant's assertion that:

a. The Respondent was justified to retire the 8 pilots under Clause 34(b) of the CBA.

b. The Respondent was entitled to compensation for loss of business and monies occasioned due to the Appellant's call for Industrial action.

c. The respondent should be awarded compensation for monies paid to the 6 aggrieved Pilots past their retirement notice period following the early retirement.

d. The two pilots entitled to payment of additional leave days.

For plenary, learned counsel **Miss Anne Babu** appeared for the Appellant, while learned counsel **Miss Jacqueline Munyaka** appeared for the Respondent.

Supporting the appeal on the counterclaim, **Miss Babu** referred to the reasons the Respondent gave for prematurely retiring the aggrieved pilots from its service and faulted the Judge for the failure to properly appreciate that the exiting of B777 Fleet by the Respondent amounted to a redundancy which in her view, was the best option for the Respondent to take in the circumstances of this appeal, especially, when CW1 admitted on oath that redundancy was one of the options the Respondent had at its disposal to apply in the termination of the aggrieved pilots' employment with them.

Relying on **Clause 45(a)** and **(b**) of the CBA, **Miss Babu**, submitted that the Judge's interpretation of **Clause 34(b)**, went contrary to the true intention of the contracting parties occasioning great prejudice to the aggrieved pilots in terms of terminal dues.

To buttress the above submissions, **Miss Babu** relied on the cases of **Kenindia Assurance Company Limited versus First National Finance Bank Limited [2008] eKLR**; **Thomas Nyakamba Okong'o versus Co-Operative Bank of Kenya Ltd [2012] eKLR**; **Evanson Njiiri Wanjihia versus Caltex Oil (K) Ltd [2009] eKLR; Eldocity Limited versus Corn Products Kenya Limited & another [2013] eKLR; Lalji Karsan Rabadia & 2 others versus Commercial Bank of Africa Limited [2015] EKLR; Fidelity Commercial Bank Limited versus Kenya Grange Vehicle Industries Limited [2017] eKL*R*** and lastly, **Savings and Loan Kenya Limited versus Mayfair Holdings Limited [2012] eKLR**, all on the principles that guide the Court on the construction of instruments, contracts and or agreements and which we shall revert to at a later stage of the Judgment.

Relying on **Article 41** of the Kenya Constitution 2010 entrenching the right to fair labour practices and persuasive decisions in the case of **Hamida Bana & 102 others versus National Bank of Kenya Limited [2017] eKLR; TSPIC Corporation G.R. No. 163419 (a decision of the Supreme Court of Malasia, Oliver Odadi Nyaleso versus Sheckh Zayed Childrens Welfare Centre [2017] eKLR; Banking Insurance & Finance Union (Kenya) versus National Bank of Kunya Limited [2015] eKLR; Christine Munguti & 21 others versus National Bank of Kenya Limited [2017] eKLR; Leonard Gethoi Kamweti versus National Bank of Kenya Limited & 2 others [2016] eKLR**, **Miss Babu** submitted that the manner the trial court interpreted and construed **Clause 34(b)** of the CBA infringed the aggrieved pilots' right to fair labour practices as it sanctioned the Respondent's action of prematurely retiring them when circumstances of the appeal favoured a declaration of redundancy in their favour and which default was prejudicial both to their work and terminal benefits. Second, it also went contrary to **Section 45 (2)(b), 45 (5) (a) and 45 (5) (d)** of the Employment Act, **especially** when the Appellant had demonstrated clearly that the Respondent's termination of the aggrieved pilots' employment was neither carried out in accordance with fair procedure; nor in accordance with justice and equality. Third, it also went contrary to Clause 49 of the CBA which required the Court to interpret the CBA in accordance with the Labour Laws of Kenya. Fourth, the Court also failed to consider and apply the guiding principle that where it is arguable that two clauses of a CBA are applicable the one more favourable to the employee should be applied; that in the circumstances of this appeal, clause 45 of the

CBA was more favourable to the aggrievedpilotsthan**34(b).**

Turning to good faith, **Miss Babu** submitted that on the record, the appellant has sufficiently demonstrated that there was no good faith in the Respondent's action of applying the prerequisites in **Clause 34(b),** as the substantive reasons for terminating the pilots' employment as opposed to opting for a declaration of redundancy.

On compensation for accrued leave not taken, **Miss Babu** relied on the persuasive decision in the case of **Max Masoud Roshankar & another versus Sky Aero Limited [2015] eKLR**, and submitted that the aggrieved pilots were entitled to payment of accrued leave up to the last day of employment which in this appeal fell on 3rd February, 2016; that the trial court correctly appreciated that it was improper for the Respondent to force the pilots to proceed on leave during the time of the pendency of their termination notice, but faulted the Judge for converting the periods the pilots were paid salaries pursuant to a court order when they were not rendering any services to the Respondent as leave take. In **Miss Babu's** view, the approach taken by the Judge amounted to penalizing the aggrieved pilots for their employer's default in not allocating them duties to perform during that period.

On compensation for being subjected to an unfair labour practice, **Miss Babu** relied on **Section 49(1)** of the Employment Act and faulted the trial court for the failure to award compensation to the aggrieved pilots, especially when they had sufficiently demonstrated that the Respondent's termination of the pilots' employment on account of early retirement as opposed to a declaration of redundancy was unjustified and therefore unfair.

Turning to the cross-appeal, **Miss Babu** reiterated the submissions in support of the appeal and submitted that the appellant's counterclaim was well founded both on the facts and in-law; that the Respondent's claim for Kshs. 49,029,649/- for alleged losses incurred was properly discounted by the trial court firstly for the failure to specifically plead the same and second, for the failure to specifically prove the existence of the loss; and second that the alleged losses were occasioned by any default on the part of the Appellant.

That likewise, the Respondent's claim for a refund of Kshs. 47,958,818/- on account of salary payments made to the aggrieved pilots as a condition for granting an injunction does not also lie, firstly, because it was not pleaded. Second, the salaries were paid pursuant to a court order against which the Respondent filed no appeal. Neither was there a condition granted that these were to be refunded in the event the Appellant did not succeed on the counterclaim. Thirdly, it was the duty of the Respondent to allocate work to the aggrieved pilots pending the determination of the cause and in default they cannot be penalized for their employer's default.

On the totality of the above submission, **Miss Babu** prayed for the appeal to be allowed with costs to them and the cross-appeal to be dismissed with costs to them.

In rebuttal to the appeal, **Miss Munyaka** submitted that the premature retirement **clause 34(b**) of the CBA was properly construed and applied by the Respondent when prematurely retiring the aggrieved pilots from its employment; that the pilots identified by the Respondent for early retirement had been in the Respondent's employment for over 10 years and were almost attaining the mandatory retirement age of 65 years. They therefore satisfied the requirement envisioned under **Clause 34(b**) of the CBA for purposes of premature retirement; that the Respondent acted within the law as they not only engaged the union but also the pilots individually. Two of them made representations against premature retirement notices. The Respondent in good faith considered the merits of those representations, found them merited and revoked the premature retirement for the two pilots. It was therefore not correct as contended by the Appellant that the aggrieved pilots had been subjected to an unfair labour practice, process contrary to the law.

On redundancy, **Miss Munyaka** submitted that redundancy was not applicable in the circumstances of this appeal as it was meant to apply only to employees who had served the Company for less than 10 years and had not attained the age of 50 years. Second, the employer offered the aggrieved pilots option of alternative employment which they declined to accept. The Respondent could not in the circumstances

be faulted for retiring them prematurely.

On a proper construction of **Clause 34(b)** of the CBA, **Miss Munyaka** submitted that there is no explicit provision of law on how premature retirement is to be effected; that **Article 41** of the Constitution entrenches the right to fair labour practices and is therefore binding on both the employer and the employee; that **Section 59** of the Labour Relations Act stipulates clearly that, a CBA is binding on the parties executing it as well as their unionizable members.

To buttress the above submission, **Miss Munyaka** relied on the persuasive decision of the Supreme Court of India in the case of the **State of Punjab and others versus Dhanjit Singh Sandhu Civil Appeal Nos. 5698-5699 of 2009**; the case of **Damand Jihabhai & Co. versus Eustace Sisal Estates Limited [1967] EA 153**; and **National Bank of Kenya Limited versus Hamida Bana & 103 others [2017] eKLR**, also all on the principles that guide the court on the interpretation and construction of an instrument, contract or agreement to which we shall revert to at a later stage of this Judgment.

On the cross appeal, **Miss Munyaka,** submitted that the Appellant by its conduct occasioned the loss in respect of which the Respondent sought compensation for, firstly, for their failure to co-operate with the Respondent in the search for an amicable solution to the issue affecting the aggrieved pilots. Second, for calling for an industrial action and thereby occasioned massive financial loss to the Respondent, amounting to Kshs. 49,024,649/, for which the Appellant should be ordered to make good to the Respondent.

On salaries paid to the prematurely retired pilots, **Miss Munyaka,** conceded that these were paid pursuant to a conditional court order for a conditional injunction *status quo* issued on or about 16th September, 2015, directing the Respondent to continue paying salaries to the aggrieved pilots even though they were rendering no services to the Respondent amounting to **Kshs. 47,958,818/-**, being the difference between what the retired pilots were entitled to at the point of expiry of their six months' notices and what they were actually paid up to 4th February, 2016, when the court orders were vacated and for which the Respondent was entitled to seek a refund.

On the totality of the above submissions, **Miss Munyaka** prayed for the appeal to be dismissed with costs to them and the cross-appeal to be allowed with costs to them.

This is a first appeal, our mandate is therefore as was set out by the predecessor of this Court in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1968] EA 123**, in which it was expressed thus:

> ***"An appeal to this Court from a trial court is by way of a retrial and the principles upon which 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 witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif V. Ali Mohamed Shalan [1955], 22 E.A.C.A.270).***

We have considered the record in light of the above mandate, rival submissions and principles of law relied upon by the respective parties both in the appeal and cross-appeal in support of their opposing positions. In our view, the issues that fall for the determination in this appeal are whether the learned trial judge erred in law and fact:

i. ***By pronouncing that pilots were fairly and lawfully prematurely terminated from their employment with the Respondent.***

ii. ***By holding that only two (2) out of the six (6) aggrieved pilots were entitled to be compensated for accrued leave days not taken.***

iii. ***By failing to award compensation to the pilots for unfair and illegal termination of employment.***

While those for the determination in the Respondent's Cross-Appeal are whether:

iv. ***The Respondent was justified to retire the 8 pilots under clause 34(b) of the CBA.***

v. ***The Respondent was entitled to compensation for loss of business, and monies occasioned due to the Respondent call for industrial action.***

vi. ***The Respondent was entitled to be awarded compensation for monies paid to 6 pilots past their retirement notice period following the early retirement.***

vii. ***The two pilots were entitled to payment of additional leave days.***

At the conclusion of the trial, the trial Judge summarized the pleadings, evidence tendered and submission of the respective parties as already summarized above, which we find no need to rehash them. It is sufficient for us to state that we shall bear them in mind when determining the above issues. Starting with issue as to whether the aggrieved pilots should have been prematurely retired or declared redundant, the Judge construed **clause 34(b)** of the CBA in light of the decision in the case of **Kenya Plantation and Agriculture Workers Union versus Bamburi Cement Limited and another [2015]**

eKLR, and distinguished it from the circumstances prevailing in the cause. In the Judge's opinion, the early Retirement provided for in **clause 34(b)** of the CBA and which was binding on the rival parties in the cause was distinguishable from the circumstances of Voluntary Early Retirement (VER), the substratum in the **Kenya Plantation and**

Agricultural Workers Union versus Bamburi Cement Limited and another case (supra), because, according to the Judge, VER is elective based on parameters set out by the employer giving an option to an employee either to opt for it or not. Whereas, the Early Retirement provided for in **clause 34(b)** of the CBA is not voluntary because, once an employee chooses to take up the early retirement, the employer cannot force him/her to stay on. Likewise, when an employer chooses to exercise this right, the employee cannot also resist and on that account, sanctioned the Respondent's action of invoking **clause 34(b)** of the CBA and prematurely retiring the aggrieved pilots.

Turning to redundancy, the Judge also construed **section 2** of the Act on the definition of Redundancy and considering it in light of clause 45 of the CBA, **section 40** of the Act and the rival positions in the cause, and concluded as follows:

0. ***It may be the position that the respondents would have been declared redundant but the claimant opted for the early retirement which was also legal and provided for in the CBA.***

0. ***The fact that the Claimant opted to retire the Respondent's Pilots and not declare them redundant brings us to the 2nd issue whether an employer can be forced to declare an employee redundant as opposed to early retirement.***

0. ***In answering this question, I revert to the CBA between Respondents and the claimants. I note that the CBA has both provisions for early retirement and redundancy. Early retirement is open to employees who have served for 10 years or more provided they are not less than 50 years. The provision on redundancy does not have a capping on age though the redundancy will be carried out as envisaged under the Employment Act 2007 section 2.***

0. ***Can an employer be forced to apply the redundancy provisions as opposed to the early retirement provision? In my view, the guiding principle is the law and the CBA. Both are legal and the fact that the claimant opted for the retirement clause which it was in his capacity to elect does not make the election illegal or unjustified, because the respondents would have had greater benefit if they had been declared redundant.***

0. ***It is my finding that Clause 34(b) of the CBA was rightfully used and the Respondents and indeed this Court cannot force parties to rewrite their contract and employ the redundancy clause as opposed to the early retirement clause.***

On the Respondent's claim for compensation for loss incurred as a result of the alleged withdrawal of good will by the Appellant and calling for industrial action, the Judge rejected the claim on the ground that, the documents relied upon by the Respondent in support thereof were;

"**some calculation on loss incurred but there is no proof that the Respondent in particular occasioned the said loss**."

The Judge then rendered herself as follows:

86. The Respondents led evidence to show that they were not cause of the losses and this in cross examination of CW1 who said:

"I do not have evidence that flights did not fly due to withdrawal of goodwill. Flights can fail to fly for technical reasons even sickness of a pilot….."

Turning to the Respondent's claim for the refund of monies paid to the aggrieved pilots as salary after the retirement notices had expired during the subsistence of the injunction, the Judge concluded as follows:

88. On the 4*th* issue is the claim that the Respondents be ordered to refund moneys paid to them as salary after the retirement notices. This claim cannot stand as this was ordered by the court after the Respondents made their application seeking stay on the retirement notice. This order was finally lifted by the court and they cannot be ordered to refund what they were paid during the subsistence of the orders of stay."

Turning to the claim for leave days the Judge rendered herself as follows:

89. The Respondents also claimed that they were forced to proceed on leave during the pendency of their termination notice. This in my view, was improper because the leave earned was a separate right from the notice right and one could not be imposed on another.

90. It is therefore my finding that the respondents were entitled to payments of their pending leave days which the respondents have submitted they should be paid, I do agree that the respondents are entitled to payments of these days.

92.However given that they continued working for over 3 months after their retirement notice following the orders of this Court, I would consider that period to cover their leave period for which they were not allocated any duties. The exact number of days were from 14*th* *October 2015 to 3rd February, 2016- an equivalent of 3 months and 20 days =110 days.*

93.In respect of all respondents, except for Cap. Ireri and Cap. Ithogo, they had leave days of less than 110 days and so they cannot benefit from the period.

It is against the above Judge's conclusions that we now proceed to determine the above issues. It is not disputed that the approach the Respondent took to prematurely retire the aggrieved pilots was to invoke and apply **clause 34(b)** as opposed to **clause 45** of the CBA on redundancy. **Clause 34** provides as follows:

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 ten 10 *years or more provided that he/she has attained the age of not less than 50 years."*

Redundancy provided for under **Clause 45** adopts the definition of redundancy as set out in **section 2** of the Act to be reverted to herein below shortly. It also provides for the mode of service of redundancy notices to both unionazable and non unionizable employees affected by any declaration of a redundancy by an employer; and lastly, remedies and or benefits accruing to an employee declared redundant.

Section 2 of the Labour Relations Act defines redundancy as follows:

"Redundancy" means the loss of employment, occupation, job or career by involuntarily 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"

The parameters we are enjoined to apply in determining whether to interfere with the trial Judge's interpretation and application of both **clause 34(b)** and **45** of the CBA are the same as those applied in the case law relied upon by the respective parties to this appeal in support of their opposing position as already indicated above and which we find prudent to distill as follows:

i. The mere unreasonable, unjust and absurd, the result of a particular interpretation the more unlikely itisthat,thepartiesmayhaveintendedit.

ii. Where the strict interpretation of a statute leads to an absurd and unjust situation, the court should use its good sense to remedy the situation by reading words in, if need be so as to do what Parliament would have done had they borne the situation in mind.

iii. The duty of the court is not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument.

iv. The court will treat as repugnant a clause which is in consistent with the main purpose of the contract or with the intention of the parties' observation ascertained from the whole of the contract in all contextual setting.

v. The whole agreement must be in the usual way be considered and the natural meaning given to the words used, unless such meaning involves absurdity.

vi. The surrounding circumstances must also be taken into consideration.

vii. A contract ought to receive that construction which its language will admit and which will best effectuate the intention of the parties to be discerned from the agreement.

viii. Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression.

ix. The wording of the agreement should be taken and understood in their ordinary meaning.

x. The law governing execution of a contract shall be taken in its natural language in so far as the language is un ambiguous with the provision relied upon and which have to be applied across the board.

xi. a party cannot seek to avoid the operation of the law just because they *do not suit him at that particular time.*

xii. A court of law has no mandate to imply a term in a contract.

xiii. In employment contracts the function of the industrial court is limited to interpreting and enforcing only those obligations which the parties to the employment contract have to assume.

xiv.*Partiestoacontracthavethefreedomtocontractastheywish*.

We have applied the above threshold to the conclusions reached by the trial Judge on this issue following the Judge's appreciation and construction and application of **clause 34(b)** of the CBA on early retirement to the rival position before her and find no error in the conclusions reached by the Judge on this issue. Our reasons are firstly, that both **clause 34(b)** and **45** were part of numerous other provisions in the CBA mutually negotiated, agreed upon and executed by the respective parties to this appeal and Cross-Appeal. Both were therefore binding on them. In the case of **Mohamed Abushiri Mukulu versus Minister for Lands and Settlement & 6 others [2015]** as approved in the case of **Kenya Tea Growers Association versus Kenya Plantation & Agricultural Workers Union [2018] eKLR,** and which we adopt it was stated that, the essence of a CBA is that, the terms and conditions therein are voluntarily agreed upon between the employer and the union and are therefore binding on those parties.

Our construction of both clauses and as correctly appreciated by the Judge in our view is that both donate a discretion to the Respondent as the employer to apply either of the two clauses to sever employer/employee relationship with their employees subject to establishing existence of the prerequisites applicable for invocation of those clauses, a position conceded on oath by **Mr. Mwenda** CW1. Second, **clause 34(b)** is explicit that it applies to pilots who have not yet attained the mandatory retirement age of sixty-five (65) years provided for in cl **ause 34(a)** subject to satisfying the criteria for premature early retirement provided for under **clause 34(b).** As conceded by **Henry Kinuthia Ithogo** (RW1), all the aggrieved pilots had been in the Respondent's service for periods ranging from twenty-seven (27) to thirty-seven (37) years which is far much in excess of the ten (10) years minimum period of years of service required for the invocation and application of the said clause. It was also conceded by **Mr. Ithongo** that all the aggrieved pilots were aged between sixty-three (63) and sixty-five (65) years, which also brought them within the age bracket of not less than fifty (50) years. It is also not disputed that the discretion to invoke the above provision is not one sided. It is elective and donated to either of the contracting parties to an employer/employee relationship under the CBA governing the contractual relationship of the respective parties to this appeal.

On the basis of the above reasoning, it is our finding that the Judge properly appreciated the record, construed **clause 34(b)** of the CBA and arrived at the correct conclusion that, the Respondent was entitled in law to invoke and apply the said procedure to sever its

employer/employee relationship with the aggrieved pilots. As admitted by their own witness, they fell within both the age and years of service brackets provided for in the said clause. Second the Clause having been mutually negotiated, agreed upon and endorsed by both parties was binding on them.

As for redundancy, it is not disputed that **clause 45** of the CBA made provision for redundancy. It was also conceded in cross- examination by **Mwenda** (RW1), that redundancy was one of the options open to the Respondent to invoke in the event they desired to sever their employer/employee relationship with the aggrieved pilots, but did not invoke this clause for the reasons given by **Mr. Mwenda,** that according to them the prevailing circumstances favoured the application of **clause 34(b)** on early retirement as opposed to **clause 45** on redundancy.

Redundancy as defined in **section 2** of the Act denotes loss of employment, occupation, job or career by involuntary means through no fault of an employee resulting in the termination of the employer/employee relationship with the redundant employee by the employer.

The approach we take in resolving this issue and which we approve is as was set out by the Court in the case of **Pure Circle (K) Ltd versus Paul K. Koech & 1 2others [2018] eKLR**, in which prerequisites put forth as basis for declaring redundancy were stated as follows: (i) loss of jobs (ii) sufficient demonstration by the employer that there is need for the employer to restructure the business (iii) justification for declaration of redundancy lies with the employer; (iv) the moment the employer demonstrates sufficient basis for declaring an employee redundant, it is not the business of the union or a court to interfere.

Applying the above threshold to the rival positions on this issue, it is our finding that the record is explicit that the Respondent's contention that in the year 2014, before taking action that triggered the litigation resulting in this appeal, the Respondent had suffered reduced business growth returns which necessitated reduction in its business operations giving rise to a legal and informed business Judgment to exit the B777 Aircraft Fleet and offer early retirement to the pilots who were flying the said Aircrafts was not controverted by the Appellant nor the aggrieved pilots. It is therefore our view that, this was a commercial Judgment based on the circumstances then prevailing in the Respondent's business operations which according to the Respondent justified the decision taken. It is also our finding that the record is explicit that the Appellant did not protest the Respondent's decision to exit the B777 Aircrafts fleet. What they protested is the manner of severing the employer/employee relationship with the aggrieved pilots who had been substantively employed to fly those Aircrafts and had not yet reached the mandatory retirement age as provided for in **clause 34(a)** of the CBA. They were in favour of the declaration of redundancy as opposed to premature retirement.

In the same case of **Pure Circle (K) Ltd versus Paul K. Koech & 12 others** (supra), it was explicitly stated that the discretion lies with the employer to determine the remedial measures to be put in place to ameliorate the situation. The Respondent cannot therefore be faulted for opting for early retirement as a measure with an option to reroute the aggrieved pilots to fly other Aircrafts, an offer made but rejected as conceded on oath by Appellant's own witness.

As already indicated above, the key criteria for redundancy is demonstration of existence of evidence of involuntary loss of a job, career or occupation affecting an employee already serving the employer. The job description of the aggrieved pilots was flying the B777 Aircrafts. There was no assertion by them either in their pleadings or evidence that they were trained to fly only those of Aircrafts and could not be deployed elsewhere. It is therefore our finding that, since there was no loss of job, career or occupation with regard to the aggrieved pilots and not withstanding that redundancy was also an option open to the Respondent to invoke when severing their employer/employee ties with the aggrieved pilots; they cannot be faulted for not invoking this mode of procedure for reasons given above in favour of the application of **clause 34(b)**, especially when RW2 conceded on oath that they pressed for redundancy because, it offered a wide range of benefits for the aggrieved pilots as opposed to early retirement. It is also conceded by the same witness that the Respondent floated the idea of retiring four (4) and retaining six (6) on renegotiated pay or retaining all and then deploying them to fly other Aircrafts on renegotiated pay which offers were both declined. We therefore affirm the trial court's conclusion that the Respondent committed no error when it invoked **clause 34(b)** of the CBA to sever its employer/employee relationship with the aggrieved pilots as opposed to declaring them redundant.

As for alleged subjection of the aggrieved pilots to unfair labour practices, based on the argument that the circumstances of the appeal favoured redundancy as opposed to early retirement, rejected by the trial Judge and which rejection we affirm, it is our finding that the trial Judge rightly held that the Respondent acted within its mandate when it elected to invoke and apply **clause 34(b),** as opposed to **clause 45** of the CBA in severing its employer/employee relationship with the aggrieved pilots. Second, besides stating that the aggrieved pilots were subjected to unfair labour practices in contravention of **Article 41** of the Kenya Constitution 2010, no particular element of this Article which was allegedly infringed by the Respondent in its move to sever those fleets was pointed out to this Court. Third, breach of sections **40,41,43** and **45** of the Act relied upon as further evidence of subjection of the aggrieved pilots to unfair labour practices, do not apply to the circumstances of this appeal, because, the Respondent committed no error in its failure to invoke **section 40(a)** of the Act because, for reasons already explained above that redundancy was not the best option to take by the Respondent in the circumstances of this appeal. None compliance by the Respondent of this provision did not therefore warrant any sanctioning either by the trial court or by this Court on appeal. The other **sections 41, 43** and **45** procedures also do not apply as they relate to termination of the employer/employee relationship through disciplinary procedures. Herein, we have stated that what led to the premature retirement of the aggrieved pilots did not arise from any disciplinary proceedings initiated against them by the Respondent but from the Respondent's desire to restructure its

business operations arising from alleged lack of profits. It is not disputed as conceded to by RW2 that they were informed of the intention to exit the B777 fleet way back in November 2014; that upon being served with early retirement letters by the Respondent, only two went back to renegotiate. The eight did not because, they wanted to pursue the redundancy route. They were therefore given an opportunity to be heard. We find no merit in this complaint and it is rejected.

As for the failure to award compensation, we agree **section 49** of the Act donates a discretionary power to the Court to award compensation for any infringement of an employee's rights under the Act. See **National Bank of Kenya versus Samuel Nguru Mutonya [2019]** and **National Bank of Kenya Limited versus Anthony Njue John [2019] eKLR.** The trial court and now this Court on appeal having absolved the Respondent from any wrong doing in prematurely retiring the aggrieved pilots from their employment with them precluded the trial court and now this Court on appeal from delving into the issue of assessment of an appropriate award of compensatory damages, a duty imposed on the court only upon finding that an employer subject to the above provisions has infringed on the rights of an employee under the Act and is therefore liable to pay damages to redress the infringement which is not the position in this appeal.

Turning on the cross appeal, on issue number (v) & (vi), it is not disputed that the Respondent's claim is twofold, first, for compensation for the amount forming the loss of business in the sum of Kshs. 49,029,649//- The second limb is for a refund of Kshs. 47,957,818/- paid to the aggrieved pilots during the pendence of the injunction and trial. The Respondent does not dispute that, this fell into the category of special claims.

The position in law with regard to the mode of pleading and proof of a special claim is as was stated in the case of **Ouma versus Nairobi City Council** [1976] KLR 297 in which **Chesoni, J** (as he was then) while referring to the text of **Clerk and Lindsell,** had this to say:

> **"Special damages on the other hand marry the particulars (damage beyond the general damages), which results from the particular circumstances of the case and of the plaintiffs claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise of the trial**
>
> **.....**
>
> **"The terms "general" and "special" damages are used with different meanings. They refer, firstly, to liability; secondly, to proof; thirdly, to pleading; and fourthly, to the meaning of special damages only.**
>
> **..... for special damages to be awarded, they must be pleaded and *proved*.....**
>
> **Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damages, the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe Vrs. Evans [1892] 2Q B 524 where *Bowen LJ said at pages 532,533:***
>
> **"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleadings and proof of damages, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainestpedantry."**

That position has been crystalized by the Court in the case of **Hann versus Singh [1985] KLR 716** that:

> **"Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves. The Judge was right in holding that the appellant had failed to prove his claim for the depreciation of the vehicle after the accident"**

In this appeal, all that the Respondent pleaded in its memorandum of claim is as set out in Pr.18 and Pr. 22 as follows:

> **18. The illegal withdrawal of goodwill having been scheduled to take effect from 18*th* March, 2015 and is currently ongoing and thereby causing unnecessary business loss, delays and cancellations of flights amounting to insurmournable economic hardship, loss and damages to the employer.**
>
> **.....**
>
> **22. The claimant alleges mischief in the industrial action as the Respondent has failed to furnish or issue the claimant with any notification of a strike and therefore, any such action is unlawful and illegal, and it will occasion considerable loss of business and paralyze the claimant's operation."**

While in the prayers at paragraphs (d) & (e) it is stated as follows:

a. Compensation for loss of business and income to be tabulated at the hearing.

b. A mandatory order that the Respondent bears all liability for financial loss occasioned due to the engagement of the claimant's employees in the strike, go-slow, withdrawal of goodwill and/or other industrial action"

Further in the reply to the memorandum of defence and counterclaim at paragraph 6 it was stated as follows:

"The claimant further avers that at the time of filing this reply to defence and counterclaim, the liquidated loss suffered on account of the respondent's call for withdrawal of goodwill was at the sum of Kshs. 49,024,649/-. The claimant shall at the hearing crave leave to plead such other further loss as may have been suffered by the claimant. (Annexed herein and marked KQ R3 is a tabulation of loss on account of withdrawal of goodwill."

And prayers as follows:

1. Compensation for the sum of Kshs. 49,957,595/=

2. Restitution of monies paid to the pilots after their premature retirement, which amounts shall be tabulated at the Hearing.

3. Interests on (1) above.

4. Any other orders the Court may deem fit to grant."

Applying the threshold in the case of **Ouma versus Nairobi City Council** (supra), as crystalized by the Court in the case of **Hann versus Singh** (supra) to the rival positions on this issue, we find nothing to fault the Judge in holding that the Respondent's above claims were neither pleaded with the particularity expected of them in law nor proved as all what CW1 did was simply to mention the figures as pleaded above, which according to the above principles of law did not satisfy the prerequisites of pleadings with sufficient particularity and proof. CW1 also conceded that, he had no evidence to show that scheduled flights were disrupted or any proof that the loss suffered was to the magnitude claimed.

As for the second limb of this claim, it is not in dispute that they were paid pursuant to a court order against which no appeal was filed. In the absence of a rider to the said order that payment was conditional to success in their claims by the aggrieved pilots, no refund can issue. Second, in the absence of an application to have these orders vacated, the court was *functus officio* and rightly declined jurisdiction to revisit the matter.

Turning to the issue of payment for leave days not taken, it is not disputed that the Respondent was granted a conditional stay pending hearing of the cause namely, that they continue paying the aggrieved pilots full salary during the period when their six months' premature retirement notices were running and during which time the Respondent assigned no work to be performed for them by the aggrieved pilots. It is this set of circumstances that led the Judge to hold that they were deemed to have been on leave. We find no error in the said holding, especially when it was not disputed that they were never assigned any duties to perform for their employer during that period.

The upshot of the above assessment and reasoning on both the appeal and Cross-Appeal is that, we find no merit in both the appeal and cross appeal. Both are accordingly dismissed.

(2) Each party to bear own costs.

The Judgment is delivered under **Rule 32(3)** of the Court of Appeal Rules since the Hon. Mr. Justice **E.M. Githinji, JA** ceased to hold the office of Judge of Appeal.

Dated and delivered at Nairobi this 22nd day of May, 2020.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true *copy of the original.*

Signed

DEPUTY REGISTRAR