IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 107 OF 2018

BETWEEN

KENYA AIRWAYS LIMITED .....APPELLANT

AND

ALEX WAINAINA MBUGUA .....RESPONDENT

(Appeal from the judgment and decree of the Environment and Labour Relations Court of Kenya at Nairobi **(M. Mbaru, J.)** dated 7th *November, 2017* **in E&LRC CAUSE NO. 430 OF 2016)**

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JUDGMENT OF THE COURT

This appeal and the litigation preceding it underlines the dilemmas and dialectics that confront courts as they try by application of law to introduce the soothing balm of justice to the painful wounds that result from a fractured employment relationship that births distress, disillusionment and destabilization.

Consider the man **Alex Wainaina Mbugua (Alex)**, the respondent herein. By any account a guru in matters of finance, he was head-hunted, poached even, from his highflying and lucrative position as Chief Financial Officer – Africa, of Anglo-Gold Ashanti in South Africa by the appellant, Kenya Airways Limited (KQ). He was persuaded by KQ?s assurances that they needed a Kenyan Group Financial Director with potential to take over as its Managing Director within 5 years when the incumbent was expected to retire. He was appointed by a letter dated 25th June, 2008, which detailed his terms of engagement and stated his gross salary as Kshs.1.8 Million per month which was a pay-cut from what he was earning down South.

In his statement of claim filed before the Employment and Labour Relations Court, Alex averred that he embarked on his KQ career with devotion, attention and ability, consistently meeting and exceeding expectations and in appraisals, was often found to be outstanding. His exceptional performance saw Alex sponsored for training at the Harvard Business School in September, 2012 at the cost of US$100,000 paid by KQ. This was unprecedented and done in preparation for his anticipated appointment as Chief Executive Officer of the airline. Meanwhile, he became the longest serving Finance Director and Member of the KQ Board of Directors and kept it afloat despite significant revenue short falls of US$1 billion in the 4 years up to 31st March, 2015. He listed several notable achievements of his tenure.

The anticipated appointment as Chief Executive Officer did not however, happen and Alex intended to resign from the carrier on 24th June, 2014 but was *"passionately implored"* and prevailed upon not to do so by KQ?s then, and former Chairman of the Board of Directors who emphasized his invaluable position on the Board. He stayed on and his performance was always satisfactory as evidenced by the quarterly and annual performance appraisals the first being in October, 2015 when he was rated as having met expectations (ME). The Audit and Risk Committee of the Board to which he reported never raised any concerns about his performance and the external audit reports were always unqualified.

According to Alex, his troubles with KQ appeared suddenly on 11th January, 2016 when, on going for a record performance appraisal meeting, he was abruptly confronted by KQ?s Chairman of the Board, who was never involved in such appraisals of staff, and who went on to demand Alex?s immediate resignation, failing which a performance hearing would be constituted which would culminate in the termination of his employment. No reasons having been given why he should resign, he declined to do so whereupon the Chairman served him with a letter summoning him to a meeting early the next morning. The letter which also suspended him was in the following terms as well;

"You have been identified as such a key member of the senior management of the Company whose performance has been found to be wanting. The Board has therefore mandated the Human Resource Committee to look into and/or determine this matter in accordance with section 41 of the Employment Act."

Alex contended that his alleged poor performance was a red-herring and suspension was unlawful and unwarranted proxy. It was also no more than an ill-motivated and malicious witch hunt by the Chairman. He proceeded to request for more time to prepare for the meeting and to also seek various documents. Only a fraction of the same were supplied to him and his attempt to further reschedule the meeting, after it was re-scheduled to 18th January, 2015, and to be allowed access to the rest of the crucial documents he requested were rebuffed. He thus indicated that he could not attend the meeting of 18th January, 2015 and requested a full Board hearing to address his grievances over the manner he was being handled.

No response was made to his requests but instead he was advised by a letter dated 19th January, 2015, that KQ had terminated his services with immediate effect as determined by the Human Resource Committee, which considered his non-attendance of a scheduled meeting to amount to insubordination, and that he was guilty of non-performance. The termination letter was jointly signed by Amb. Denis Awori, the Chairman of the Board and Mbuvi Ngunze, the Group Managing Director and Chief Executive Officer of KQ.

By a letter dated 22nd January, 2015 addressed to the two, Alex rejected and repudiated the justification given for his dismissal. He explained that he had given reasons for his non-attendance on 18th January, 2015, in a letter which they did not respond to. He termed as false the allegation of his non-performance and gave reasons for his position that his termination was irregular, unfair and unlawful. That letter elicited no response from KQ notwithstanding that such appeal should have been determined within seven days in accordance with KQ?s Disciplinary Handling Procedures. That led Alex to fire off yet another more detailed letter dated 2nd March, 2015 reiterating his belief that his termination was unfair and giving reasons for that opinion. He gave notice of intention to sue, which he eventually did, seeking these remedies;

"(a) A declaration that Claimant?s dism*issal from* the respondent?s employment was unprocedural, unfair and unlawful and unconstitutional;

(b) A permanent injunction do issue restraining and stopping the respondent from head hunting, advertising, recruiting a new group Finance Director to replace the Claimant based on the reasons contained in the letter dated 19*th January, 2016;*

(c) An order do issue reinstating the Claimant as *the respondent?s group Finance Director forthwith without loss of any salary and benefits thereof;*

(d) Costs of this suit;

(e) Any other relief that the court may deem *appropriate to grant."*

KQ in response to the claim stated that its financial performance had ran into head winds and turbulence leading to a severe turndown of performance and huge losses to the great concern of the Kenyan public. It denied Alex?s narration of exemplary performance and gave its view that the Harvard training, far from being a reward to Alex for exemplary performance, was in fact for the sole purpose of assisting him in improving his performance. It embarked on a review of the performance of top management, including Alex, in view of its dismal and alarming performance and to assess their suitability to lead the much needed turn around. It admitted that its Chairman did serve Alex with the letter summoning him to the evaluation meeting and defended its decision to deny him access to its office facilities and resources since he had very sensitive information and contacts including its bankers, suppliers and business associates. It also defended the decision to summarily dismiss Alex as being justified and arrived at in conformity with the law. It pleaded that Alex was well able to secure an alternative job in a similar position elsewhere as there were no exceptional circumstances shown, in challenging his claim for reinstatement. Moreover, it pleaded at paragraphs 70 to 72 that;

"70. In further response to paragraph 33 of the *Memorandum of Claim the respondent avers that* the Claimant?s continuing employment as Group *Finance Director is untenable as the major shareholder being the Government of Kenya and Koninklijke Maatschappij NV (KLM) have lost confidence in the Claimant;*

71. In addition, the respondent avers that the position as Group Finance Director is critical to the performance of the respondent and the same is a fiduciary position requiring the trust and confidence of the Board and the shareholders in the abilities, competence and integrity of the individual holding the position;

72. The respondent avers that it has lost trust and confidence in the Claimant as well in his abilities, competence and integrity and therefore an order for reinstatement would not be practical in the *circumstances."*

It prayed that the appeal be dismissed with costs.

Alex was later to amend his statement of claim to include other matters and to introduce in consequence a new prayer (d), alternative to the prayer for annulment of his termination and for reinstatement, as follows;

"*In t*he alternative to (b) and (C) above, the Claimant prays for remedies for wrongful dismissal and unfair termination as follows:

a. Damages equivalent to 12 months? salary-Kshs.38,941,749.84

b. 3 months*? pay in lieu of notice - Kshs.9,735,437.46*

c. Unpaid salary for 19 days worked in January Kshs.1,988,960.34

d. Untaken leave days Kshs.1,621,572.56

e. Air Travel Tickets as per the policy dated 16.5.2006

f. Refund of tickets of the Claimant spouse and children incurred since termination amounting to USD.3,461.00 and Kshs.95,337.00

g. Exemplary and punitive damages

h. An order that the respondent is guilty of contempt of court orders issued on 5*th may, 2016 by removing the Claimant as a Board Member.*

i. Compensation for constitutional rights violation to be assessed

j. Certificate of service

k. A fine of Kshs.100,000 against the respondent for failure to comply with mandatory provision of section 51(3) of the Employment Act, 2007

l. Interests on (b) (c) & (d) above."

This elicited an amended response in which KQ denied the claims and reiterated that it accorded Alex *"ample opportunity to present his case"* but he declined or refused to utilize the same and that it was entitled to summarily dismiss [him] on account of insubordination.

The matter proceeded to hearing before Mbaru, J. with Alex testifying on his own behalf along the lines expressed in his statement of claim. Thomas Omondo Achola and Ambassador Dennis Awori, KQ?s Director of Strategy & Performance Management, and Chairman of the Board respectively, testified on its behalf. At the end of the trial, the learned Judge found in favour of Alex and entered judgment for him as follows;

"a) A declaration that the termination of *employment was unfair;*

b. the Claimant is hereby reinstated back to his position as Group Finance Director without loss of benefits and any lawful entitlement(s) to be paid within 30 days; and

c. The Claimant shall report back to work on 8*th* November, 2017 at 9.30 hours to the Chief Officer for allocation of duties; and

d. Costs of the suit.

In the alternative to the above;

a. The respondent shall pay the Claimant salaries due for 3 years;

b. Compensation amounting to 12 months? salary at *the last gross salary due on 19th January, 2016;*

c. Costs of the suit."

Aggrieved by that determination, KQ filed a notice of appeal and eventually a record of appeal containing a memorandum in which it complains that the learned Judge erred by;

- **Holding that the termination was unfair whilst disregarding its evidence and considering irrelevant factors**
- **Treating the evidence selectively and failing to *consider Alex?s performance was poor and not good as she held***
- **Failing to hold that Alex contributed to the termination by failure to attend the Board Committee**
- **Exceeding her jurisdiction by awarding Alex 3 years*? salary***
- **Ordering reinstatement when specific performance issues only exceptionally in contracts of service and it was, moreover impractical**
- **Treating Alex as the *"natural occupant of the position"* and disregarding the lack of trust and confidence by the major shareholders namely the Government and KLM in his suitability in restructuring KQ?s business**
- **Awarding 12 months? gross salary without *giving reasons***
- **Failing to hold that Alex?s performance review *was extraordinary in the circumstances.***

In formal response to the appeal, Alex filed a Notice of Grounds Affirming the Decision dated 16th May, 2018 and simultaneously filed a Notice of Cross Appeal of even date. In the latter document, Alex sought a variation of the learned Judge?s decision to include, in payments in lieu of reinstatement, all pending contractual and terminal dues and thus prayed for orders that;

> **"1. The cross appeal herein be allowed and the Court be pleased to vary the alternative Remedy to Reinstatement awarded by the Judge by addition of the following remedies:**
>
> **a. 3 months? pay in lieu of notice, being *Kshs.9,735,437.46***
>
> **b. Unpaid salary for 19 days worked in January, 2016, being Kshs.1,988,960.34**
>
> **c. Untaken leave days being Kshs.1,622,572.56**
>
> **d. Air travel tickets as per the policy dated 16*th May, 2006***
>
> **e. Refund of tickets of the respondent, spouse and children incurred since termination amounting USD.3,461 and Kshs.95,337.00**
>
> **2. Costs of the Cross Appeal."**

The parties filed written submissions as well as lists and bundles of authorities. In those filed on behalf of KQ by its counsel on record M/s Ochieng Onyango Kibet & Ohaga Advocates, he condensed the twenty grounds of appeal into four issues as follows;

> **"*i. Did the learned Judge of the Employment and Labour Relations Court err in holding that the* termination of the respondent?s employment was *unfair.***
>
> **ii. Did the learned Judge of the Employment and Labour Relations Court err in issuing an order for the reinstatement of the respondent.**
>
> **iii. Whether the learned Judge of the Employment and Labour Relations Court erred in law and in fact in the damages awarded in the alternative to an order for reinstatement of the respondent.**
>
> **iv. Is the respondent entitled to the prayers sought in the Notice of Cross Appeal."**

We think that the four issues adequately capture what we are called upon to determine in this appeal. KQ?s position on those issues is that the learned Judge got them all wrong while to Alex, naturally, the Judge?s findings and conclusions were faultless, failing only in not granting him all that he sought in the alternative to reinstatement. KQ maintained that it had a good reason for terminating Alex on account of poor performance. It went on to fault the learned Judge for ordering Alex?s reinstatement without paying attention to the factors outlined in **Section 49(4)** of the **Employment and Labour Relations Act** and without considering the practicability of such an order when KQ?s main shareholders had lost confidence in him.

Reliance was placed on Chitty on Contracts (27th Edn.)VOL. 1, "General Principles? where at paragraph 27 - 012 the learned authors opine that specific performance of certain types of contracts may be refused not because of being unnecessary, but rather *"it may be undesirable to grant it or impracticable to enforce it*." Such include employment contracts where it is undesirable to enforce continuance of a *„personal?* relationship between unwilling parties. Also cited was Richard W. Painter and Ann E.

> M. Holmes" **Employment Law, Cases and Materials**, 7th Edition, and in particular this passage at page 444;
>
> **"*The common law has been most reluctant to* enforce contracts of employment remedies which require the contract to continue, i.e. injunction and specific performance. There are a number of reasons for this. First, damages are often adequate as a remedy, and it is a general rule of a contract that where this is the case then the equitable remedies of injunction and specific performance should not be considered. Secondly, and perhaps most importantly, contracts of employment require mutual trust and confidence. This element would be missing if the employer and employee were to continue a relationship of service against the will of one or the other.** As Fry LJ said in ***De Francesco vs. Barnum*** (1890) 45 ChD 430, the courts ***„are very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining personal relations with one another to continue those personal relations … I think the courts are bound to be jealous lest they should turn contracts of service into contracts of slavery.?*** (Emphasis ours)

Counsel also referred to this Court?s decision in ***KENYA AIRWAYS LIMITED -vs- ALLIED & AVIATION WORKERS UNION KENYA & 3 OTHERS***, Civil Appeal No. 43 of 2013.

Turning to the learned Judge?s award of 3 years? salary over and above the 12 months? salary compensation, KQ submitted that Alex never pleaded for 3 years? salary as an alternative remedy to reinstatement. Relying on this Court?s holding in ***DAVID SIRONGA OLE TUKAI -vs- FRANCIS ARAP MUGE & OTHERS***, Civil Appeal No. 76 of 2014, it contended that the court is always bound by the pleadings of the parties and acts both out of jurisdiction and out of character in granting what has not been sought, and without hearing parties on the same. It was also contended that the learned Judge had no basis and gave no reason for awarding the maximum 12 months? salary compensation

which falls under a trend that this Court deprecated in ***UNITED STATES INTERNATIONAL UNIVERSITY -VS- ERIC RADING OUTA,*** Civil Appeal No. 143 of 2013 and ***CMC AVIATION LIMITED -VS- MOHAMMED NOOR***, Civil Appeal No. 199 of 2013. It offered that were the Court to find that Alex?s termination was unfair, damages be pegged at 3 months? gross salary.

Regarding the cross appeal, KQ first addressed the claim for air travel tickets for Alex, his spouse and children, submitting that they were a privilege *"only available to its serving and retired directors"* and, as a fringe benefit, they went with the termination of employment as this Court stated in an interlocutory ruling in ***ERIC MAKOKHA & OTHERS -VS- LAWRENCE SAGANI & OTHERS***, Civil Application No. NAI 20/94 (UR) and in ***JIMI MASEGE –VS- KENYA AIRWAYS LIMITED,*** Civil Appeal No. 63 of 2003. The claims by Alex were therefore misconceived.

KQ does not have a problem with Alex?s claim for 3 months? pay in lieu of notice, unpaid January, 2016 salary, and untaken leave days as well as his terminal dues which it had in fact advised him would be calculated and paid once he completed the clearance process.

At the hearing of the appeal, **Mr. Ohaga**, learned counsel for KQ, relied on those submissions which we have endeavoured to summarize, and elected not to highlight them as they were clear and comprehensive enough. For Alex, the firm of Kamotho Njomo & Company Advocates filed written submissions dated 8th November, 2016, which were orally highlighted by **Mr. Ngatia**, learned counsel who led Mr. Kamotho at the plenary hearing.

Mr. Ngatia submitted that the reason given for Alex?s termination, namely performance, did not meet the mutually agreed standards which required that it be dealt with by the Board "by discussion and decision" as stipulated in **Clause 23** of his letter of appointment, which KQ breached. The terms of the letter of appointment were not open to unilateral variation by virtue of **Clause 26.1** which provided thus;

> **"26.1 No term or provision of this letter of appointment shall be varied or modified by any prior or subsequent statement, conduct or act of any party, except that hereafter the parties may amend this letter of appointment only by letter or written instrument signed by each of the parties."**

Repudiating the poor performance claims by KQ, counsel pointed out that over the 2008 - 2015 period, his performance did not once fall under "acceptable". Rather, in summary he had 13 "needs improvement"; 50 "met expectations"; 24 "*exceeds expectations"* and 8 "*outstanding* scores". He went on to state that when KQ?s performance suffered, the persons identified by the Senate Select Committee of Inquiry into the Affairs of Kenya Airways Limited and its Subsidiaries in its November, 2015 report were the Chief Executive Officer and the Marketing Director with no mention of the Group Finance Director. He pointed out to KQ?s first witness? evidence to the effect that KQ had unqualified people running key positions that drove revenue. That witness gave the example of revenue generation which was the work of the Commercial Director but it was however given to the Human Resource Director. Indeed, the KQ Board Chairman confirmed in cross-examination that Alex was not involved in commercial, marketing or operating functions where there was haemorrhage.

Mr. Ngatia charged that Alex was improperly denied the opportunity to escalate his grievances to the Board as per the terms of engagements, and that his termination was by the Human Resource Committee without evidence that the full Board ever ratified that decision. He contended that reinstatement was the proper order under the circumstances seeing that fair labour practices are a constitutional right under **Article 47**. Citing ***MALLOCH -VS- ABERDEEN CORPORATION [1971] WLR 1578***, a decision of the former English House of Lords, counsel urged that where the decision to terminate was wrongful, then it was a nullity and the remedy ought to be reinstatement, and not damages.

According to Mr. Ngatia, as the other Directors with whom Alex may have had difficulty working are no longer at KQ and the trial court having previously injuncted the hiring of a Group Financial Director, this was a fit and proper case for reinstatement. This was all the more needful in view of the many violations KQ was guilty of, so that it should not appear that an employer who is able to pay damages should be allowed to chest thump and ride rough shod over the rights of an employee.

Making a reply to those submissions, **Mr. Ohaga** contended that it was of no significance that Alex was poached from South Africa by KQ as all that mattered was the letter of appointment, all its antecedents being irrelevant. The summons he received to attend the Human Resources Committee were on the instructions of the Board which had power to delegate its authority to a Committee. Counsel charged that Alex was the author of his troubles for failing to appear when summoned and his claim that he did not have certain documents was a red-herring as they were in his lap top as he conceded in cross examination. He was in fact able to provide all of those documents at the hearing of the suit. His performance was poor and he had a low score under board evaluation on understanding of KQ?s financial position. He was accorded an opportunity to be heard so ***MALLUCH -VS-ABERBEN*** (Supra) was distinguishable. Moreover, he failed to make out a case for reinstatement under **Section 49** of the **Employment and Labour Relations Act.**

We have given due consideration to the entire record and weighed the rival arguments laid and made before us by counsel for the parties. We have done so as a first appellate court with a clear duty to subject this entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. We do so bearing in mind that we, unlike the trial Judge, have not had the advantage of hearing and observing the witnesses in live testimony and we make due allowance for it. We defer to the trial Judge?s findings especially those based on credibility of witnesses but are under no duty to agree with her findings if they are clearly wrong or proceed from a misapprehension of the evidence. See ***SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS [1968] EA 123***.

The first issue we have to decide, on a consideration of the record as a whole, is whether Alex?s termination was proper. Under **clause 17(g),** of the letter of appointment, he could be terminated if his performance did not meet mutually agreed standards and results as a result of his failure or neglect. **Clause 16** is also relevant as it states that if he failed to perform to the reasonable satisfaction of the company any obligation within the employment contract, it *"may have to require [him] to remedy such failure within a stated time and if he fails to*

comply with such a requirement to terminate the agreement."

Whereas, indeed, it is the Human Resource Committee that handled performance issues involving Alex and others at his level, there is no doubt that what transpired leading to his termination was not the regular performance appraisal or review. In a lengthy cross-examination, KQ?s Board Chairman on several occasions referred to the *„peculiar?* or *„special?* circumstances the airline was going through. There is no doubt that with its? losses becoming a matter of grave public concern, KQ?s top leadership considered it necessary to have personnel changes. The Chairman admitted that when he met Alex, he „advised? him to resign and that he *"hoped and expected him to resign."* He was expected to resign rather than go through a performance appraisal - a strange expectation seeing that he had gone through so many appraisals over a period of 8 years. The one to come was clearly going to be a different cup of tea.

Ambassador Awori testified that he is the one who wrote the letter that he gave Alex when the latter rejected the advice or a demand really, to resign. Ordinarily, it is not the Chairman who would initiate such a meeting or summon the Group Finance Director whose Manager and Evaluator was the Managing Director. He stated that he wrote the said letter *"very carefully noting the law."* He was too careful:

> **"11th January, 2016**
>
> **Mr. Alex Wainaina Mbugua**
>
> **SN 8189**
>
> **Finance Department**
>
> **Dear Alex**
>
> **RE: PERFORMANCE**
>
> **I refer to today's discussions on the above subject.**
>
> **As you are aware the Board has been concerned about the declining business performance of the airline over the last three (3) years. To this end, the Board of Directors has been compelled by the prevailing circumstances to review the status and or performance of key members of the senior management.**
>
> **You have been identified as such a key member of the senior management of the Company whose performance has been found to be wanting. The Board has therefore mandated the Human Resource Committee look into and/or determine this matter in accordance with Section 41 of the Employment Act.**
>
> **You are hereby invited to a formal hearing tomorrow, 12th January, 2016 at 7.30a.m. at Serena Hotel. You are at liberty to bring along a colleague to accompany you to the deliberations. In this regard, kindly let us know in advance who you will be bringing along.**
>
> **Due to the sensitivity of your position, effective immediate and during this entire process you will not be allowed access to your office or have access to company email.**
>
> **We look forward to receiving your cooperation in the matter.**
>
> **Yours faithfully**
>
> **Amb. Dennis Awori**
>
> **Chairman**
>
> **CC. Group Managing Director & CEO"**

Alex on receipt of the letter sought some information or documents from KQ and also asked for some time to prepare. As we have indicated earlier in this judgment some documents were availed, but not all, and even though time was extended, Alex felt that given the blockade of his office (with email blocked, locks changed, and the like) and the non-availment of some of the documents, he needed time but the requested second extension of time was flatly refused. He wrote to the Managing Director on 15th and raised certain concerns including;

> ***"As you are aware, I am in my eighth year as Finance Director of KQ. This makes me the longest serving Finance Director in KQ history and also*** **the longest serving local sitting board member. Over the course of the years I have neither had attention drawn to my performance, nor been a recipient of any disciplinary action. I therefore find it rather alarming that there is such urgency to (a) request my immediate resignation, and pursuant to my refusal to acquiesce, (b) subject me to a hearing whose structure and purpose is unclear, and without my being made aware of any substantive charges against me. This is in spite of the recently concluded board review exercise, as well as my performance appraisal with you as my line manager which indicated that I met expectations. ...**

Kindly clarify if the meeting you have called for is a Performance Appraisal or Disciplinary Action.

The "summons" in your letter of 13 January indicate that it is a Performance Appraisal. However, this is an unusual appraisal for several reasons: not only is it outside the regular appraisal format, but it is preceded by a request for me to resign and by my being denied access to the office and my email being disabled. You have also informed me to bring a colleague to the deliberations. In my eight years at KQ, I have never once been asked to bring a colleague for my Performance Appraisal.

If this is a formal disciplinary hearing, then you are in breach and violation of the clause 17.1(b) and 17.2 of the HR policy at KQ and this needs to be remedied before we can proceed."

It is quite obvious to us that KQ conflated the performance review and disciplining process and came up with what was essentially a hybrid, mongrel process that did not fall under either category. The process was tainted and it would seem the performance angle was no more than a red-herring to get rid of the respondent. His fate was determined even before he was summoned to attend the Serena session, whatever it was, with the demand that he resign, the barricading of his office, disablement of his e-mail and the like. He had the mark of Cain.

We have no difficulty finding, as did the learned Judge, that KQ was in breach of the law in summarily terminating Alex?s employment. The grounds given were spurious as the entire process was violative of KQ?s own internal regulations and the Act. What appears from the record is a flagrant disregard for procedural fairness. Whereas Alex?s failure to appear when summoned to some degree is blameworthy, it would seem to us that he had presented cogent reasons indicative of his unpreparedness and had also sought clarification in the letter we have quoted which do not seem to have been considered. He had a well-founded apprehension that what he had been summoned to was an irregularly-assembled kangaroo court with a single brief: to guillotine him.

Having agreed with the learned Judge on the main issue that the dismissal was unfair, we now turn to the remedy of reinstatement that was issued. Much as it appears logical that an employee who has been unfairly terminated and who in consequence is exposed to much financial and social harm and may in fact be ruined career-wise, should in fairness be restored to his position before his employers unfair and other unlawful actions, the law on employment and labour relations is not so. Far from being the natural, logical result of a finding such as we have affirmed, reinstatement issues only in exceptional circumstances. The reason for this lies in the nature of the employment relationship, it is by definition very personal and, though not intimate, it is close enough for the law to appreciate that unless employer and employee be agreed, they can neither walk, nor work together. **Section 49(4)** of the **Employment and Labour Relations Act** obligates a court before ordering reinstatement to consider;

> **"the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the opportunities available to the employee for securing comparable or suitable employment with another employer; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination."**

In ***KENYA AIRWAYS -VS- ALLIED & AVIATION WORKERS UNION KENYA*** (supra), Murgor, JA. In her judgment cited with approval and we do as well, the sentiments expressed by the New Zealand Court of Appeal in ***NEW ZEALAND EDUCATIONAL INSTITUTE -VS- BOARD OF TRUSTEES OF AUCKLAND NORMAL INTERMEDIATE SCHOOL [1994] 2 ERNZ 414***;

> **"Whether … it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."**

With respect to the learned Judge, and while noting that the position did remain open main titularly vacant by court order, we are not satisfied that she fully engaged with the statutory requirement to consider the propriety of reinstatement. We think, in particular, that the uncontested loss of confidence in Alex by the Government of Kenya and KLM, who were KQ?s major shareholders, is not a matter that could be wished away. Courts ought to attempt to fashion workable solutions to the often sensitive and volatile employment spaces, and should eschew the making of orders that serve only to further complicate as opposed to solving the problems already existing. On this score we think the criticism against the learned Judge was not without basis. Reinstatement was not an appropriate remedy and this would explain why the learned Judge, to her credit, issued other orders in the alternative.

Regarding those alternative remedies, KQ complains that the learned Judge exceeded jurisdiction in granting 3 years? salary. This complaint has not been countered by Alex. Indeed, it is difficult to discern the basis upon which the learned Judge made that order which in her judgment is expressed as *"Salaries due"* for 3 years. It is not clear whether this was a typographical error but suffice to say that the learned Judge had neither the factual basis nor the jurisdiction to make the order, and the same is for setting aside.

Regarding the compensation for unfair termination, the learned Judge granted 12 months gross salary. Under the Act, 12 months is the maximum that can be granted by a court as compensation for unfair termination but in every case it grants it the court ought to explain and justify the maximum. The 12 months must never be the instinctive default amount of compensation and this Court has so stated in many other cases including ***UNITED STATES INTERNATIONAL UNIVERSITY –VS- ERICK RADING OUTA*** (supra) and ***CMC AVIATION LIMITED -VS-MOHAMMED NOOR*** (supra). In the latter case this Court stated;

> "The trial court did not state why it opted to give the remedy provided under **section 49** (**1) (c)** that is, twelve *months? gross salary, and not the other remedies under* ***section 49 (1) (a) or (b).*** The court should have been guided by the provisions of **section 49 (4)** but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did."

This same thinking was echoed in **OL PEJETA RANCHING LIMITED VS DAVID WANJAU MUHORO [2017] eKLR** as follows;

> "The trial judge did not at all attempt to justify or *explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention..."*

Granted that there are instances where the conduct of an employer may well call for a more punitive approach, courts are bound by the limits or caps set by statute and must be careful to remain within them. In the absence of explanation or justification for the 12 months, but given the shabby, humiliating andunjustified manner in which KQ treated Alex, we order compensation at nine (9) months.

The upshot of our consideration of this appeal is that it succeeds only in part and fails in larger part. As for the cross-

appeal, given all that we have said it must succeed in the full terms of its prayers which shall be granted.

Our final orders therefore are that;

1. The appeal fails in its challenge to the finding that the respondent?s employment was unfairly terminated.

2. The order of reinstatement is set aside.

3. The order for 3 years salary is set aside.

4. The order of compensation at 12 months gross salary is set aside and substituted with an order of 9 months gross salary at the rate of the last salary.

5. The cross appeal is allowed in entirety.

6. The appellant shall pay to the respondent the costs of the appeal and of the cross appeal.

DATED and delivered at Nairobi this 7th day of June, 2019.

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR