IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE. G.B.M. KARIUKI & OUKO, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 67 OF 2010

BETWEEN

KENYA CIVIL AVIATION AUTHORITY…….....1ST APPELLANT

C.A. KUTO……...….....2ND APPELLANT

AND

RUFUS NJUGUNA…….....1ST RESPONDENT

RURIANI MICHENI…….....…….2ND RESPONDENT

DANSON KIMANI…….....3RD RESPONDENT

ALLAN MUKINDIA……....….....4TH RESPONDENT

PAMELA OWITI……..…….5TH RESPONDENT

(Suing on behalf of themselves and 63 others former employees of the Directorate of Civil Aviation, a department within the Ministry of Transport and Communications)

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Anyara J) Dated 7th November, 2005

in

Misc. Civil Case No. 1278 of 2004)

****

JUDGMENT OF THE COURT

The respondents ***Rufus Njuguna, Ruriani Micheni, Danson Kimani, Allan Mukindia and Pamela Owiti*** suing on behalf of themselves and 63 other former employees of the Directorate of Civil Aviation, a department within the then Ministry of Transport and Communication, took out an originating

summons dated the 23rd day of September, 2004 against the appellants ***Kenya Civil Aviation Authority and C.A. Kuto seeking a total of*** eleven (11) reliefs. These can be summarized as follows: a declaration that the dismissal of the respondents was wrongful and a nullity; an order for reinstatement of the respondents to their positions before the dismissal, an order that the arrest, confinement in police cells for three days and subsequent prosecution of the respondents in the Nairobi Chief Magistrates court Criminal Case No. 940 of 2002 and Mombasa Chief Magistrates Case No. 908 of 2004 amounted to a denial of the fundamental right to the protection of personal liberty and was therefore inconsistent with and in breach of Section 72 of the former Constitution of the Republic of Kenya; alternatively an order that the arrest and subsequent prosecution of the respondents and each one of them was not authorized by law in any of the situations envisaged by Sections 71 (1) (a) (b) (c) (d), but was on the unlawful instructions of the 2nd appellant to intimidate employees from exposing criminal and or unlawful actions of the 2nd appellant; an order that the dismissal of the respondents without benefits was and is a denial of the fundamental right to the protection against deprivation of property without fair and prompt compensation guaranteed under Section 75 of the Constitution of Kenya ; an order that the Attorney General and the 1st appellant do pay to each of the respondents salary arrears from 18th April 2002 to the date of reinstatement; an order that the second appellant do pay to the respondents compensation in terms of Section 72 (6) of the former Constitution; alternatively damages from the appellants for breach of the respondents' fundamental rights and freedoms guaranteed by the Constitution of Kenya; costs and interests. Such further orders, writs and or directions as the Honourable Court shall consider appropriate for the purpose of enforcing or securing the enforcement of the plaintiffs' fundamental rights and freedoms found to have been breached in relation to them.

Several grounds were put forward in support of the originating summons. In summary, the respondents contended that their dismissal from the appellants' employment was unconstitutional as it infringed various provisions of the constitution and was illegal as it was contrary to the Public Service Regulations and provisions of the Employment Act and the Civil Aviation Act; it was also contended that it was also unprocedural and not based on any factual basis; that it was in breach of the rules of natural justice; there was no basis that the respondents were guilty of dissertion of duty, defiance of instructions of the Permanent Secretary, commission of acts of gross misconduct, absentism from duty without lawful permission, taking part in an illegal strike and was therefore in totality not justified.

The respondents also relied on the content of an affidavit deponed by one ***Rufus B. Njuguna*** on behalf of himself and the rest of the respondents on the 23rd day of September, 2004 and filed simultaneously with the originating summons. In summary, that some of the respondents were former employees of the now defunct East African Community which was disbanded in the year 1977; that upon the disbandment, the Civil Aviation employees were absorbed by the Kenya Government, and placed under the Directorate of Civil Aviation then a department within the Ministry of Transport and Communication; that some of the respondents were however direct employees of either the Government or the Directorate; that in pursuance of their constitutional rights they started agitating for better terms of employment and delinking of the Directorate of Civil Aviation employees from the Civil service and making it a distinct Authority; that it was in the process of agitating for better terms of employment that the Government translation of service i.e rent to market rent opportunities resulted in some employees getting negative salaries. That the Government had promised to look into the problem and when it failed on its promise that the respondents decided to go on a go- slow in the discharge of their services. The appellants reacted by harassing and prosecuting some of the respondents and ultimately dismisse them unprocedurally from their employment; that the events complained of leading to the litigation from which this appeal arose took place between 30th March, 2002 and 8th April, 2002.

Lastly, that in October of the same year 2002 the Kenya Civil Aviation Authority was established; that the appellants were urged to reinstate the respondents to their respective employments but the appellants reinstated only 187 out of the 269 employees who had been affected, hence the litigation leading to this appeal.

In response to the originating summons, the second appellant ***C.A. Kuto*** deponed in a 45 paragraphs replying affidavit on the 29th day of November, 2004 and filed on the 30th day of November,

2004. In summary, the 2nd appellant confirmed that indeed some of the respondents had been employees of the defunct East African Community which broke up in the year 1977; that upon the break up, the Directorate of Civil Aviation was created as a department in the Ministry of Transport and Communication under the Public Service Commission Civil Service. Regarding events culminating to this appeal, ***Mr. C.A. Kuto*** deponed that he was aware that a move was made to delink the Kenya Civil Aviation Authority from the civil service but this was not for purposes of improving on the terms of employment of the staff who had been absorbed by the Government from the defunct East African Community but to make the Authority to be more effective and efficient in the regulation of the provision of air navigation services.

The deponent recalled that in the month of March 2002 there appeared to have been discontentment amongst the staff; the management started receiving threats of a go-slow and impending strike; that the management moved to forestall the impending strike by engaging in negotiations with the staff union officials located at various points with a view to resolving the issue amicably but then some of the respondents issued a defiant threat that the strike was on. The defiance prompted the Government to issue a return to work notice which the respondents failed to heed leading to their dismissal. Upon dismissal, the respondents were given an opportunity to appeal to the Public Service Commission; the appeals were processed in the normal manner and allowed for employees save for sixty eight (68), that an opportunity was given to the sixty eight (68) to appeal to the Public Service Commission which they did but were not successful; that a reinstatement order for the sixty eight (68) will not be in the best interests of the parties as the newly created Kenya Civil Aviation Authority created on the 24th October, 2002 was undergoing staff rationalization; but concedes that the employees of the defunct Directorate of Civil Aviation had their services translated into the service of the new outfit the Kenya Civil Aviation Authority.

Parties were heard by ***Emukule J*** as directed by the then Hon the Chief Justice and in a ruling delivered on the 7th day of November, 2005 ***Emukule J*** found for the respondents. The appellants were aggrieved by that decision and they have appealed to this Court citing twelve (12) grounds of appeal. In summary, the appellants contend that the learned trial Judge fell into an error when he declared that the respondents' dismissal from the Public Service was wrongful and a nullity; by failing to find that the originating summons was an abuse of the Court process, by reasons of the respondents' failure to raise any constitutional issues arising out of their individual employment contracts which were never produced; by failing to hold that the respondents' remedies lay in filing suits under their individual employment contracts in the normal manner and in ordinary civil courts or the industrial court; by failing to find that the respondents were not employees of the appellants; by ordering the assessment of each individual respondents' claim by the Deputy Registrar who has no jurisdiction under order 48 Civil Procedure Rules (as it was then now order 49) to take evidence after a trial in a constitutional petition has been concluded; by making an order for assessment of the respondents claims in a constitutional petition which was contrary to public policy; by ignoring the law on special damages and the quantum of damages awarded for breach of employment contracts; by failing to find that the respondents had been accorded a fair hearing by the Public Service Commission; by failing to find that the respondents' claim was time barred under Section 7E (b) of the Civil Aviation Act, Chapter 394 of the Laws of Kenya; by finding that the appellants had contravened the respondents' constitutional rights to liberty following their arrest and confinement in police cells; by failing to hold that the respondents ought to have filed a suit in a Civil Court for malicious prosecution against the State; by ordering the second appellant to compensate the respondents' when in law and in fact the 2nd appellant was not the employer of the respondents and for failing to note that the second appellant enjoyed immunity under Section 5E of the Civil Aviation Act, Chapter 394 of the Laws of Kenya that protected the second appellant from any personal liability in respect of any action, claim or denial whatsoever and lastly by awarding the respondents cots and interests.

In consequence thereof the appellants they asked for an order that the appeal be allowed and costs in appeal and of the High Court proceedings be borne by the respondents.

On the hearing date, ***Mr. P.O. Ogunde*** learned counsel appeared for the appellants and clustered the grounds of appeal into six grounds. Grounds 8, 9 and 12 were each argued alone, grounds 2,3,5,6 and

10 together; 4 and 11 together and then 1 and 7 together. On grounds eight (8), learned counsel argued that the respondent presented their claim to Court in contravention of the provisions of Section 7 (e) (b) of the Civil Aviation Act Cap 394 of the Laws of Kenya which required the issuance of a written notice of intention to institute legal proceedings against the Aviation Authority a month before presentation of the claim; that the cause of action arose in the year 2002 while the case was presented to Court on 24th September, 2004 outside the statutory period of one year; that the respondent attempted to go round this statutory requirement when they chose to approach the Court by way of an Originating summons.

Further on ground 8, the Court should have noted that this claim fell into ordinary civil claims and should have ruled that it had been presented in a wrong forum; that it was an error for the learned trial Judge to rule that the appellants had admitted the claim of the respondents when this had not been so stated to the Court; it was therefore an error for the learned Judge to introduce this on his own.

On ground 9, learned counsel submitted that there was nothing presented before the learned Judge to demonstrate that the appellant's actions were central to the arrest and prosecution of the respondents.

on grounds 2,3,5,6 and 10, learned counsel reiterated that the moment the learned trial Judge realized that the central issue in controversy between the appellants and the respondents related to termination of the contract of employment, the court should have stopped there, held that they were before a wrong forum and then directed them to the correct forum; that the learned Judge further fell into an error when he directed that the actual entitlement for each respondent be calculated by a Deputy Registrar as there was no jurisdiction on the part of the Deputy Registrar to do so.

On grounds 4 and 11 learned counsel maintained that the respondents were employees of the Public Service Commission and the learned Judge fell into an error when he directed the appellants to meet damages in favour of the respondents; that the learned trial Judge fell into error when he ruled that the respondents' dismissal was unlawful and a nullity because in the case of dismissal, this would give rise to an award of damages while in the case of a nullity this would call for a reinstatement.

On grounds 1, 7 and 12 learned counsel argued that there was no order for reinstatement. That notwithstanding, the learned counsel maintained that the final conclusion reached by the learned trial Judge was wholly erroneous as the respondents were given an opportunity to defend themselves; that he also failed to find that there was basis for the termination of the respondents' services; that costs usually follow the event and lastly that there was no basis for the award.

Mr. Malombo Momanyi for the Attorney General fully associated himself with the submissions of the appellants and then reiterated that from the content of the replying affidavit filed by the appellants, they demonstrated clearly that the respondents' contracts of employment had been terminated by the Public Service; that the respondents had been given an opportunity to show cause and they did so; and that due process was followed in terminating the respondents employment. This is borne out by the fact that out of 254 appeals submitted, 186 were allowed while 68 were rejected. On that account learned counsel urged us to allow the appeal.

Dr. Khaminwa on the other hand submitted that grounds 2, 3, 4,8,10 and 11 were not raised in the replying affidavit of the 2nd appellant ***C. A. Kuto*** or before the learned trial Judge; that it is not correct for the appellants to contend belatedly that the respondents were employees of the Public Service Commission when the dismissal letter indicated clearly that respondents were employees of the Kenya Civil Aviation Authority.

Dr. Khaminwa further contended that the appellants were in breach of the rules of natural justice as they never gave the respondents an opportunity to be heard; that this is borne out by the fact that the appellants gave a press release on 6th April, 2002 threatening dismissal if the respondents did not return to work which threat was carried out on the 8th of April, 2002.

Dr. Khaminwa referred us to the case of ***Marete versus the Attorney General [1987] KLR 690*** for the proposition that the contravention by the State of any of the protective provisions of the repealed

constitution was prohibited and the High Court was empowered to award, redress to any person/persons who may have suffered because of such contravention. Secondly that such redress could include compensation for loss of earnings consequent on the contravention and also compensation for the inconvenience and distress suffered. In addition ***Dr. Khaminwa*** referred us to a number of texts on principles of proportionality, legitimate expectation and the right to be heard.

In reply to ***Dr. Khaminwa's*** submissions ***Mr. Ogunde*** reiterated the earlier submission and then argued further that in the complaints by the appellants on grounds 2, 3, 4,8,10 and 11 it is only the issue of limitation of time within which the respondents claim should have been lodged that was not argued before the learned trial Judge.

Mr. Momanyi on the other hand while supporting ***Mr. Ogunde's*** response reiterated that the respondents summary dismissal was justified under the then relevant law as the appellants were guilty of willful neglect of duty as they defied the order to return to work.

This being a first appeal, our mandate is as set out in Rule 29(1) of this Court's Rules 2010, namely to reappraise the evidence before us and then draw out our own conclusions on the facts. In ***Selle and another versus Association Motor boat Company Limited and another [1968] EA123*** at page 126 Sir Clement De Lestang, V.P. had this to say inter alia:-

"An appeal to this Court from a trial by the High 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 give 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 witness is inconsistent with the evidence in the case generally (Abdul Hamed Saf Versus Ali Mohamed Shalon [1955] 22 EA CA 270.".

In the instant appeal, the learned trial Judge, after assessing and analyzing the evidence before him drew out the following questions for determination:-

i. Whether the respondents' dismissals were lawful?
ii. Who was the respondents' employer?
iii. Under what provisions of law were the respondents employed?
iv. Did the employer breach that law?
v. What are the consequences of the employer breaching that law?

In a summary, the findings of the learned trial Judge were that there was no dispute that the respondents were employees of the Public Service Commission; that in this regard the respondents were subject to Public Service Regulations; that the respondents decision to go on a go-slow strike was contrary to those Public Service Commission Regulations and that is why the Minister for Transport and Communication intervened to forestall the strike; that the regulations centrol in apportioning blameworthiness between the appellants and the respondents were regulations numbers 26,27,28,29,30,31 and 32. All of these reemphasize the need for the employer to observe the rules of natural justice by informing the employee of the charges for which he/she is accused of before meting out disciplinary action on such an employee.

Upon analyzing the content of each of the above regulations and applying them to the rival arguments before him, the learned Judge arrived at the conclusion that the respondents were employees of the Public Service Commission; that they were obligated to discharge their duties in line with the requirements set by the above regulations; that respondents breached those regulations by staging a go-slow strike; that the appellants were entitled to take disciplinary action against the respondents; but in doing so, the appellants were obligated to observe the rules of natural justice; that the appellants failed to do so. In the result the learned Judge concluded that the respondents were unlawfully and unprocedurally dismissed from their employment and were therefore entitled to redress.

On the basis of the above reasoning the learned trial Judge granted the respondents the following reliefs:-

"1. ***I declare that the dismissal of the plaintiffs from the Public Services the then (Directorate of Civil Aviation) was wrongful and a nullity.***

2. I order that the plaintiffs be paid their arrears of salary and other benefits for the period dating back to 18.04.2002. The exact amounts to be assessed by the Registrar or Deputy Registrar taking into account the applicable terms of service….

…….

5. I grant prayer No.3 of the originating summons dated 23-09-2003 .

9. I grant prayer no 7 in terms of Section 72 of the Constitution and in line with the grant of prayer No. 3 of the originating summons and therefore decline to grant prayer No. 8.

10. The defendants shall bear the costs of this action.

11. The defendants shall pay interest at Court rates in all amounts assessed and due to the plaintiffs' in terms of the orders made herein."

On our own, we have re-assessed, re-evaluated and re-analyzed the content of the evidence tendered before the learned trial Judge in line with the rival pleadings, rival submissions that had been presented before the learned trial Judge, the complaints raised by the appellants in the memorandum of appeal filed herein as against that Judgment, as well as the submissions on appeal. Our simple task is first of all to determine whether we are properly seized of this appeal and then if we rule in the affirmative, proceed to determine whether this appeal is to be allowed as requested for by the appellants or the learned trial Judges' decision is to be affirmed as asserted by the respondents.

The issues as to whether we are properly seized of this appeal or not arise from the appellants contention that the respondents were non suited as at the High Court level, on account of failure to comply with the provisions of **Section 7E (b) of the Civil Aviation Act Cap 394** Laws of Kenya as amended. This is therefore a matter which touches on the jurisdiction of this Court. It therefore goes to the core of the proceedings. It is now trite as laid down by this Court in the case of ***Owners of Motor Vessel Lilians Versus Caltex Oil (Kenya) Limited [1989] KLR1*** that a question of jurisdiction may be raised by a party or by a Court on its own motion and must be decided forthwith on the evidence before the Court.

We note from the content of the rival pleadings filed before the High Court, directions taken before ***Makhandia J*** (as he then was) and the then Hon. the Chief Justice ***E. Gicheru CJ*** as well as the rival submission before the trial Judge and the entire ruling resulting therefrom that the issue of limitation of action or the respondents being non suited was not raised before the High Court. It is therefore being raised before us on appeal for the first time.

In the case of ***Great Lakes Transport Co. (U) Ltd versus Kenya Revenue Authority [2009] KLR 720*** the Court held, inter alia that

"***It was trite law and the provision of Order 14 of the Civil Procedure Rules was clear that issues for determination in a suit generally flow from the pleadings and unless pleadings were amended in accordance with the Civil Procedure Rules, the trial Court by dint of the provision of Order 20 Rule 4 of the aforesaid rules could only pronounce Judgment on the issues arising from the pleadings or such issues as the party had put forward for the Courts determination."***

Section 7E (b) provides:-

"***Where an action or other legal proceedings is commenced against the Authority for any act done in pursuance or execution or intended execution of this Act or any public duty or authority or in respect of any alleged neglect or default in the execution of this Act of any such duty or authority, the following provisions shall have effect-***

a. **……..**
b. ***(b) the action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect, omission or default complained of in the case if continuing injury or damage within six months next after the causation there of."***

Events giving rise to the litigation culminating in this appeal took place in March/April 2002 before the provisions relied upon by the appellant to agitate the issue of limitation took effect on 24th October, 2002. A part from citing this provision, learned counsel ***Mr. Ogunde*** did not cite any other provision in this new legislation which made this provision retroactive. Neither have we traced any on our own. This being the case, we have no otherwise than to hold that the requirement in Section 7E (b) was not conditional on the respondents complying with it before moving to Court to seek redress for wrongs committed against them by the appellants before the effective date of that provision.

It is on record that learned Counsel ***Mr. Ogunde*** had also argued that the respondents move to approach the seat of justice by way of **an Originating summons** was not a cure. Indeed the respondents approached the seat of justice by way of an Originating summons. The originating summons had been presented under the provision of the now amended order 36 Civil Procedure Rules (now Order 37). This provision made it mandatory that before proceeding with the hearing on any originating summons directions had to be taken. ***Makhandia J*** (as he then was) was alive to this procedure and that is why he took directions on the mode of procedure already reflected above. Secondly since the matter involved constitutional issues, directions had to be taken before the Hon. the Chief Justice on the number of Judges to hear it.

The entries on the court record are clear that the appellants were ably represented by legal counsel. They never raised this issue both in their replying affidavit or at the two directions stages. This is the stage where the appellants could have pointed out the complexities of the matter thus making it unsuitable for determination by way of an originating summons and instead have it converted into a civil claim and to determine it as such. In ***Ng'ati Co-operative Society Limited versus Councilor John Ledidi and 15 others Nakuru CA No. 64 of 2004 (ur)*** the Court made observation that under Order 36 Rule 10 (as it was then now order 37) there was jurisdiction to convert a case which had been incorrectly brought by an originating summons so as to be continued as a normal suit. Thirdly whether there had been breaches of the respondents' constitutional rights which called for redress. We therefore find that the procedure adopted by the Court in determining the issues in controversy between the parties was proper hence we are properly seized of this appeal and shall proceed to make pronouncements on its merits.

The fact of the arrest, prosecution and acquittal of the respondents was admitted by the 2nd appellant in paragraphs 30 and 31 of the replying affidavit. No justification for that arrest, and prosecution was demonstrated by the content of the said replying affidavit. We are therefore in agreement with the learned trial Judge that in the absence of justification for the appellants' actions in arresting and prosecuting the respondents, the appellants had trespassed on the respondents' constitutional liberties, violated the same and the respondents were therefore entitled to redress by way of payment of compensation.

The procedure laid down for seeking redress on account of such violations under the relevant now repealed constitutional rules then was by way of a petition. The claims were therefore properly laid.

We wish to affirm our earlier stand that the procedure adopted by the respondents to seek redress by way of originating summons was proper and that they also presented their claim to the proper forum.

Mr. Ogunde learned counsel took issue with the learned Judges action of directing the Registrar or Deputy Registrar to work out the aggregate sum due to each plaintiff as their ultimate compensation. He argued that this in essence was licence to the respondents to avoid compliance with the rules on proper

pleading for special claim. Secondly that the Registrar or Deputy Registrar had no mandate under Order 48 Civil Procedure Rules as it was then to take over a proceeding previously handled by a Judge and determine it.

The decision in ***Marete versus Attorney General (supra)*** though not binding on this Court stated the correct proposition in law, that under the provisions of the repealed constitution a court of law had and still has jurisdiction to award compensation for any violations of the fundamental freedoms and rights. Herein the appellants had violated the respondent's right to earn a living. It would not have been prudent for the Court to declare existence of the right and violation and then sent the respondents away empty handed. The Court was in order when it awarded them the loss of salary arrears as a compensation for the inconvenience and distress suffered. The only damages that the Court could not award as per that decision (Marete) were exemplary and punitive damages. These do not fall into the category of salary arrears or refunds.

Order 48 of the repealed Civil Procedure Rules donated certain administrative powers to the Registrar or Deputy Registrar. We have revisited these and we find none of these appears to be mandating the Registrar to do what the learned trial Judge ordered him to do. This lack of mandate in itself does not invalidate the relief granted. All it calls for is a finding that what the learned Judge should have done after finding for the respondents should have been to grant an interim decree and then call for tabulations on the entitlements of each respondent, receive representations on the proof on quantification of each plaintiffs claim for purposes of indicating these in the final decree. The cure for this is to set aside the order directing the Registrar or Deputy Registrar of this Court to work out the arrears and substitute thereto an order that the file should be placed before a High Court Judge of equal jurisdiction to perform the function which had erroneously been assigned to the Registrar or Deputy Registrar of the High Court.

With regard to who the respondents' employer was, the learned trial Judge found that the respondents or some of them had been employees of the East African Community which was disbanded in the year 1977; that upon the disbanding of the East African Community the respondents were placed under the Directorate of Civil Aviation which was made a department under the Ministry of Transport and Communication within the Public Service and then by virtue of this the respondents became Public Service employees subject to Public Service Regulations'

It was also a finding of the learned trial Judge that the respondents were employees as such on the 31st day of March, 2002; that on24th October, 2002 the Civil Aviation Act Cap 394 Laws of Kenya was amended paving the way for the inclusion in the amendment of Section 5E which translated the entity known as the Directorate of Civil Aviation into Kenya Civil Aviation Authority; that the same new Act stipulated that employees of the Directorate of Civil Aviation as at 31st March, 2002 automatically became employees of the new Authority; that the respondents had been unlawfully dismissed from their employment on 8th April, 2002 and since that unlawful dismissal had been reversed by the Court the respondents were in effect restored back to their position as employees of the appellant as at the date of dismissal which date fell on 31st March, 2002 . On that account found the respondents to be employees of the appellants. We find that reasoning well founded both on facts and the law.

With regard to the immunity of the second appellant ***C.A Kuto*** from personal liability to meet the Judgment in favour of the respondents, reliance has been placed on the provisions of Section 5E of the Civil Aviation Act (Supra). The parent Act (the amended Act) had no provision for such immunity. It was introduced through the October 24th, 2002 amendment. Section 5E provides:

"subject to Section 5F no matter or thing done by a member of the government or by an officer , employee or agent of the Authority shall if the matter or thing is done bonafide for executing the functions powers or duties of the Authority under this Act, render the member, officer, employee or agent or persons acting on their directions personally liable to any action, claim or demand whatsoever.

5F. the provision of Section 22 shall not relieve the Authority of the liability to pay compensation

or damages to any person for any injury to him, his property or any of this interest caused by the exercise of any power conferred by this Act or any other written law or by the failure whether wholly or partially of any works"

We wish to adopt our earlier reasoning in our construction of Section 7E (b) of the same Act, and affirm firstly that this provision 5E has no restrospective effect. Secondly it was only meant to shield a person from personal liability. It does not shield an officer of the authority from official liability. The second Appellant was cited as a party in the originating summons as the chief executive of the first appellant. He is the one who deponed the replying affidavit vide paragraph 1, 2, 3, 4and 5 that he was the Director General of the Kenya Civil Aviation Authority, KCAA, the first appellant; that the first appellant was the successor of the defunct Directorate of Civil Aviation, DCA and lastly that the respondents were all employees of the defunct Directorate of Civil Aviation. Being the Chief Executive of the second appellant, there is no way the citation of the appellants to meet the respondents demands in the originating summons could have been complete without the citation of the second appellants' chief officer as a contributor to the actions forming the respondents' cause of action. We therefore find that the citation of and the placing of blameworthiness on the second appellant was proper and well founded save that the second appellants blameworthiness can only be joint and several with that of the first appellant and the Attorney General.

With regard to allegations of unlawful dismissal of the respondents from their employment, the learned Judge's reasoning was informed by the survey done on the regulations numbers 26, 27, 28,29,30,31 and 32 of the Public Service Regulations that governed the terms of engagement between the appellants and the respondents. To the learned Judge, all these underscored the need to adhere to the rules of natural justice by giving the respondents a chance to be heard before any disciplinary action was taken against them. The learned Judge took note of the fact that the threat of dismissal was made on 6th of April, 2002 and carried out on the 8th day of April, 2002. It was his opinion that a span of 2 days was too short and in any case there was no time for the respondents to respond to those accusations. The learned judge also found as a fact that indeed the respondents were wrong to engage in the go slow strike but that notwithstanding, due process should have been followed to remove them from their employment. The facts on the basis of which that reasoning was founded were not controverted. We find the learned Judge was right. We affirm that finding.

Turning to costs, Section 27 (1) (2) of the Civil Procedure Act Cap 21 Laws of Kenya is clear on this. It provides:-

"Subject to such condition and limitation as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge and the Court or Judge shall have power to determine by whom or out of what property or to what extent such costs are to be paid and to give all necessary directions for the purpose aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provide that the costs of any action, cause or other matter or issue shall follow the event unless, the Court or Judge shall for good reason otherwise order.

(2) The court or Judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such"

In **Singh versus Urbanlite limited [1985] KLR 920** this court held inter alia that:-

"The rule on the power of the court to make an order as to costs is a permissive rule and is therefore accordingly in the discretion of the court…"

In the case of ***Mayfair Holdings Limited versus Ahmed [1990] KLR 667*** this Court went further to reiterate that:-

"In the absence of special circumstances a successful litigant should receive his costs and it is necessary for the Court to show some reason for refusing to give him costs."

From the above principles, it is clear that a successful party is entitled to costs in the absence of special circumstances and for reasons to be given for such withholding. The respondents were the successful parties. There was no reason advanced to the learned trial Judge as to why he should have withheld the award of costs to the respondents . The learned counsel ***Mr. Ogunde*** in his address on this ground conceded rightly so that costs normally follow the event. We find no error in the learned trial Judge's exercise of his discretion in awarding costs to the successful party.

Before we bring the determination of this appeal to a close, we have noticed that prayer 7 in the originating summons had sought an order that the three defendants do pay the plaintiffs and each one of them compensation in terms of Section 72 (6) of the constitution (repealed). This prayer was granted vide item 9 of the reliefs granted set out above. Section 72(6) of the retired constitution provided.

"***A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person***"

We find no assessment of the amount payable to the respondents' was done by the Court. This is however a curable error.

In ***Kariuki versus East African Industries Limited and another [1986] KLR 383*** specific awards were made for wrongful arrest (Kshs.1, 000.00) for false imprisonment (Kshs.1, 000.00) and for malicious prosecution (Kshs.10, 000).

In terms of the principle in ***Marete versus the Attorney General*** (Supra) the learned trial Judge was entitled to assign a figure under this head. He inadvertently failed to do so. We find the exercise of the learned Judges discretion under this head was incomplete. Bearing in mind all the guiding principles in assessing an award of general damages and bearing in mind the scanty facts before us on the duration of the inconvenience from arrest to the termination of the prosecution, we would assess Kshs. 50,000.00 for each and every one of the respondents as their respective compensation under this head.

In the result we make the following orders in the disposal of this appeal.

1. We find no merit in grounds 1, 2,3,4,7,8,9,10,11 and 12 of the appeal. These are accordingly dismissed for the reasons given.

2. The declaration that the dismissal of the appellants from the Public Service of the then Directorate of Civil, Aviation was wrongful and a nullity, is affirmed.

3. The first limb of the relief under item 2 that the appellants be paid their arrears of salary and other benefits for the period dating back to 18th April, 2002 is affirmed.

4. The second limb of the relied in item 2 that the exact amounts under 3 above to be assessed by the Registrar or Deputy Registrar of the Court taking into account the applicable terms of service is set aside for the reasons given. We substitute it with an order that the respondents do file a schedule of arrears due to each and every one of the respondents to form a basis for assessment of the arrears of salary and other benefits before any other High Court Judge. The resulting figure will form the basis of compensation for each and every respective respondent under item 2 of the reliefs granted by the High Court.

5. The blanket relief under item 5 is set aside. We substitute this with an order that each and every appellant be and is hereby awarded Kshs. 50,000.00 as compensation from the wrongful arrest, false imprisonment and malicious prosecution.

6. In view of what we have stated in number 1, 2,3,4 and 5 above, the orders of the learned Judge made on 7th November, 2005 shall form a preliminary decree.

7. Final decree to issue following compliance with item 3, and 4 above.

8. The relief granted in item 9 is varied to read that the liability of the appellants is joint and several since the blame worthiness attributed to the 2nd appellant arose from the execution of his official duties with the first appellant.

9. Item 11 of the relief granted by the High Court is varied to read that interest on item 3 and 5 above be and is hereby granted at Court rates from the date of Judgment in the High Court.

10. Since the revision of the order in ground 5 and 6 of the grounds of appeal is not realy a success in favour of the appellants, we find no merit in disturbing the order on costs. The respondents will have costs both on appeal and in the High Court.

Dated and Delivered at Nairobi this 4th day of April, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDEG OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR