IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MARAGA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 46 OF 2013

BETWEEN

KENYA AIRWAYS LIMITED.....APPELLANT

AND

AVIATION & ALLIED WORKERS UNION KENYA.....……..1ST RESPONDENT

MINISTER FOR TRANSPORT…...…….…….2ND RESPONDENT

MINISTER FOR LABOUR & HUMAN

RESOURCE DEVELOPMENT……...….....……...….3RD RESPONDEN

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ATTORNEY GENERAL……..…..…..4TH RESPONDENT

*(An appeal from the award, order and decree of the Industrial Court of Kenya at Nairobi (**Rika, J.**) made on 3rd December, 2012*

in

INDUSTRIAL COURT CASE NO. 1616 OF 2012)

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JUDGMENT OF GITHINJI, JA

[**1**] This is an appeal from the Award of the Industrial Court (**Rika, J**.) declaring the restructuring, redundancy and retrenchment of 447 unionisable employees of the appellant, Kenya Airways Limited (Airline) substantially without justification, procedurally wrong and amounting to unfair termination and awarding reinstatement with back pay and allowances to all the 447 employees.

The Award was made following a claim filed by the 1st respondent – Aviation & Allies Workers Union Kenya (Union) against the appellant and the 2nd and 3rd and 4th respondents.

[**2**] The claim was precipitated by a staff notice No. 035/2012 dated 1st August 2012 signed by Group Managing Director & Chief Executive (CEO) of the appellant addressed to "All Kenya Airways

People". A similar notice dated the same day was issued to the Union and to the Labour Officer. The subject of the notice was the Kenya Airways staff rationalization exercise. The notice communicated the decision of the Board of Directors to the effect that the Airline would immediately embark on a restructuring exercise that would result in redundancies and where applicable to outsourcing of labour. The reasons given for restructuring were; declining revenue principally occasioned by economic difficulties in most of the markets, extremely high operating costs, unsustainable employee costs owing to large increase in head count and salary increments and adjustments. The objective of the rationalization exercise was identified as the long term sustainability of the Airline. The notice further stated that the exercise would cover both unionisable and non unionisable cadre across the board; that the details of the employees to be affected was being worked out but were not expected to exceed 650; that the key criteria to be used in the identification of staff affected would be their fit in the revised organization structures based on their skills and experience, standard of work performance, displayed work initiative and respective competencies defined for different roles. A severance package was appended to the notice by which the Airline offered to pay 3 months salary in lieu of notice; 20 days salary for every completed year of service, and accrued leave days at the rate of 20.5 working days per month. The Airline also offered a Voluntary Early Retirement (VER) package with additional severance pay for staff who would wish to leave the Airline voluntarily as part of the ongoing restructuring as a first option and indicated that if the required numbers were not achieved through VER, the Airline would move to the next stage of identifying the individuals to be retrenched.

The Airline also appended "A frequently asked questions" document explaining all aspects of the rationalization exercise and offered to all staff an employee assistance programme comprising of individual de-briefing with counseling experts.

The Airline assured the employees that the exercise would be humanely done in accordance with labour laws and collective bargaining agreement where applicable and acknowledged that the exercise was a difficult decision but the best option in the present business circumstances.

[**3**] Thereafter two consultative meetings were held between the Airline and the Union on 3rd and 10th August 2012. After the second meeting, a third meeting was expected to be held in the following week. It however transpired that unknown to the Airline, the Union had on 9th August, 2012 filed a suit, Cause No. 1360 of 2012 in the Industrial Court and had on 10th August, 2012 obtained a temporary injunction restraining the Airline from proceeding with any negotiations or any staff rationalization that may render the employees redundant pending the hearing of the application *inter-parties*. However, the injunction was vacated on or about 30th August, 2012 at the instance of the Airline and the Airline fully implemented the rationalization programme between 3rd and 4th September, 2014 resulting in 447 unionisable staff being rendered redundant.

[**4**] On 12th September, 2012 the Union filed a statement of claim in the Industrial Court (Cause No. 1616 of 2012) in which it averred that the rationalization process was effected maliciously and gave particulars of malice as *inter alia*;

(i) Failing to give notice of the intended rationalization.

(ii) Humiliating claimant's members.

(iii) Proceeding with rationalization without any basis or justification.

(iv) Failing to give the claimant a fair hearing.

(v) Acting in breach of the collecting Bargaining Agreement and the Recognition Agreement.

In paragraph 13 of the statement of claim the Union averred that its claim was for an order to direct the Airline, in terminating the employment of the members on account of redundancy, to comply with the provisions of the Employment Act and the normal express and implied terms of Agreement for Employment in terms of:

(i) Full redundancy payment

(ii) Notice of termination of 36 months.

(iii) Severance pay at the rate of 120 days for each completed year of service.

(iv) Payments of the deposit retained in the provident fund reserve

(v) Observance of "Last-in-first-out" (LIFO) principle.

(vi) Rebated travel tickets.

(vii) All payments to include allowances.

(viii) Loss of service for up to 60 years.

The statement of claim also contained submissions *inter alia* that; the Airline had failed to comply with section 40 of the Employment Act by failing to give a notice of not less than one month to the Union and personal notice to all unionisable employees; the Airline failed to consult with the Union in an attempt to reach consensus on various matters including measures to avoid retrenchment, method for selecting employees to be dismissed; the method or criteria used in selecting employees was not objective and failed to take into account the LIFO principle and that the Airline failed to issue a notice in writing indicating the reasons for staff rationalization.

After the submissions, the statement of claim sought a declaration that members of the claimant have suffered unfair wrongful redundancy, an order for reinstatement of the affected employees and, in the alternative, payment for pecuniary loss and maximum compensation for loss of employment. The claim was supported by a verifying affidavit of **Perpetua Mponjiwa** to which she apparently annexed copies of various documents.

I have referred to the structure of the statement of claim in detail because it is submitted in the appeal that the claim was for pecuniary loss and not for reinstatement.

[**5**] The Airline filed a detailed response to the claim denying allegations of malice, lack of transparency, failure to consult, procedural unfairness and breach of law and Collective Bargaining Agreement (**CBA**). A justification for redundancy was proffered and several documents were annexed to the response including a document indicating the manner in which the rationalization exercise was implemented. An affidavit sworn by **Dick Murianki**, head of Finance Control of the Airline was also annexed.

The Union filed further affidavits including two affidavits sworn by Perpetua Mponjiwa, the Chair Person of the Union, to the effect that the Airline's financial position was sound and had made profits and that the rationalisation exercise was a revenge against members of the Union who had previously taken part in a strike. **Martin Khoya Odipo**, a Chartered Accountant and a lecturer at the University of Nairobi also filed an affidavit.

The Airline filed further affidavits sworn respectively by **Charles Kireru** – head of Employee Relations, **Tom Shivo** – head of Human Resources and Dick Murianki. Lastly, at the hearing of the claim, **Benson Okwayo** from Central Planning Monitoring Unit of Ministry of Labour which serves as Industrial Court Secretariat filed an affidavit and a report in compliance with the order of the Industrial Court.

[**6**] Three witnesses gave evidence in support of the claim – Martin Odipo; Antony Ojee Odiyo and Julius Chacha Mwita. Martin Odipo had been instructed by the Union to analyse the Airline's financial statements for year 2011/2012 with a view to assessing the Airlines viability. After the analysis, his view was that although the Airlines operating costs had gone up in relationship to the revenue the employees had improved in their performance and there was thus no justification for retrenchment. He was also of the view that the performance of the Airline as a going had improved and there was no threat

to its finances or existence.

According to his evidence, since the Airline intended to acquire more planes, it needed more employees such as engineers, cabin crew and ground staff. Anthony Ojee Odipo gave brief evidence at the trial. He was employed as a flight attendant and was a member of the Union and a representative of employees. He testified that on 4th September 2013 he received a letter from the Airline saying that he had voluntarily retired although he had not applied for early retirement. According to him, the redundancy clause in 2010-2012 CBA had not been settled; the rationalization exercise was done before staff assessment and the Airline got some staff to be engaged by **Career Directions**, the outsourced firm. On his part, **Julius Chacha Mwita** gave evidence confined to his personal circumstances. He was a flight attendant but claimed that the warning letters issued to him had lapsed and the summary dismissal letter had been withdrawn.

[**7**] The evidence of Benson Okwayo – a neutral witness was based on the information he received from the Airline on the status of the Airline for the last five years. After full analysis of the information and audited accounts, he concluded that there was a downward trend of the Airlines profits from shs. 4.098 billion in 2007 to shs. 3.438 billion in 2011 except in 2009 when the Airline made a loss of 4.083 billion.

During the same period the number of employees had increased from 4,503 in 2007 to 4774 by August, 2012. He also found that the management staff costs, unionisable staff costs and casual employees had increased and that the highest costs under the wage bill were attributable to unionisable employees. After the analysis his view was that the reduction of staff would positively affect the Airlines profits all things being equal.

[**8**] The Airline called two witnesses at the trial. Dick Murianki, the head of Financial Control of the Airline and Tom Shivo – in charge of Human Resources Relationship.

The evidence of Dick Murianki related to the Airlines economic performance and was as similar to the evidence of Benson Okwayo. In addition, Dick Murianki produced the Airline's un-audited consolidated results for half year ended on 30th September, 2012 which showed that the Airline had made an operating loss of shs. 5.5. billion compared to shs. 1.0 billion profits in the previous year. He stated that the staff restructuring exercise would cost shs.826 million but the Airline would save shs. 1.2 billion in wages and allowances. He explained that the restructuring was not confined to staff restructuring but a relook of the entire business model to achieve efficiency and cost saving. The cost saving measures included review of fuel hedging, in-flight services, medical services, hotel accommodation, I.T. System and stock holding level and marketing review.

The evidence of Tom Shivo largely related to the manner in which the staff rationalization exercise was implemented and the criteria used. The criterion was based on revised strategy taking into account costs and efficiency and targeting roles and not individuals. The revised structure came up with the number of employees to be retained and once the numbers were established, the criterion was applied. The roles of ground services were abolished rendering services of 205 employees redundant. Some roles in flight operations were also abolished rendering the services of 152 employees redundant. There was shift reconfiguration in some services reducing staff. Some services like cabin groomers and revenue management were outsourced as a cost effective model and some services were eliminated on the basis of duplication.

[**9**] The Industrial Court after summarising the evidence of the witnesses framed three issues, namely, whether the retrenchment exercise was justified and based on valid grounds; whether the process was carried out fairly and in accordance with the law governing the parties relationship and third, to what extent the court should interfere in the exercise. After considering the applicable law, the court stated that the reasons given by the employer are open to judicial interpretation and the court must be satisfied in all circumstances of the matter that the decision made by the employer was reasonable. The court went on to say that it has a duty to investigate facts and circumstances and determine if the exercise of the managerial prerogative was reasonable and clothed in good faith. The court established from the

evidence that the Government owned 29.8% of the shares of the Airline; KLM - a Dutch Airline owned 26.73%; International Finance Corporation – the lending arm of the World Bank owned 9.6% and the rest of the shares were owned by private investors, majority of them being Kenyans. The Industrial Court delivered a long judgment. In an endeavor to make the reasons for the decision intelligible, it is necessary to numerically summarise the reasons as extracted from the judgment.

[**10**] In reaching the decision that the rationalization exercise was unreasonable or not substantially justified, the court's decision was apparently based on several grounds supported by reasons thus:

> (I) Historically staff costs do not seem to have directly influenced the profits of the Airline and there must be other factors impacting on the profitability.
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> (II) Although the staff salaries and allowances have steadily gone up the number of employees was not shown to have consistently matched the rise in the wage bill and there must be other factors raising the wage bill.
>
> (III) A cost benefit analysis of labour was not done to show the employees productivity.
>
> (IV) The Airline was expanding in flight fleet increase and destination and expansion will need more investment in labour.
>
> (V) The airline has improved as a going concern and there is no immediate threat of business closure.
>
> (VI) There was need for more consultation. The law secures a right to work and protection from unemployment. The Airline as a national carrier should not be left to conduct its business as it wishes. The Government and courts have an obligation to ensure it is a business that meets its economic strategic and social responsibilities. The Airline was bound to observe the National Values and Principles of Governance in Article 10 of the Constitution.
>
> (VII) The Airline cannot be allowed to expand on the basis of new business model it has adopted as Article 10 does not allow it.
>
> (VIII) It was not reasonable for the Airline to go back to employees with termination letters 12 months after the Airline had assured the employees that at no time in recent months has the company contemplated declaring redundancies in the company.
>
> Business modes have to be founded on the Constitution. The business model of employing foreigners and outsourcing labour not only lowers the international labour standards but also compromises security.

[**11**] The finding of procedural unfairness was based on the grounds, inter alia, that:

> (i) Consultation before and during the retrenchment exercise is mandatory and the Airline should have consulted the Union, the employees individually and the Government in accordance with Article 10 of the Constitution.
>
> (ii) A fair selection criteria such as LIFO which is mandatory under Kenya Law was not applied
>
> (iii) The notices were not issued in good faith as they were communicating a *fait accompli* and as there were no genuine consultations with Ministry of Labour, union and individual employees after the notice was issued.
>
> (iv) The performance and productivity assessment criteria were not fair and work

experience criterion should have been applied.

(vi) There is a strong anti-union sentiments discernable in the conduct of Airline's mandarins

[**12**] In searching for an appropriate remedy, the Industrial Court considered that the primary relief sought was reinstatement and, in the alternative, a compensatory award. While appreciating that the Airline had offered generous redundancy and VER packages the court ordered reinstatement for the following reasons.

(I) The Airline had not demonstrated that any of the roles had been diminished or abolished for sound commercial reasons.

(II) The entire process was driven by bad faith.

(III) Jobs were preserved by the injunction restraining restructuring.

(IV) There are no comparable jobs in the market for the high number of flight operations and ground services employees.

(V) The decision to outsource labour was not driven by valid commercial reasons and is simply a way of weakening union power.

(VI) Terms and conditions of employment are designed to be a continuity.

(VII) The violations by the Airline involve more than economic loss to individual employees; it is about corporate insensibility and disregard for certain constitutional ethos.

(VIII) Compensation was not an appropriate remedy.

At the time the appeal came for hearing the affected employees had not resumed work. After the Industrial Court issued an order restraining the rationalization exercise the affected employees were reinstated but were sent on leave with pay. Subsequently on 18th October 2013, this Court differently constituted stayed the execution of the judgment of the Industrial Court and further proceeding in civil application No. Nai 310 of 2012 pending the hearing of the appeal.

[**13**] The grounds of appeal are wide ranging faulting all the findings of the Industrial Court. In particular, it averred that the court erroneously assumed jurisdiction to conduct investigations as to the circumstances under which redundancy was declared; that the court misconstrued section 40 of the Employment Act under which redundancy was declared in relation to requirement for notice, consultation and selection criteria; that the court misapprehended the provisions of Article 10 of the Constitution as it relates to labour practices and the provisions of Employment Act; that the learned judge breached the appellants' right to hearing by arriving a finding on materials which were not before the court and in applying principles and jurisprudence from other jurisdictions without giving parties a right to comment; that the court failed to appreciate overwhelming evidence from un-audited and audited accounts proving crippling financial situations that justified redundancies and that the court erred in awarding reinstatement without justification and without considering alternative reliefs sought.

By section 17(3) of the Industrial Court Act an appeal from the decision of the Industrial Court lies to this Court only as a matter of law.

[**14**] It is convenient to begin by setting out the provisions of the Employment Act (EA), the Labour Relations Act (LRA) and the Collective Bargaining Agreement (CBA) relating to redundancy. Both section 2 of EA and LRA define redundancy thus:

"The loss of employment, occupation, job or career by involuntarily means through no fault of the 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."

Section 40 of the EA deals with termination of employment on account of redundancy and provides:

"(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extend of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

Section 43(1) of the EA provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

"43.(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

"(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compat- ibility; or

(ii) based on the operational requirements of the em- ployer; and

(c) that the employment was terminated in accordance with fair procedure.

Section 46 of EA sets out the reasons which do not constitute fair reason for termination or discipline.

Section 47(5) of EA provides that for a complaint of unfair termination of employment or dismissal, the burden of proving unfair termination or wrongful dismissal rests on the employee while the burden of justifying the grounds of termination or dismissal rests with the employer.

Section 49 of EA specifies the remedies which a Labour Officer can recommend or the Industrial Court could award for unjustified summary dismissal or termination and section 49(3) authorises reinstatement or re-engagement for unfair termination or summary dismissal.

Lastly, section 49(4) stipulates the matters that should be taken into account in awarding damages, reinstatement or re- engagement which includes:

> ***"(c) the practicability of recommending reinstatement or re-engagement and***
>
> ***(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances".***

However, by section 12(3) of the Industrial Court Act, the court can order reinstatement of an employee within three years of dismissal.

[**15**] The Airline and the Union had entered into 2008/2010 CBA which in clause 49 provided for redundancy. By the redundancy clause, an employee declared redundant was entitled to, among other things, a three months written notice or three months salary in lieu and a severance pay at the rate of 20 days salary for every completed year of service. The Airline and the Union had also entered into

2010/2012 CBA which had been registered with the Industrial Court containing a similar redundancy clause as in 2008/2010 CBA although the redundancy issue and few other issues had not been settled. The Airline however maintained by a letter dated 5th July 2012 that the redundancy clause had been agreed as stipulated in Clause 49. By section 59 of the LRA, a CBA is binding on the parties and all unionisable employees and its terms should be incorporated in the contract and becomes enforceable upon registration. By section 62(4) of LRA, a dispute concerning redundancy could be reported to the Minister of Labour who would in turn appoint a conciliator to resolve the dispute (S.65). If such a dispute is not resolved by a conciliator, section 76 of EA gives the Union power to refer the dispute to the Industrial Court.

[**16**] This appeal raises the broad legal issues of termination of contract of service on account of redundancy and the procedure to be followed in the implementation. It also raises the issue of the suitability of reinstatement as a remedy for unfair termination. The law on redundancy differs from country to county. However, the International Labour Organization has intervened by Termination of Employment, Recommendation, 1982 (No. 166) concerning termination of employment at the initiative of the employer for economic, technological structural, or similar reasons recommending a standard practice.

[**17**] The law in Kenya is mainly governed by the EA, the IRA, the terms of individual contracts of service and CBA where applicable. The law is purely statutory and contractual. The IRA and EA are modern legislations. Although they predate the Constitution, they essentially embody the constitutional ideals of fair labour relations and industrial justice respectively. The question is essentially one of statutory construction of the two legislations and the CBA where applicable.

Section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and Section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim

for unfair termination based on redundancy, an employer has to prove:

(I) the reasons or reasons for termination.

(II) that reason for termination is valid and that

(III) the reason for termination is fair reason based on the operational requirements of the employer and

(IV) that the employment was terminated in accordance with fair procedure.

However, as section 43(2) of EA provides the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employer.

Further, as section 47(5) of EA provides the burden of proving unfair termination of employment rests with the employee while the burden of justifying the grounds for termination rests with the employer.

Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "**based on operational requirements of the employer**" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.

[**18**] I will consider all grounds of appeal together. One of the main grounds of appeal is that the learned Judge misapprehended the law on redundancies and thereby misdirected himself in his finding that the court has a duty to investigate facts and circumstances and determine if the exercise of the managerial prerogative was reasonable and done in good faith and in particular failed to appreciate the overwhelming evidence shown by audited and unaudited accounts proving crippling financial situation of the appellant hence justifying redundancies. There is also a related ground of appeal that, it was not open to the learned Judge to confer upon himself jurisdiction to conduct investigation as to the circumstances in which redundancy was declared and arrive at a finding beyond the evidence and material led.

On this aspect Mr. Oraro learned counsel for the appellant submitted that the Judge committed a fundamental error of law by substituting himself for the employer and that the court acknowledged the necessity for redundancy. On the other hand, Mr. Mwenesi, learned counsel for the Union submitted that the Judge affirmed the right of the employer to embark on redundancy but the employer must comply with the law and CBA.

In **Aoraki Corporations Limited V. Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278** the Court of Appeal of New Zealand:

> ***"…It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome….***
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> ***Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of***

commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities."

[**19**] That passage is apt. In the present case the Airline gave the reasons for staff rationalization in the notice as declining revenues occassioned by economic difficulties in most of the markets it operates in, downturn in passenger volumes in some traditional routes occasioning sharp short falls in expected revenue, the unstable fuel prices and increasing competitive environment that had impacted negatively on operation margins; high operating costs and unsustainable employee costs disproportionate to rise in revenue. The fact of declining revenues for the period from 2005 to September 2012 was supported by the audited and unaudited accounts and by the evidence.

There was evidence that the Airline made a huge loss in 2009 and had made loses in the six months up to September 2012. There was also evidence that apart from staff rationalization, the Airline had applied company-wide measures to cut costs and to improve efficiency. The Industrial Court made a finding that the Airline has been experiencing economic problems.

There are jurisdictions like South Africa where the law provides that the employer must consult before contemplating dismissing employees on the basis of employer's operational requirements. Section 189(1) of Labour Relations Act of South Africa provides so. There are also jurisdictions like Philippines as exemplified by the decision of the Supreme Court in **Fasap v Philippine Airlines GR No. 178083** where the law provides that the employer's prerogative to bring down labour costs by retrenching must be exercised as a measure of the last resort.

That is not the law of Kenya. There is also the ILO's recommendation No. 166 (supra) which recommends consultation. There was however no evidence that the recommendation has been ratified by Kenya. The CBA does not provided for such consultation nor does Article 10 of the Constitution which provide for National Values and Principles of Governance apply to private contracts between employers and employees. The law of Kenya does not provide for pre-redundancy consultation but only post redundancy dispute resolution. The learned Judge had a negative view of outsourcing of labour as mode of reducing costs of employees. However, this is an accepted cost saving strategy worldwide.

Lastly, the judge's finding that the Airline had employed foreign staff to replace local staff was denied. There was no such allegation in the statement of claim or in the supporting affidavits. The finding was not supported by any concrete evidence.

[**20**] There was evidence that the redundancy was implemented by various means such as abolition of roles and reconfiguration of roles. Indeed, the summary annexed to the statement of response shows that most of the employees were rendered redundant by the abolition of roles. The Judge's finding to the contrary was against the weight of evidence. Only 447 unionisable employees out of 3,756 unionisable employees were affected.

[**21**] It is not necessary to consider all the reasons that the learned Judge gave for his decision that the Airline did not act reasonably. What the learned Judge essentially decided was that redundancy was not commercially necessary and that more consultation was necessary. This was a wrong test. As long as

the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role.

The Airline is a limited liability company listed at Nairobi Stock Exchange and also in Uganda and Tanzania. Although it holds 29.8% of the equity it is not a parastatal. The submission by Mr. Fedha, learned counsel for 2nd, 3rd and 4th respondents that the government has no right to interfere with the Airline's decision is indubitable. Furthermore, the Airline's social responsibility if any, is limited to the statutory obligations imposed on an employer by the EA. Furthermore, the Judge's finding that the law secures a right to work is patently erroneous. Neither Article 41 of the Constitution nor the EA secures a right to work. The legal protection that an employee has is the right from unfair termination of a contract of employment.

The fact that the Airline was expanding and that the Airline had given an assurance an year before, that it was not contemplating redundancies do not solely render the rationalization exercise unreasonable. The expansion programme is a ten-year plan. The reasonableness of the Airline's decision has to be judged by the circumstances prevailing at the time the decision was made. It is lawful even in apparently successful enterprises to reduce staff as a cost saving measure.

In the circumstances of this case, there was a valid and fair reason based on the Airline's commercial operational requirements and the termination of services on account of redundancy was justified.

[**22**] As regards procedural fairness, the learned Judge in essence held that the initial notice is intended to be an invitation to discuss possible redundancy situation which should be followed by consultation and that the Airline should have consulted the Government particularly the Prime Minister. The learned Judge further held that collective consultation was not sufficient and that employees must be consulted individually.

It has been submitted by the Airline's counsel that consultation was done although it is not provided for by the law and that it was frustrated by the court injunction which stopped any such negotiation which would lead to redundancy. The 1st respondent's counsel submitted that the notice was not valid as it was less than a calendar month and that consultation was required by the law and the Constitution. By section 40(1) (a), where the employee is a member of a trade Union the employer is required to give a notice of not less than one month to the union and by section 40(1)(b) where the employee is not a member of a trade union, the employer is required to give the notice to the employee personally.

[**23**] In **Thomas De La Rue (K) Limited v David Opondo Umutelema** **eKLR** this Court said:

> ***"It is quite clear to us that section 40(a) and 40(b)provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer…***
>
> ***Having given the two months notice required under section***
>
> ***40(1) to the Union, the appellant was not obliged to give another notice to the respondent personally under section 40(b) because these notices are alternatives. Once the notice under section 40(a) has been given, there are clear mechanisms under section 62 of how the trade union should proceed if there is a dispute."***

[24] As already stated (supra), by section 62(4), a trade union has a right to report to the Minister for Labour any dispute concerning redundancy at any stage after the employer has given a notice of its intention to terminate employment of any employee on grounds of redundancy. However, section 62(5) provides:

"The reporting of a trade dispute by a trade union under subsection (4) does not prevent an employer from declaring employees redundant on the expiry of the notice of intention to declare the employees redundant"

Section 40 of EA does not provide for the procedure stipulated by the learned Judge. The CBA did not also provide for such a procedure. The learned Judge in essence imposed more obligations on the Airline regarding notices, consultation and what institutes consultation than the legal obligations imposed on the employer by the statute. The function of the Industrial Court is limited to interpreting and enforcing only those obligations which the parties to employment relationship has agreed to assume.

There is no legal obligation express or implied for the implication into the employment contact of terms that the parties have not agreed to be binding conditions for the mere reason that the court considers it reasonable to do so.

As the observed before, the statutory law of South Africa which requires consultation before contemplation of termination on account of redundancy is not applicable in Kenya where the statutory law does not provide for pre-redundancy consultation.

The redundancy was implemented on 3rd and 4th September 2012 after the 30 days stipulated notice had expired. The order for injunction did not stop the notices from running. There was substantial compliance with the requirement of notice. Any defect in the notice is tempered by the legal requirement in Section 40(1) (f) that the employer has to pay not less than one month salary or wages in lieu of notice in all redundancy situations. The Union cannot genuinely complain of lack of consultation after obtaining the injunction which frustrated any consultation before the notice run its full course. The union and the court did not set in motion the post redundancy dispute resolution mechanism provided by law which could have resulted in more consultation after the notices were issued.

The Union could have reported the dispute to the Minister in accordance with the law for resolution of the redundancy dispute by conciliation if it thought it desirable to do so. The Industrial Court had also power under section 15(2) of the Industrial court Act to promote alternative dispute resolution and could, have under section 15(4) referred the dispute for conciliation, mediation or arbitration.

[**25**] The Airline gave notice of the criteria it would use and evidence was given on how the criteria was applied. The statutory criteria prescribed by section 40(1) (c) is seniority in time, skill, ability and reliability. The criteria applied did not depart significantly from the statutory criteria. It included work experience which the learned Judge preferred. The document annexed to the notice explained why LIFO criterion would not be applied. Although LIFO is an objective criterion, its application would be unsuitable in some situations. It all depends on the business model the employer intends to achieve. The statement of claim and the evidence did not identify any employee who suffered unfair termination or should not have been retained because of criteria used. Perpetua Mponjiwa who swore the supporting affidavits did not give evidence at the trial and none of the three witnesses called by the Union at the trial gave evidence regarding the selection creteria and the number of employees affected. The union wanted the entire redundancy exercise stopped. It was not seeking to have some of the unionisable employees replaced with other unionisable employees by application of more objective criteria. Perhaps, this is a case where the employees who complained that their roles should not have been declared redundant should have filed individual claims. The claim lacked any specificity and it was not shown that the criteria used were not objective. Further, the allegations that services of some employees were terminated because of the previous trade union activities was unsubstantiated.

[**26**] By section 20(1) of the Industrial Court Act, the Industrial Court is required to act without undue regard to technicalities and is not strictly bound by the rules of evidence except in criminal cases. That however does not warrant the court to act on conjecture and misapplication of the law as it did when considering the subject of procedural fairness. I am satisfied that the Airline applied fair procedure in the termination of the services of the redundant employees.

[**27]** The remedy of reinstatement is discretionary. However the Industrial Court is required to be

guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer. Thus, the court could consider in a redundancy situation whether reinstatement would be a surplus to employer's requirements; whether the employer will be required to dismiss other employees and whether it would perpetuate the problems of the employer. The court appreciated that the Airline was faced with a cyclic economic down turn but said that it had not faced a downfall. The court also appreciated that the Airline had offered generous redundancy and VER packages. The court was however influenced by unproven factors such as bad faith in retrenchment process, that the real reasons for restructuring was to get rid of employees involved in trade union activities; that the decision to outsource labour was not driven by valid commercial reasons; that the Airline had recruited foreigners while retrenching Kenyans; that roles had not been abolished and that the Airline was guilty of corporate insensibility. Most of the factors taken into account by the Industrial Court did not form the substance of the claim. The EA has enacted the common law principle that the remedy of reinstatement should not be given except in "**very exceptional circumstances**". The factors taken into account by learned Judge, are not, looked at objectively "**very exceptional**". There was evidence that roles had been abolished and services in some cases outsourced. One cannot help concluding that the learned Judge did not consider the issue of reinstatement objectively and that the order for reinstatement was designed to punish the Airline for the wrongs that the learned Judge erroneously believed it had committed. No consideration was given to the fact that many shareholders of the Airline expect to make a fair return for their investments and that it was the general good of everyone including the many remaining employees that long term sustainability of the Airline should be promoted. There was also no assessment of the number of the retrenched employees who had exited through VER or had obtained other jobs. There was evidence that some employees had been absolved by the contracted outsourcing firm with assistance of the Airline.

[**28**] I have already made a finding that this was a genuine redundancy resulting in loss of jobs and that fair procedure was applied. In my view, the normal remedy for a genuine redundancy even in cases where the services were not terminated in accordance with a fair procedure would be compensation by way of damages in accordance with CBA and Section 49 of the Employment Act.

However, it would not serve any purpose to remit the claim to the Industrial Court for assessment of damages as pleaded because the damages or compensation for unfair termination are either contractual or statutory. By section 49(1)(c) monthly wages and salaries can only be awarded for period not exceeding twelve months. The severance pay is limited by section 40(1)(g) of EA to the rate of not less than fifteen days pay for each completed year of service. The claim for loss of service up to 60 years is obviously not maintainable. The Airline has agreed to pay severance pay at the rate of 20 days salary for each completed year in accordance with 2008/2010 CBA which is above the statutory severance pay and 3 months' salary in lieu of notice. The Airline has also agreed to pay all other dues. In any case, the claim for pecuniary loss was seemingly abandoned in favour of reinstatement.

The Union did not prove any case against the 2nd 3rd and 4th respondents nor did the Industrial Court give any adverse relief. Although the appeal has succeeded, I would not in the circumstances award costs of the appeal and of the claim. I would for the foregoing reasons, allow the appeal and set aside the Award of the Industrial Court in its entirety with no order as to costs.

However, I have the misfortune of being the sole dissentient on the issue of selection criteria. Maraga & Murgor, JJ.A being of a different view, and being unanimous that the appeal be allowed in part on the issue of selection criteria, the Judgment of the Court shall be as follows:

> (1) As regards the appellant's justification to declare the 447 employees redundant and their reinstatement with back pay the Court being unanimous, this appeal is allowed and the order of reinstatement together with back pay is hereby set aside.
>
> (2) The appeal against the trial judge's finding of procedural unfairness relating to selection criteria is by majority and is hereby dismissed and each of the 447 employees whose services

were un-procedurally terminated is awarded damages equivalent to six months gross salary in addition to three months' salary in lieu of notice, severance pay of 20 days for every completed year of service and other unpaid dues all which the appellant has agreed to pay.

(3) All the payments made by the appellant to each of the 447 former employees shall be subject to statutory deductions.

(4) As both parties have partly succeeded in this appeal, there shall be no order of costs of this appeal and the court below.

Dated and delivered at Nairobi this 11th day of July, 2014.

E.M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF MARAGA, JA

Introduction and Background

1. World over, and more so in labour intensive economies, the law governing industrial relations is of crucial importance to the economy of any country. Both the investors and their employees always want to know the rules and terms of their engagement. The industrial relations law defines the rights and obligations of both the employers and the employees. It is for this reason that in employment relations, the hallowed principle that the law should be certain and predictable so that both employers and employees know what their minimum responsibilities and entitlements are, has been firmly established.

2. This appeal raises fundamental issues on the law of redundancy in this country. The appellant complains that besides misapprehending the Kenyan industrial relations law, the learned trial Judge also applied inapplicable foreign law to the case before him thus throwing into a spin the law of this country on redundancy.

3. I have had the advantage of reading in draft the judgment of my brother, the Honourable Justice Githinji, JA. In my view, he has concisely summarized the facts of the case and I need not rehash them in detail save for an outline that will contextualize my judgment.

4. Kenya Airways Limited (the appellant) is a limited liability company incorporated under the Companies Act. It operates an airline under the banner of Kenya Airways (KQ). In July 2012, it claimed that it had over the previous couple of months experienced economic difficulties caused principally by an increasingly competitive environment leading to a continued downturn in passenger volumes in most of the routes it operated in; unstable fuel costs; and an unsustainable wage bill owing to the large increase in head count of 2011/2012 that was worsened by tough CBA negotiations. These conditions resulted in sharp shortfalls in expected revenue streams thus threatening the sustainability of the airline. In the circumstances, in or about July 2012, the appellant's Board of Directors resolved to embark on a restructuring

exercise covering both unionisable and non-unionisable staff cadres across the board that would result in staff redundancies.

5. On 1st August 2012, Dr. Titus Naikuni, the appellant's Group Managing Director and Chief Executive Officer, issued Staff Notice No. 035/2012 to all employees of the appellant advising them of the said Board of Directors' resolution. That notice advised that the restructuring exercise would start with a voluntary early retirement (VER) initiative of all staff irrespective of age, which would be followed by retrenchment in event of failure to achieve the required number of exiting staff and called for applications of those who wished to take the VER offer. He also advised that the criteria that were to be applied in the selection of the affected staff in the restructuring exercise were their fit in the revised organizational structure based on their skills and experience; standard of work performance; displayed work initiatives; as well as their respective competencies.

6. Upon failure to achieve the required number of employees exiting through the VER, the appellant embarked on the staff rationalization assessment programme and on 4th September 2012, it issued notices to the affected employees advising them of their retrenchment packages.

7. The affected employees were not amused by the redundancy proposal. They therefore lodged a claim in the Industrial Court on 12th September 2012 through their union, the Aviation and Allied Workers Union (the Union), against the appellant. The other respondents in that claim were the Ministers for Transport and Labour on account of their statutory roles in the labour industry as well as the Attorney General as the chief legal adviser of the Government of Kenya.

8. In that claim, the Union alleged that the appellant's retrenchment programme was a unilateral and an uncalled for ruse intended to maliciously get rid of the employees who were members of the trade union and others who had participated in the 2009 and 2011 industrial strikes. It therefore sought a declaration that the retrenchment programme was unlawful and an order for reinstatement of all the affected employees with no loss of any benefit or in the alternative payment of all the pecuniary losses suffered by the affected employees and *"maximum compensation for loss of employment"* as well as costs and interest.

9. In its statement of response, the appellant averred that the claim was a reckless abuse of the court process as the Union had no *locus standi* in the matter asserting that the appellant had a constitutional and statutory right to rationalize its operations to ensure its very survival and profitability. It further averred that its decision to declare redundancy was informed by the commercial realities obtaining in the global air transport industry as confirmed by the independent reports of the Economic Planning Division (EPD) and the Ministry of Transport's auditors. It therefore denied the claim that the redundancy proposal and its staff rationalization exercise were discriminatory, malicious or unlawful. It further averred that the staff rationalization was carried out in a fair and transparent manner and in full compliance with the labour law as well as the terms of the CBA between the claimant and the appellant. The appellant also denied the claim that it imposed the VER programme upon its employees and averred that as only 125 employees freely elected to take the VER packages, it was left with no option but to retrench another 447 employees to keep its wage bill within manageable levels.

10. After hearing the claim, the Industrial Court (Rika J) made an award on 3rd December 2012 in which he held that the appellant's restructuring, redundancy and retrenchment processes were unjustified and were therefore unlawful and amounted to unfair termination of employment. He therefore directed the immediate reinstatement of the 447 unionisable employees without any loss of benefits. This appeal is against that decision.

The Grounds of Appeal

11. Aggrieved by the Industrial Court's said award, the appellant has appealed against it to this

Court and listed a total of 21 prolix grounds of appeal, some of which are divided into several paragraphs. The substratum of those grounds is that the learned Judge unlawfully conferred upon himself an inquisitorial and investigative jurisdiction on the basis of which he took into account extraneous matters and inapplicable principles of law and jurisprudence from other jurisdictions which had not even been canvassed before him; that the learned Judge misconstrued the import of **Article 10** of the **Constitution** and **Section 40** of the **Employment Act** as well as International Conventions and the CBA between the parties leading to the finding that the appellant's restructuring, redundancy and retrenchment process were unlawful and amounted to unfair termination of employment; and that despite the evidence of the appellant's economic downturn, the learned Judge erred in ordering en masse reinstatement of the retrenched employees.

Issues for determination

12. From these grounds of appeal and the submissions made by counsel for the parties as well as a perusal of the record, in my view, three broad issues emerge for our determination. They are, one, whether or not redundancy was justified in this case; secondly, if it was, whether or not it was legally and fairly carried out; and thirdly, if redundancy was not necessary or if it was illegally carried out, whether or not the learned Judge was justified in ordering the reinstatement of the affected staff.

13. Though this is a first appeal, **Section 17(2)** of the **Industrial Court Act1** restricts our consideration of the issues in this appeal to only matters of law. I am therefore not going to re-evaluate the evidence on record and come to my own conclusions as I would do in appeals not limited to points of law only. In **Peter Munya v. Dickson Mwenda Kithinji & 2 Others,2** the

> Supreme Court defined the phrase "a matter of law" as involving: ***"(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine… ;***
>
> ***(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge ….;***
>
> ***(c) the conclusions arrived at by the trial Judge …,where the appellant claims that such conclusions were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same…."***

14. I do not understand these principles as suggesting that where an appeal is restricted to only points of law, an appellate cannot consider the evidence on record at all. Even where an appeal is so restricted, if there are allegations of misapprehension of evidence leading to a pervasive decision or ignoring the evidence on record and basing a decision on extraneous matters, those are points of law. To determine such issues, even where the appeal is limited to points of law only, the appellate court, without preferring one set of facts to another or substituting the trial court's decision with its own, has to review the evidence on record and determine whether the trial Judge indeed committed the improprieties he is accused of.

1 Act No. 20 of 2011.

2 Supreme Court Application No. 5 of 2014.

15. Applying these principles to this case, the justification of redundancy and the procedural propriety in implementing the redundancy decision as well as the learned Judge's interpretation of the constitutional and statutory provisions touching on the matters in issue are clearly points of law. I have therefore to consider the evidence on record in order to determine whether or not

redundancy was justified and if so whether it was legally carried out.

16. **Section 40** of the **Employment Act**, which provides for redundancy, does not help us in determining the first issue of whether or not redundancy was justified in this matter. It will assist in the second issue of whether or not it was legally carried out. To determine the first issue therefore, we need to understand exactly what the term "redundancy" means and when it is justified. That being the case, I must now turn to the definition of the term "redundancy" in our legislations.

Definition of Redundancy

17. Both **Section 2** of the **Employment Ac**t and **Section 2** of the **Labour Relations Act** define redundancy as:

> ***"the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."***

18. There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment.

19. The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises "*where the services of an employee are superfluous*" through "*the practices commonly known as abolition of office, job or occupation and loss of employment.*" In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.

20. The termination of employment in this case was at the initiative of the appellant. There is no dispute about that. The appellant claimed that given the economic conditions it found itself in, it reorganized its operations and found that it no longer required the services of the affected employees. The termination of employment in this case was also at no fault of the affected employees. There is no allegation that the appellant's employees did or omitted to do anything that led to the termination of their services. And they were not accused of any insubordination, desertion, negligence or any other such impropriety. Their services were terminated because, in the opinion of the appellant, after reorganizing its operations, it no longer required their services hence the retrenchment. This is analogous to what **Halsbury's Laws of England,3** refers to as termination of employment attributable wholly or mainly to the fact that:

3 Fourth Edition, Vol. 16 page 460 par. 667

> ***"(i) the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish,***
>
> ***(ii) the requirements of that business for employees to carry out work in the place where they were employed have ceased or diminished or are expected to cease or diminish."***

21. Thus far, subject to the redundancy decision being justified, the two aspects of the definition of redundancy are satisfied in this case.

22. Before I consider the facts of this case to determine the issues raised in this appeal, I need to say something about some observations of the learned Judge on the scope of the term redundancy.

23. In this case although the learned Judge appreciated that besides financial distress redundancy can also arise in relocations of business or in mechanization of the modes of production as well as where technology can be employed to run a business more efficiently and/or profitably, he, however, focused on threat to the appellant's economic collapse only. Besides economic distress, redundancy can also arise where the employer finds that he can employ modern technology to run his business more efficiently and/or profitably. This is the crisp of the **International Labour Organization's Recommendation No. 166--Termination of Employment of 1982** and the decision in the case of **G.N. Hale & Son Ltd v. Wellington Caretakers IUW.4** In the latter, the New Zealand Court of Appeal rejected the lower court decision that redundancy must only be a commercial decision taken to ensure the ongoing viability of an employer and held that redundancy can be declared if the employer decides to reorganize his business and run it "*more efficiently*" and profitably. Locally, this view was echoed by this Court in the case of **Kenya Airways Corporation Ltd v. Tobias Oganya Auma & Others,5** where it was held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations.

24. The decision to declare redundancy has to be that of the employer. In the above News Zealand case of *G.N. Hale & Son Ltd,* it was held that so long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with that of the employer. In this regard therefore, I agree with counsel for the appellant that the learned Judge erred and took into account extraneous matter when he held that the appellant being a parastatal (which it was not as will be demonstrated shortly), the Government of Kenya should have been roped into the redundancy negotiations and the view of the former Prime Minister taken into to ensure that besides the economic considerations, the social welfare, the issue of unemployment and public interest as a whole were considered. The decision to declare redundancy, as I have said, is that of the employer based on purely commercial considerations and not on principles such as sustainable development, noble and lofty as they may be.

25. Kenya Airways is not a State Corporation. It is a private liability company incorporated under the Companies Act and listed on the Nairobi Stock Exchange as well as those of Uganda and Tanzania. Although the Government of Kenya is its shareholder, it holds only 29.8% of shares in it. KLM holds 26.73%, the International Finance Corporation, a private sector arm of the World Bank, holds 9.56%, and the rest of the shares are held by the private investors. Kenya Airways is therefore not wholly owned or controlled by the Government of Kenya in terms of the definition of a parastatal in **Section 2** of the **State Corporations Act**.6 The fact that it flies the Kenyan flag does not give the Kenyan Government any right to control its operations to ensure that the conduct of its business meets the country's *"economic, strategic as well as social responsibilities"* as the learned Judge held.

26. The learned Judge also misapprehended the import of **Article 10** of the Constitution. Whereas the principles of integrity, good governance, accountability and others in that Article are noble and should be embraced by even non-governmental and private organizations, they cannot be prescribed to such bodies as must-follow legal requirements in the conduct of their businesses. Those principles mainly govern decisions of public bodies, and public officers in the discharge of their public duties. The provisions of Article 10 are therefore not applicable to the issue of redundancy in this appeal.

27. A reading of **Section 40** of the **Employment Act**, makes it clear that employers have a

statutory right to declare redundancy provided that such an act is justified. Once it is justified, the implementation of the redundancy decision is then governed by the criteria set out in that Section and, as the Industrial Court stated in the case of **Kenya Union of Commercial Food & Allied Workers v. British American Tobacco (K) Ltd,7** by the redundancy provisions in the CBA between the parties where there is one.

6 Cap 446 of the Laws of Kenya.

7 Industrial Cause No. 143 of 2008.

28. Although the learned Judge said the court has jurisdiction to "investigate" the proposed redundancy to satisfy itself that it is justified, I do not agree with Mr. Oraro that the learned Judge usurped an inquisitorial or investigative jurisdiction as such. Ours being an adversarial system, the courts have no such jurisdiction. Save as herein stated, the learned Judge relied on the material placed before him by the parties. The use of the term "investigate" was therefore, in my view, inappropriate.

29. I now turn to the consideration of the issues raised in this appeal. As a whole, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair. I will consider these principles it turn.

Substantive Justification

30. In this appeal, as I have already pointed out, the appellant's case, as outlined to us by its counsel Mr. Oraro teaming up with Messrs Awele and Ouma, was that its decision to declare redundancy was informed by the commercial realities obtaining in the global air transport industry and was regrettably taken to ensure its very survival and profitability. In its response to the 1st respondent's claim, the appellant averred that it had over the previous couple of months experienced economic difficulties caused principally by a sharp decline of revenue which threatened its sustainability. It stated that the decline in revenue was brought about by an increasingly competitive business environment it operated in leading to a continued downturn in passenger volumes in most of its routes; unstable fuel costs; and unsustainable wage bill owing to the large increase in head count in 2011/2012 coupled with tough CBA negotiations.

31. The appeal was strenuously opposed by the 1st respondent. Its counsel, Mr.

Mwenesi teaming up with Ms Ogutu, submitted that given the circumstances obtaining in the appellant's operations, redundancy was not necessary at all. Referring us to the definition of that term, counsel submitted that "redundancy" is a state of superfluity in the labour industry. It is unemployment resulting from there being no more work for the affected staff to continue doing.

32. In this case, counsel said, as the appellant was and is still expanding its operations, it cannot be heard to claim that there in no more work for the affected employees. Instead it should be employing more workers. According to counsel, the appellant's purported declaration of redundancy was a stratagem aimed at getting ride of some of its employees and replacing them with preferred ones. For instance, he said, the appellant abolished the ground staff's jobs and then immediately outsourced the services those staff were performing. Counsel said that is not redundancy but mere change in the performance of a task. He cited the case of **Shawkat v. Nottingham City Hospital NHS Trust8** where it was held that change of the method of performing a given task does not justify redundancy.

33. I have considered these submissions and perused the record of appeal.

Though he opined that the appellant's financial position is healthy and that its viability as a going concern was not threatened at all, the 1st respondent's financial analyst, Mr. Martin Khoya

Odipo, conceded that the appellant had, for about five years previously, experienced economic difficulties and that although it made some profits except in 2009 when it suffered heavy losses, the analysis of its accounts showed an overall downward trend of profits

8 [2001] EWCA CIV 954; [2001] IRLR 555.

between 2007 and 2012. This situation was confirmed by the Economic Planning Division (EPD) of the Treasury, the Ministry of Transport's auditors and the appellant's unaudited reports as well as by the learned Judge himself who described it as *"a cyclic economic downturn"* although he was quick to observe that it was *"not a downfall."* These difficulties, the appellant said, were caused by various factors including a huge wage bill.

34. The appellant adduced evidence through its Head of Financial Control Mr. Dick Murianki that the headcount of the appellant's employees rose from 3,222 in 2010 to 4834 in 2012. Consequent upon that increase was the swelling of the wage bill as well as other staff related costs by Kshs. 1.66 billion and Kshs. 2.33 billion in the 2010/2011 and 2011/2012 financial years respectively. In the 2011/2012, the appellant incurred a loss of Kshs. 6.5 billion. In the circumstances, I find that, if the appellant was to continue in business, it had to find a way of controlling its operational expenses.

35. There was not much the appellant could do about the competitive environment it operated in or the unstable fuel costs. Those were factors beyond its control. It could only take action on factor(s) it had control over such as its wage bill. It contended that, in the circumstances it found itself in, it had no option but to reorganize its operations to tame its huge wage bill. How did it go about it?

36. The appellant adduced evidence that in its staff rationalization programme, it abolished some ground services such as the information systems, revenue assurance support executive and customer relations executive roles due to duplication as well as some roles in flight operations thus rendering a total of about 357 employees redundant. It also reconfigured some of its shift duties to avoid duplication and found it economical to outsource the services of cabin groomers as well as those of the staff in the revenue management. All these measures led to abolition of some jobs and reorganization of others thus inevitably reducing its staff.

37. The learned Judge censured the appellant for retrenching Kenyans and replacing some of them with foreigners and *"outsourced greenhorns."* With respect, there was no justification for that criticism. The foreigners the appellant employed were cabin crews who served in foreign markets such as China where, due to language limitations, Kenyans cannot effectively serve and not because those foreigners were cheaper as the learned Judge supposed. Outsourcing is these days an accepted business strategy. There is no evidence on record to justify the learned Judge's finding that the labour force that the appellant outsourced consisted of greenhorns who will *"compromise air safety and security."* At any rate the learned Judge was not considering any issue of air safety or security of the appellant's operations. In addition to all these factors there was evidence,which the learned Judge paid lip service to, that suppressed profitability was a commercial reality obtaining in the global air transport industry and that other airlines had also declared redundancies.

38. Taking all these factors and concessions into account, I agree with counsel for the appellant that the appellant was, on the preponderance of evidence on record, justified in declaring redundancy.

39. Having found that the appellant in this case was justified in declaring redundancy, I now wish to consider the more complicated issue of whether or not the appellant lawfully and fairly implemented the redundancy decision.

Procedural Fairness

40. Justification is one important aspect of redundancy. The other equally important aspect is procedural fairness. As I have pointed out, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair. Both are clearly mandatory requirements and I was happy to note that counsel on both sides of the divide appreciated this. Mr. Oraro, learned counsel for the appellant, submitted that the appellant discharged its obligations under Section 40(1) of the Employment Act. On the other hand, Mr. Mwenesi, learned counsel for the 1st respondent, held a contrary view. I will in due course refer to their respective submissions in detail.

41. Though contractual, employment relations have some sort of statutory underpinnings. **Part VI** of the **Employment Act 2007** in a nutshell outlaws unreasonable or unjustified termination of employment. Though it requires an employee to proof that the termination of his employment was unlawful, in my view, it places a heavier burden of proof upon the employer to justify any termination of employment. **Section 40(1)** of the **Employment Act**, which provides for the implementation of the redundancy decision, provides in mandatory terms that *"[a]n employer shall not terminate a contract of service on account of redundancy unless … [he] complies with the … conditions"* therein stipulated. As this is the central provision in the second issue of fair play in redundancy that we need to determine in this this appeal, I need to set out it verbatim. It reads:

> ***"(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -***
>
> > ***(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extend of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
> >
> > ***(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
> >
> > ***(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
> >
> > ***(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
> >
> > ***(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
> >
> > ***(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
> >
> > ***(g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."***

42. All the paragraphs of this subsection are clearly conjunctive meaning that they all have to be satisfied for termination on account of redundancy to be lawful.

43. In this case, no issue was raised with regard to paragraphs (e), (f) and (g) regarding payment of salary in lieu of leave and notice of termination of employment on account of redundancy as well as settlement of severance pay. It is agreed that the appellant discharged

its obligations on those requirements. I therefore only need to consider the issues of notice, the criteria employed in the selection of the affected staff and compliance with the CBA between the parties raised in respect of paragraphs (a), (b), (c) and (d).

44. Paragraphs (a) and (b) of the above Section require notice of the intended redundancy to be given to the employees likely to be affected and the labour officer for the area where the employer's business is situate. Mr. Mwenesi, learned counsel for the 1st respondent, submitted that employment being a fundamental right, where there is staff rationalization, which in most cases leads to redundancy, the law should strictly be adhered to. In this case, he said, the appellant never complied with the provisions of **Section 40** of the **Employment Act** as it claimed. He said that section requires, in mandatory terms, one calendar month's notice of redundancy to be given to both the affected staff and to a trade union to which the affected employees belong. Counsel rubbished the letter of 1st August 2012 from the appellant's Chief Executive Officer as a mere general notice of intention to declare redundancy. He said it did not constitute the notice envisaged by **Section 40(1)(a)** of the **Employment Act** as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees.

45. Mr. Mwenesi further submitted, quite correctly, that the section also requires redundancy notice to be given to the Labour Officer for the area of employment but in this case no such notice was given to the Labour Officer.

46. I disagree with Mr. Mwenesi that the appellant's letter of 1st August 2012 did not constitute the notice envisaged by **Section 40(1)(a)** of the **Employment Act** as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar month's notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.

47. I also disagree with Mr. Mwenesi that where an employee is a member of a recognized trade union, notice of intended redundancy should be given to both the employee concerned and his trade union. A reading of the subsection (1) of Section 40 of the Employment Act does not warranty that interpretation. As this Court made it clear in the case of **Thomas De La Rue (K) Ltd v. David Opondo Umutelema,9** paragraphs (a) and (b) of Section 40(1) provide for 2 alternative notices. If the affected employee is a member of a trade union, notice should only be given to his union and not to both. Notice is to be given to the employee himself if he is not a member of trade union.

48. All this is, however, of little moment in this case as notice was given to both the employees likely to be affected and their trade union. The issue for our determination in this case with regard to the notice under paragraphs (a) and (b) of the above provision is the validity or adequacy of the notice the appellant gave which I now wish to turn to as I deal with the purpose of the notice and the requirement for consultation.

49. I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40(1) of our Employment Act does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for

in our law and implicit in the Employment Act itself.

50. By dint of **Article 2(6)** of the **Constitution**, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010. Before then Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or conventions which Kenya had ratified before that date, whether domesticated or not, automatically became part of

9 [2013] eKLR.

the law of Kenya. The process of ratification of the treaties Kenya has entered and those it enters into after the enactment and entry into force of the **Ratification of Treaties Act, 2012** is now through legislation.

51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. **Article 13** of **Recommendation No. 166** of the ILO Convention No. 158-**Termination of Employment Convention, 1982-**requires consultation between the employers on the one hand and the employees or their representatives on the

other before termination of employment under redundancy. It reads:

> ***"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:***
>
> > ***(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;***
> >
> > (b) ***give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."***

52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with **Part VIII** of the **Labour Relations Act, 2007** which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-**Termination of Employment Convention, 1982**, is to give the parties an opportunity to consider "*measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.*" The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in **Mugford v. Midland Bank,**

UK Employment Appeal Tribunal,10 and the treatise by **Rycroft and Jordan, - "A guide to the South Africa Labour Law"** both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on.

53. In this case, although consultation was not provided for in the Collective Bargain Agreement (CBA) of the parties, it was nonetheless contained in the

10 App No. 760 of 1996 IRLR 208 (1997).

Recognition agreement between the parties dated 18th December 2008. Even without that provision, the appellant held two consultative meetings with the 1st respondents on 3rd and 10th August 2012 and a third one would have been held the following week had the 1st respondent not obtained an injunction in Industrial Court Cause No. 1360 of 2012 halting all the appellant's activities in the redundancy programme. I am not bothered by the issue of whether or not the people who purported to represent the 1st appellant in those meetings, were authorized to negotiate the dispute on behalf of the 1st respondent. The evidence on record shows that there were wrangles in the leadership of the 1st respondent and the appellant cannot therefore be blamed for consulting with the officials it thought represented the 1st respondent. What concerns me is the fact that both the parties regarded consultation as an important step in the redundancy programme. The issue is whether or not, before the 1st respondent obtained an injunction, proper and effective consultations were held or were possible and this is where the issue of the validity of the notice the appellant gave comes in.

54. Section 40(1) of the Employment Act requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice, as was stated in the English case of **Williams v. Compare Maxam Ltd11** is:

> ***"to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere."***

55. Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand Chief Judge succinctly expressed this point in

> the case of **Cammish v. Parliamentary Service12**: ***"Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done."*** [Emphasis supplied]

56. In this case, as I have pointed out, the notice of the proposed redundancy was given by appellant's Chief Executive Officer on 1st August 2012 and the negotiations commenced on 3rd August 2012. That is not a notice of at least

30 days. It is therefore obvious that with hardly two days, the 1st respondent cannot have prepared for meaningful negotiations. The 1st respondent's views on whether redundancy would have been avoided by say a freeze on salary increments and how the employees' hardships arising from redundancies could be minimized were never considered. In the circumstances, even without the said injunction that the 1st respondent obtained which halted all activities in pursuance of the proposed redundancy, I do not think that any meaning consultations would have taken place. I therefore agree with the learned Judge and find that the

appellant flouted the requirements of notice and consultation.

57. The other important aspect of procedural fairness in redundancies is the criteria employed to determine the employees to be laid off. This requirement is expressly provided for in **Section 40(1)(c)** of the

12 [1996] 1 ERNZ 404, at p. 417.

Employment Act which places the burden of proving its compliance on the employer. In addition, **Article 15** of the **Supplementary Provisions** to the ILO **Recommendation No. 119--Termination of Employment Recommendation, 1963,** concerning reduction of the work force also provides that:

> ***"(1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.***

Sub-Article (2) of that Article enumerates the criteria to be employed as including the:

> ***"(a) need for the efficient operation of the undertaking, establishment or service; (b) ability, experience, skill and occupational qualifications of individual workers; (c) length of service; (d) age; (e) family situation; or (f) such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to national customs and practice."***

58. The *"seniority in time"* in Section 40(1)(c) of the Employment Act and the *"length of service"* in Article 15 of the above ILO Recommendation No. 119--Termination of Employment Recommendation, 1963, in my view, embrace the ILO principle of *"last-in-first-out"* and is among the criteria to be considered. It cannot therefore be an alien inapplicable principle as counsel for the appellant contended.

59. In this case, the appellant gave the employees' *"fit in the revised organizational structure"* based on their skills and experience; standard of work performance; displayed work initiatives as well as their respective competencies as its criteria for selection of the affected employees which are more or less the same as those stated in the above provisions. Following the injunction the 1st respondent had obtained which halted all activities relating the redundancy process, on 13th August, 2012 Mr. Alban Mwendar wrote to the appellant's employees that the assessment to determine those to be retrenched had been suspended. That in my view suspended even the running of the redundancy notice of 1st August 2012. That injunction was not discharged until 31st August 2012 and on 4th September, 2012 the affected employees were given their matching orders. When was the assessment done?

60. The affected employees were retrenched on the ground low productivity. Curiously, as the learned Judge found, some of those retrenched had scored highly in the annual performance appraisal. The appellant's Mr. Shivo did not come out clearly on the distinction between performance and productivity. The appellant did not also provide any document to show how each employee scored on the productivity assessment. So it is not clear why the 447 and not the employees were retrenched.

61. I do not agree with the learned Judge that the "last-in-first-out" principle in Section 40(1)(c) must always be employed. The employer can use all or any of the criteria in that paragraph. In the present technological age, if the *"last-in-first-out"* principle is held to be mandatory, it may defeat the employer's objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological know how that the employer requires.

All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold.

62. My view being that no notice was given to the labour officer and no proper notice was given to the affected employees or their trade union; that no meaningful consultations were possible or held; and that the criteria followed to select the affected employees was flawed, I must find, as I hereby do that, despite the fact that the redundancy itself was justified, the appellant's retrenchment of 447 employees amounted to unfair termination of employment. That being my view of the matter, I now wish to turn to the remedies that the affected employees were entitled to.

Remedies for irregular termination of employment under redundancy

63. The traditional common law view has been that illegal termination of a contract of employment entitled the dismissed employee to damages13 and that the measure of damages is salary in lieu equivalent to period of the notice provided for in the service contract.14 Where no reasonable notice is provided for in the service contract, the court will award reasonable damages having regard to the circumstances of each case.15 The common law does not provide for general damages as a remedy for breach of a service contract. However, since the enactment of the Employment Act and the Industrial Relations Act as well as the Industrial Court Act, all of 2007, damages and reinstatement are now statutory and the court has jurisdiction, inter alia, to order reinstatement of the affected employees or award damages to them.

13 Paramount Bank Ltd Vs Mohamed G. Qureishi & Another, (Civil Appeal No. 239 of 2001) (CA); [2005] eKLR.

14 Rift Valley Textiles Ltd Vs Edward Onyango Ogada Civil Appeal No.27 of 1992, Alfred Githinji Vs Mumias Sugar Company Ltd Civil Appeal No.194 of 2001 and Central Bank of Kenya v. Nkabu [2002] 1 E.A. 34.

15 Ombaya Vs Gailey & Roberts Ltd [1974] E.A. 166.

Section 49(3)(a) of the **Employment Act** and **Section 12(3)(vii)** of the **Industrial Court Act** make this abundantly clear. In this case, the learned trial Judge ordered reinstatement. Was that the efficacious remedy in the circumstances of this case?

64. Counsel for the appellant lampooned the learned trial Judge for ordering en mass reinstatement of the affected employees which, he said, was not even pleaded, though prayed for. He argued that reinstatement is not a matter of capricious discretion of a judge. Even in countries like New Zealand with fairly developed labour laws, reinstatement is ordered in exceptional circumstances to avoid subjecting the parties, particularly the employers, to servitude. In this case, if the appellant's redundancy programme amounted to unlawful termination of employment as the Judge erroneously found, counsel submitted, then the affected employees' remedy lay in damages as provided by **Section 49** of the **Employment Act.**

65. Counsel for the 1st respondent on the other hand submitted that the trial Judge cannot be faulted for ordering the reinstatement of the affected employees. He said as is clear from paragraphs 45 to 56 of his judgment, the learned Judge found that the affected employees sought reinstatement through their union. While quite aware that under common law specific performance is rare in labour relations cases and that reinstatement is therefore ordered in exceptional circumstances, the learned Judge made a judicious, and not a capricious decision as the appellant claimed, to order reinstatement after analyzing all the principles applicable and considering the employees' cases.

66. World over, more than 95% of employees have no other source of income other than their pay. Termination of employment therefore causes untold hardships to the affected employees

and their families. In most cases it is a matter of survival for such employees and their families. Their long-term commitments like mortgages are thrown into disarray. It is for this reason that in industrial relations jurisprudence, the law takes the view that unlawful determination of a service contract amounts to denial of the right to work and the affected employee is entitled to reinstatement or damages.

67. Counsel for the appellant made heavy weather on the issue of the right to work contending that it is not part of our law. With respect that is not correct. As I have pointed out, international treaties or conventions ratified by Kenya are by dint of Article 2(6) of the Constitution part of the law of Kenya. **Article 23(1)** of the **Universal Declaration of Human Rights** states that "*[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."* The right to work is therefore part of our law. What counsel perhaps had in mind is the security of tenure of those in employment which in my view is as provided in the Employment Act and other Acts.

68. As I have said, in Kenya, reinstatement is one of the remedies provided for in **Section 49(3)** as read with **Section 50** of the **Employment Act** and **Section 12(3)(vii)** of the **Industrial Court Act** that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.

69. Under the Kenyan Employment Act, the factors to be taken into account when considering reinstatement are enumerated in **Section 49(4)** of the **Employment Act**. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor.

70. One of the factors to be considered in determining whether or not to order reinstatement is practicability. In **New Zealand Educational Institute v. Board of Trustees of Auckland Normal Intermediate School16** the New

> Zealand Court of Appeal stated defined what practicability means: ***"Practicability is capability of being carried out in action, feasibility or the potential for the reimposition 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 regard to when it is practical to order reinstatement, it stated:

> ***"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***

16 [1994] 2 ERNZ 414 (CA).

conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.

71. Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.

72. In this case, I have already found that given its precarious financial position, the appellant was justified to declare redundancy. I have, however, also found that since the appellant flouted the provisions of Section 40(1) of the Employment Act with regard to notice, consultations and the criteria for the selection of the affected employees, its termination of the service contracts of its 447 employees amounted to unfair termination of employment. In these circumstances, I find that the Judge's order of reinstatement was not an efficacious remedy as it defeats that objective of the justified redundancy. The learned Judge should have considered the alternative remedy of compensatory damages, which the 1st respondent had sought. That being my view, I do not need to consider the propriety of awarding back wages and rather than remit the matter to the learned trial Judge to assess the damages the affected employees deserve which will increase the parties' costs and prolong the final determination of this matter, I now wish to consider compensation, if any, the affected employee should have been paid.

73. In this case, the appellant has already offered payments in lieu of accrued leave, overtime and notice as well as severance pay to the affected employees pursuant to the CBA between the parties. As the appellant's own witnesses and those of the 1st respondent testified, redundancy was one of the clauses in the 2010/2012 CBA that was outstanding and had not been agreed upon. However, by the parties letter of 3rd July 2012, it was agreed that pending agreement, the parties would be bound by the redundancy clause in their 2008/2010 CBA. Pursuant to that clause, the appellant offered to pay to the affected staff three months' salary in lieu of notice and severance pay at the rate of twenty days for each completed year of service. The Act requires not less that one month's salary in lieu of notice and severance pay of at least fifteen days for every completed year of service. Although in this case the appellant paid three months' salary and twenty days pay for every completed year of service, those payments were in accordance with the parties' CBA and were therefore part of the parties' service contracts to be complied with in cases of redundancy. I cannot therefore accept the extra payments the appellant made under that CBA as sufficient compensation for the retrenched employees in this case. Those payments would have sufficed if the appellant had complied with the rest of the provisions of Section 40(1). Having not done so, I find that the affected employees are entitled to damages as a remedy for the flouting by the appellant of the rest of the provisions of that section.

74. **Section 49(1)(c)** of the **Employment Act**, provides for payment of compensation not exceeding an equivalent of twelve months' gross salary as an alternative remedy to reinstatement available to an employee whose services have wrongly been terminated. In considering the quantum of damages in such situation, the relevant factor in that section to be taken into account is the affected employee's chances of securing alternative employment. It is common knowledge that the air transport industry in

Kenya is fairly limited. I also take judicial notice of the fact that unemployment is generally a serious problem in this country. So the retrenched employees in this case have little chance, if any, of securing alternative comparative employment. In the circumstances, I think they are entitled to damages equivalent to six months' gross salary in addition to the payments the appellant has made or offered to make to them.

Conclusion

75. Termination of employment on account of redundancy is justified if there is substantive justification for declaring redundancy and there is procedural fairness in the consequent retrenchment. Given the fact that for a period of about five years the appellant's profits had continually dipped, I find that the appellant was justified in declaring redundancy. The appellant, however, failed to meet that statutory threshold of procedural fairness in the implementation of its redundancy decision in that it failed to give notice to the labour officer and a proper and adequate notice to the affected employees or their union; it failed to hold meaningful consultations with the affected employees or their union; and its selection of the affected employees was not based on an objective and open criteria.

76. However, having found that redundancy was justified, I hold that the remedy of reinstatement with back wages was, in the circumstances, not efficacious and I accordingly set aside the learned Judge's order of reinstatement in its entirety and substitute it with an award of damages equivalent to six months' salary to each of the 447 retrenched employees. This award will be in addition to the payments the appellant has offered to make to those retrenched employees. As stated in **Section 49(2)** of the Employment Act,

these payments shall be subject to the relevant statutory deductions. The parties having each partly succeeded, I make no order as to costs.

DATED and Delivered at Nairobi this 11th day of July, 2014

D.K. MARAGA

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF MURGOR, JA

This dispute arises from an appeal from an Award of the Industrial Court in Nairobi *(Rika, J)* delivered on 3rd December 2012, wherein the court found that the redundancies declared by the appellant of the unionisable members of the 1st respondent were made without justification and procedurally wrong, and amounted to unfair termination of the employment contract and consequently ordered the appellant to reinstate the 447 employees to their roles, and be paid back salaries and allowances from the month of September, 2012.

The complete facts, proceedings and submissions relating to the application are as set out in the lead judgment of *Githinji JA*, and as such I do not deem it necessary to enumerate the entire narrative.

By way of staff Notice No. 035/2012, and dated the 1st August 2012 the appellant through its CEO wrote to "All Kenya Airways People" notifying them that it was facing major challenges in balancing the high operating costs, caused by escalating employee and fuel cost, among other overheads, which had continued to rise disproportionately when compared to decreasing revenues. As such, a restructuring exercise would be undertaken that would result in staff redundancies, and where applicable, to outsourcing of labour. The notice stated that the rationalization would cover both unionisable and non unionisable employees and would be expected not to exceed 650 members of staff. Further, that the selection criteria to identify staff for the revised organization would be based on their skills and

experience, standard of work performance, displayed work initiative and respective competencies. The notice also informed the employees that a Voluntary Early Retirement Scheme was also available for those employees who wished to take up the option. The letter was copied to the 1st respondent, and the Federation of Kenya Employers.

On 4th September 2012, the appellant issued letters of termination, and letters informing of the approval of Voluntary Early Retirement to the affected employees.

The 1st respondent disagreed with the appellant's decision and filed a suit claiming that its member had been subjected to unfair and wrongful redundancy.

I have considered the appellant's, as well as the 1st respondent's and the arguments as set out in the pleadings, and the submissions from learned counsel for all the parties. I have discerned the following to be the issues for determination:

1. *Was a valid redundancy notice issued?*

2. *Was there a mandatory requirement to consult before declaring employees redundant?*

3. *Was the declaration of a redundancy justified?*

4. *Was a valid selection process carried out?*

5. *Was the Industrial Court entitled to award reinstatement of the employees?*

6. *What compensation was due, and what should have been paid?*

The first issue was whether a proper redundancy notice was issued. In his submissions, Mr. Mwenesi, learned counsel for the 1st respondent contended that Section 40 (1) (a) of the Employment Act No. 11 of 2007 (***"the Act"***), was not complied with, as the appellant had failed to notify the Labour Officer of the Ministry of Labour, the 3rd respondent herein, of the impending redundancy, and that no letter was specifically addressed to the 1st respondent, on behalf of the employees, but that the appellant had wrongly addressed the employees directly. Further that the notice did not specify which employees had been identified for redundancy, and no consultation was undertaken with the employees, the 1st respondent and the 3rd respondent. As a consequence, the termination was a nullity. Mr. Oraro, learned counsel for the appellant, submitted in response that this issue had not been placed before the Industrial Court for determination; that the validity of the notice was not disputed by the parties and indeed, the learned judge of the Industrial Court had found that a valid redundancy notice had been issued. Counsel further submitted that the Labour officer had been duly notified.

It is apparent that the question of the validity of the notice was not determined by the Industrial Court, however, notification being a legal requirement under section 40 (1) (a) of the Act, it will be necessary for this Court to consider whether or not a valid notice was issued. Section 40 (1) (a) stipulates,

> ***1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;-***
>
> ***a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy, not less than a month prior to the date of the intended date of termination on account of the redundancy.***
>
> *b) ……*

At the outset it essential to pointed out, that the provision does not specify the format or the details to be

contained in the notice. What is required is that the employer issue a notice to the union, as well as to the Labour Officer in charge of the employment area of the employee specifying the reasons for and the extent the redundancy. Finally it is specified that a one months' notice is required to be given.

From the evidence, the appellant issued Notice No. 035/2012 addressed to all its employees on 1st August 2012, which it copied to the 1st respondent. Given that the notice was addressed to all employees and copied to the 1st respondent, instead of being addressed to the 1st respondent, could it be said that the 1st respondent was not duly notified? Of pertinence, is whether or not the 1st respondent received the notification. From the evidence the 1st respondent has not denied receipt of the notice, which in my view, is conclusive that the 1st respondent was duly notified of the impending redundancy.

As to whether or not the area Labour Officer, of the Ministry of Labour, the 3rd respondent was notified is the next question. No evidence was lead in respect of whether or not such notice was received by the 3rd respondent. From the record, the issue was neither pleaded, canvassed or indeed determined by the trial court. The record is silent on the notice to the Labour officer. In the circumstances, and without the benefit of this evidence, I must decide in favour of the appellant that the Labour Officer was duly notified as required by section 40 (1) (a) of the Act.

As to the reasons for the redundancy, this was clearly stated by the appellant, which reasons were that it was facing major challenges in balancing the high operating costs, caused by escalating employee and fuel cost, among other overheads, which had risen disproportionately when compared to declining revenues. The appellant also specified the extent of the redundancies, and indicated that 650 employees as the number of employees to be affected by the redundancy.

Turning to the period of notice, Mr. Mwenesi argued that, the notice period was less than the 30 days stipulated by law. From the evidence, the notice was issued on 1st August 2012, and subsequently, the redundancy letters to each employee were issued on 4th September, 2012, which in effect provided for a period of 34 days, and therefore I consider that the notice period provided by the appellant was in accordance with the law.

Consequently, I find that the notice as issued by the appellant on 1st August 2012 was valid and in accordance with the requirements of the section 40 (1) (a) of the Act.

The next issue was whether there was the requirement for consultations to be conducted between, the appellant the affected employees, the 1st respondent, the 3rd respondent and the Government of Kenya as a whole. Mr. Mwenesi submitted that, the failure by the appellant to carry out the requisite consultations, had rendered the redundancies illegal.

According to Mr. Oraro, consultations were not a mandatory requirement, but, that in any event, the appellant and the 1st respondent had held two meetings on the 3rd and 10th August 2012 to discuss the redundancies. A further meeting was scheduled, but the 1st respondent instituted proceedings in the Industrial Court against the appellant, and had obtained an injunction on 10th August 2012, stopping the redundancy, and any further negotiations until the suit was heard and determined.

In the judgment, the learned judge dealt extensively with the question of consultations and stated thus,

> ***"After the notice, there were no good faith and genuine consultations with the Ministry of Labour, the AAWU and the individual employees. KQ management rode roughshod over everyone. The Office of the Prime Minister asked for suspension of the decision, but KQ went ahead with the exercise. Parliament was called to intervene by the employees as shown in their Petition, but KQ remained intransigent."***

To determine whether it was a legal requirement for the appellant to hold consultations with the affected employees, 1st respondent and the 3rd respondent, it would be necessary to consider the applicable law, that being, ***the Employment Act No. 11 of 2007, the Labour Relations Act No. 14 of 2007***, the contract of service, the Collective Bargaining Agreement of 2010/2012, ("the CBA") as well as the Recognition

Agreement dated 18th December 2008, between the parties.

As seen earlier, the Act expressly provides that the employer is required to notify the union and the Labour Officer of the impending redundancies. But on the requirement to hold consultations, the Act is silent. When the ***International Labour Organisation Termination of Employment Convention 1982 ("ILO Convention"***), as ratified by Kenya in 1985 is taken into consideration, it is apparent that the Convention requires employers to notify the trade unions, and the competent authorities of the impending redundancies, and to provide the trade unions with an opportunity for consultations, where retrenchment is contemplated. So that, where section 40 (1) (a) of the Act only contemplates notification, it is clear from the ILO Convention, which is applicable to Kenyan law by virtue of Article 2 (6) of the Constitution, that in addition to the requirement to notify the union, in this case, the 1st respondent and the competent authorities, that being the Ministry of Labour, there is also the requirement for the employer to hold consultations with trade union representatives.

Conversely, neither section 40 (1) (a) of the Act, nor the ILO Convention makes it a requirement for the employer to consult with the employee.

In ***Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR*** this Court

stated:-

> ***"Where an employee is a member of a trade union, the law contemplates that the employer will deal with the employee through the union. That is why section 40 (a) requires notification of the union in cases of redundancy of unionisable workers. Under section 56 of the Labour relations Act, officials or authorized representatives of a trade union are entitled to reasonable access to the employer's premises to; amongst other things represent its members in dealing with the employer. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee."***

A contrary view was expressed by the Industrial Court when it concluded that, the selection criteria should be discussed with the employee **and** the trade union, where the employees are advised on how the criteria would be applied. I do not agree. This interpretation is not was intended by the ILO Convention. The Convention expressly provides that the trade union representatives, **on behalf of the employees**, would engage and hold consultations with the employer.

In the High Court case of ***Kenya Union of Commercial Food and Allied Workers vs British American Tobacco Cause No. 143 2008*** the learned judge outlined the manner in which redundancy consultations should be conducted when he stated,

> ***"The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union's duty is to make reasonable counter proposals to the employer's proposals with a view to giving the affected employees a "soft landing ground". In our view such consultations must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy.***

Much as this view is of persuasive value, I agree with the learned judge. I might add that, consultations in redundancies are two-way discussions between the employer and the union to be conducted with candor, reasonableness and commitment towards addressing the concerns of both management and the employees and focused on reaching solutions.

Having said that, in the instant case there is evidence to show that the appellant, held meetings with the

1st respondent on 3rd and 10th August 2012 to discuss the redundancies, but before the discussions were concluded or a stalemate was reached, the 1st respondent instituted proceedings in the Industrial Court, and obtained an injunction on 10th August 2012 to stop the redundancy process. From the minutes of the meetings, it was the 1st respondent that refused to engage in further discussions with the appellant, despite the willingness of the appellant to continue the consultations. It was also the 1st respondent that subsequently obtained an injunction to stop further consultations, and the entire redundancy process. There is nothing in the record to show that the appellant dismissed or rejected the 1st respondent's proposals. I am unable to discern the basis upon which the learned judge reached the conclusion that it was the appellant who was responsible for the breakdown in the consultations. From the available evidence, I take the view, that it was the 1st respondent and not the appellant who failed to carry out meaningful consultations as required, which consequently, compromised the entire redundancy process to the detriment of its members.

Were consultations with the entire Government, and the Prime Minister's office mandatory? The Industrial Court went further to conclude that, Article 10 of the Constitution requires that the Government should have been consulted as, it was a significant shareholder in the appellant, and it had a right to be involved in the redundancy process, and to concern itself with the appellant's business strategy, and social justice agenda, particularly with regard to the protection of employment rights. In so doing, the Industrial Court stated,

> ***"This may be a noble intention, in the context of international business; it cannot be done at the expense of Kenyans. There is need to have consensus of the social partners. KQ cannot be allowed to expand in the mode it has chosen. Article 10 does not allow this. The entire Constitution of Kenya is demanding that business models are founded on principles laid down in the Constitution."***

The Industrial Court went further to state:-

> ***"The law secures the right to work. They have the right of protection against unemployment. The protections given under Article 41 of the Constitution, and in the Employment Act 2007, are given strong endorsements under Article 23 of the UNDHR. The right to work is part of our law."***

Article 10 provides:-

> ***"The national values and principles of governance in this Article bind all State organs, State Officers, Public Officers and all Persons whenever any of them—***
>
> ***a] Applies or interprets the Constitution;***
>
> ***b] Enacts, applies or interprets any law; or,***
>
> ***c] Makes or implements public policy decisions."***

Article 23 of the Universal Declaration of Human Rights espouses the right to work, to free choice of employment, just and favourable conditions of work and to protection against unemployment.

Mr. Oraro submitted that, the Industrial Court misapprehended the applicability of international conventions and foreign jurisprudence. In particular, the court in seeking to justify the view that the right to work is absolute, wrongly invoked the concept of social development rights in labour disputes, and improperly invoking human rights conventions, to interpret the right to work as superior to that of creditors, shareholders and other stake holder in a private business enterprise. Counsel submitted that Article 41 of the Constitution was the more applicable provision as this specifies the right to fair labour practices, which the appellant employed in issuing the redundancy notice to the employees in compliance with the law. Mr. Mwenesi countered that, the courts are required to have regard to the principles in the Constitution, and recognize that Article 24 of the Constitution stipulates that

employment is a fundamental right. In counsel's view the Industrial Court did not go beyond its remit in finding that the Government should have been consulted. Counsel cited ***Shawkat vs Nottingham City Hospital NHS Trust [2001] EWCA Civ 954*** where the same requirements were applied in the UK. Mr. Fedha for the 2nd, 3rd, and 4 respondents submitted that his client's position was that the appellant is a limited liability company, and therefore the Government could not interfere with its commercial decisions.

As seen earlier, neither the Employment Act, the Labour Relations Act nor the ILO Convention make it a legal requirement for the employer to hold consultations with the Government.

In the case of ***TOBIAS ONGAYA AUMA & 5 OTHERS VS KENYA AIRWAYS (supra)*** this Court held:-

> ***"However, we would reiterate that in determining the lawfulness or otherwise of the termination of employment whose terms and conditions have been reduced into a contract, the only test is whether the said termination or redundancy was in accordance with the contract itself."***

Article 10 of the Constitution, is applicable to State Organs, State officers, public officers and all persons whenever any of them interprets the Constitution, enacts, applies or interprets any law; or makes or implements public policy decisions. In the instant case, I take the considered view that Article 10 has limited application if at all in a labour dispute between a commercial corporation and its employees. The public policy concerns envisaged by the Industrial Court cannot in this case be seen to arise. The law on redundancies in Kenya is elaborate as it is specific. There is, in addition, a contractual relationship at time existed between the parties which must also be recognized and respected. I am of the view that Article 10 is therefore not applicable to this dispute. I consider that Article 23 of the Universal Declaration of Human Rights must be read in conjunction with Article 41 of the Constitution, and the existing Kenyan Labour laws, as well as the contract of employment between the parties.

To the contrary, as the trial court observed, the appellant is a public company registered under the Companies Act Chapter 486, and listed on the Stock Exchanges of Kenya, Uganda and Tanzania. The Kenya Government is a minority shareholder holding a 29.8 % shareholding in the company. The balance of the shares are held between KLM a Dutch airline holding 26.73% of the shares, and other local and foreign investors who hold, 43.47% of the shares.

Consequently, it is the Board and management of the appellant, that have the sole mandate and responsibility to manage the company, and make decisions that are in its best interests, whose stakeholders comprise shareholders, creditors, and employees. The divergent stakeholders' rights and interests require to be managed to ensure the ultimate survival of the company. It goes without saying, and in keeping with the 2nd 3rd and 4th respondents' position, that the Board and management, must have the corporate latitude to balance the competing interests, one against the other, whilst at the same time driving the company forward in the achievement of its strategic imperatives, ultimately aimed at continued and sustained profitability.

Consequently, I find that the Industrial Court was wrong in its findings that the appellant failed to consult with the 1st respondent, and had a mandatory obligation to consult with the Ministry of Labour, and the Government as a whole.

The next issue was whether the declaration of redundancy by the appellant was justified. Mr. Oraro submitted that the issue of whether or not a redundancy should be declared is, based on the operational circumstances of the employer at the time, and it is the employer, and not the court to determine whether or not the redundancies were justified; that the learned judge misapprehended the law and misdirected himself in finding that it is the court's duty to investigate facts and circumstances to determine if the decision to declare redundancies was reasonable and exercised in good faith. Counsel cited the decision of the Court of Appeal of New Zealand in ***G.N. Hale & Sons Limited vs Wellington Caterers IUW [1990] 2 NZILR 1079 (CA),*** where the decision to declare redundancies remains ultimately

with the employer, and not the court. Mr. Mwenesi countered that, the learned judge rightly found that the redundancies were not justified since the evidence pointed to the continuing expansion of the appellant's business, and it was not possible for the employees' positions to be abolished where jobs opportunities were being created. Counsel cited the case of ***Shawkat vs Nottingham City Hospital NHS Trust (supra)***, to support the proposition that a simple change in the type of work did not give rise to a redundancy, as the work had not diminished.

The Industrial Court stated that the reasons for a decision to retrench was open to judicial interpretation, and that it is for the court to determine whether or not the reasons behind the decision were reasonable. The court went on to declared the redundancies to be illegal and rendered itself thus,

> ***"There is no doubt in the mind of the Court that the reasons or reasons advanced by the 1st respondent in the mass retrenchment are objectively, not valid reasons. KQ is merely using a financial down turn to justify its replacement of unionized employees."***

In his judgment, the learned judge, in relying heavily on the evidence of Mr. Martin Khoya Odipo, the Managing Director of Khoya & Company, out rightly rejected the appellant's evidence that it was experiencing a down turn in profitability, which had led to the decision to restructure the company. The Industrial Court concluded that because the airline was expanding by increasing its fleet and destinations, it required more employees to undertake the increasing workload. The Industrial Court questioned the credibility of the appellant's unaudited and audited financials accounts, but concluded that though the accounts demonstrated that the company had suffered losses in profits, this did not mean that it was at risk of collapse, and that, the dip in profits for the financial year ended March 2012 was one off occurrence, and not sufficient reason for terminating the employees' services. In the light of the new Constitution, the appellant no longer had the freedom to conduct its business without due regard for the rights of the employees. The Industrial court criticised the company's new business model, and concluded that outsourcing was yet another method adopted by employers to eradicate trade unions. The Industrial Court found that no good reasons were advanced to justify declaring 447 employees redundant.

Section 2 (1) of the Act, and the Labour Relations Act define redundancy as,

> ***"the loss of employment, occupation, job or career involuntary means through no fault of the 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 and loss of employment."***

According to section 40 of the Act an employer is entitled to terminate the services of an employee on account of redundancy.

The ILO Convention also specifies that employers can terminate employment for reasons of economic, technological, structural or similar nature.

In the case of ***TOBIAS ONGAYA AUMA & 5 OTHERS VS KENYA AIRWAYS [2007] eKLR*** this Court stated,

> ***"Further, it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations".***

In ***G.N. HALE & SONS LIMITED VS WELLINGTON CATERERS (supra)*** the Court of Appeal took the view that a worker does not have the right to continue employment if the business can run more efficiently without him. As long as the employer genuinely believed that there was a redundancy situation, any dismissal was justified, and it was not for the court or the union to substitute their business judgment.

From evidence the appellant tendered, its audited and unaudited accounts for the financial years 2011 and 2012 as well as other financial data, which was corroborated in significant part by Mr. Benson Okwayo from the Central Planning Unit of the Ministry of Labour, Industrial Court Secretariat to show that on account of the difficult business environment, it had suffered losses due to the high operational costs relative to the revenues earned. For the period ending 30th September 2012 the appellant had reported a huge loss of Kshs. 6.5 billion, compared to a profit of Kshs. 2,034 billion for the same period the previous year.

Faced with a drastic decline in profitability for the past five years, relative to its escalating costs, the appellant sought to bring costs down to more sustainable levels, and introduced various cost saving measures, including, fuel hedging, the overhaul and rationalization of in-flight services, introduction of a biometric system to manage medical expenses, and eliminate fraud, renegotiation of hotel rates globally, and the introduction of an enhanced IT systems and processes to increase service delivery , and reduce on unnecessary manpower.

From the record, it is evident that, between the years 2005 and 2012, the staff numbers were consistently rising. Between 2010 to 2012, almost 652 employees were recruited, increasing the staff headcount to 4,834 employees. In Mr. Okwayo's own words, "***Trend for wage bill in 2010 was a major issue. It's the second biggest contributing factor"***. As headcount increased, so too did unionisable staff cost which increased by Kshs. 1.66 billion in the financial year 2010/2011 totaling Kshs 8.66 billion, and in 2011/ 2012 financial year the costs stood at Kshs. 10.99 billion an increase of Kshs 2.33 billion.

In addition, the average cost per employee, which are those costs of maintaining an employee in the workplace, (including recruitment costs, training, statutory dues, medical and other insurance, uniform and equipment, amongst other things), increased, from Kshs. 1.23 million per employee in 2005 to Kshs 2.78 million per employee as at March 2012. So that, when the average cost per employee was compared with percentage growth, cost per employee rose steadily, while the percentage growth declined dramatically from 27.41% in 2010 to 4.43% in 2011. By 2012 it had only grown to 7.96%, evidencing a slowdown in the rate of growth and an acceleration in the cost per employee. Mr. Murianki testified that as a consequence, the redundancies would result in a one off payment of Kshs. 837 million, while the company would make a saving of Kshs. 1.4 billion annually.

Given the financial status, and the foreseeable consequences on the appellant, and the mitigating initiatives that the appellant was forced to employ, I have no reason to doubt the authenticity of the appellant's precarious financial status which clearly threatened the immediate, short and long term future sustainability of the company. A continued decline or loss in profitability can have sever ramifications on the future prosperity of any company, and undermine investor and market confidence. The Industrial Court was wrong to reject the appellant's account of its financial circumstances and rely entirely on Mr. Odipo's unsubstantiated report, including the tenuous interpretations and assumptions in place of the appellant's accounts, financial data and future projections so as to arrive at a determination that the redundancies were not justified. It was not the Industrial Court's duty to question the appellant's strategic intent, or to reach a conclusion that the company must be on the verge of collapse or be staring bankruptcy in the face before a decision could be taken to declare redundancies. What mattered was that following the unprecedented losses resulting from fuel hedging and escalating staff costs at the end of the 2012 financial year, urgent and immediate action was required to return the company back to profitability, to safe guard the company's future viability. Without immediately embarking on measures to reverse the downward spiraling trend, there was the real possibility that it would continue to declare losses in the future to the detriment of all its shareholders, creditors, and the remaining 4,200 employees. It is these circumstances that have led to the unfortunate decision to declare the redundancies, and it is these same circumstances that the Industrial Court should have borne in mind when determining whether or not the decision to declare the redundancies was justified. From the decisions in ***TOBIAS ONGAYA AUMA & 5 OTHERS VS KENYA AIRWAYS (supra)*** and ***G.N. HALE & SONS LIMITED VS WELLINGTON CATERERS (supra),*** it is clear that an employer has the right to declare redundancies, where it is convinced that circumstances requiring redundancies have arisen, and the Industrial court was not entitled to substitute its own decision for that of the company, particularly where it has exercised its discretion properly, and in the best interest of the company, as well as its stakeholders.

The evidence showed that in restructuring the staff portfolio, the appellant identified certain roles to be abolished and others to be reduced in number, the remaining positions of which would be filled following the employee assessments. Of the category to be completely abolished, were the positions of, Revenue Assurance Support Executive, Customer Relations Executive, Facilities Technicians, Procurement Officers, Cabin Groomers, Customer Service Agents, Loading Supervisors, Team Leader Equipment Operators, Passenger Systems Agent/Analyst Passenger Systems Supervisor Launderer and Team Leader. In the other category were the positions of Flight Operations, Equipment operators, Customer Service Agents, Duty Service Supervisor, Check in Controllers, BRS Controllers, Team Leader (Baggage) and the HR Assistant where employees would be assessed to select those employees that would remain in employment. The performance assessments, would be based on productivity, and shift and skills, to determine those employees who would be found fit for the future organization so as to be retained.

From the total of 447 affected employees a total of 205 positions were completely abolished. According to Mr. Shivo, the roles were abolished as they had ceased to add any value to the company, and were to be outsourced to specialist local firms, equip with the relevant technical and professional expertise to provide such services.

No reference was made in the judgment to the abolished positions, and the Industrial Court misdirected itself in failing to recognise that certain positions had ceased to exist, which was further justification for the redundancies. Instead, the Industrial Court exclusively addressed the positions to be fill through assessments and completely disregarded the impact of the structural changes on the positions that were abolished in arriving at the conclusion that no positions were lost following the exercise.

With the 205 positions having been completely abolished, this rendered the employees that held these positions superfluous within the meaning of section 2 (1) of the Act, and the Labour Relations Act, and subject to redundancy as specified under section 40 of the Act.

On whether the reduction of positions was justified, the Industrial Court took exception to the of rendering the flight attendants and pursers, equipment operators and Customer service agents redundant, and concluded that the collapse or merger of roles, was unjustified on account of the appellant's expansion program; that the aim of declaring these employees redundant was to transfer these positions to a local outsourcing firm, Career Direction Limited, to avoid the regulatory burdens, and to recruit foreign nationals. The new business model was criticized for having given rise to the redundancies, and the introduction of outsourcing.

I have already stated that the appellant was within its rights to declare redundancies. What the Industrial Court failed to consider was that in this age of heightened technology, increased mechanization, and an increasingly skilled workforce, there are diverse business concepts which when effected, can cost effectively facilitate expansion and growth of a business, while reducing workforce requirements. Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It not designed to deprive Kenyans of their jobs. Consequently, the finding by the Industrial Court that the appellant's redundancy exercise was unjustified on the basis of its expanding operations is decidedly not compelling, and aimed at usurping the appellant's managerial prerogative.

Given the acute financial predicament in which the appellant found itself and the fact of the eliminated roles and positions in the company following the restructuring exercise, I find that it was indeed justifiable for the appellant to have declared these positions redundant.

Turning to the issue of whether the selection process adopted conformed to the requirements of the law, it is apparent that this process mainly affected the category of employees whose positions were reduced in number and were to be filled following assessments. From the evidence, it is clear that the 1st respondent's entire case revolved around this category of employees, and as a consequence the Industrial Court focused its determination solely on the plight of these employees.

Mr. Oraro complained that the learned judge wrongly applied Section 45 (2) (e) of the Act to conclude that the appellant had adopted an unfair procedure in declaring the redundancies, and misdirected himself by applying standards, not existent in Kenyan law, namely the notification of the employee, consultation and a fair selection criterior. Counsel's other complaint was that the learned judge concluded that the only way of assessing employees was on a Last In First Out (LIFO) basis was not mandatory. Mr. Mwenesi submitted that no assessments were carried out to identify the employees to be declared redundant, as the assessments were stopped by the injunction order, and Voluntary Early Retirement opened on 1st August 2012 and closed on 10th August 2012, and therefore there had been no opportunity to assess and select employees whose contracts would be terminated. When did the process of statutory forced retirement begin if this process had been stopped?

Counsel cited ***TOBIAS VS KENYA AIRWAYS (supra)*** on the process of identifying employees to be declared redundant.

The Industrial Court concluded LIFO was the only criteria to be applied in a selection process, and stated,

> ***"Last in First Out [LIFO] is a mandatory requirement under the Kenyan Law. Section 40 refers to consideration of seniority in time, which is basically about LIFO. Although Shivo appeared to downplay the importance of LIFO, it is part of the Kenyan law and parties cannot contract out of the requirement… In the air industry, where security and safety are fundamental issues, seniority must be a key aspect in the selection criteria. LIFO remains a very objective selection criterion and is considered in some jurisdictions as the golden rule of procedural retrenchment law. A valid retrenchment exercise can be reversed on the sole ground that LIFO was not observed."***

Section 40 (1) (c) of the Act specifies the criteria to be followed in the selection of employees to be declared redundant, which should have due regard to seniority in time and to the skill, ability and reliability of each employee.

Section 40 of the Act, provides,

> ***1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;-***
>
> ***a) …***
>
> ***b) …***
>
> ***c) The employer has , in the selection of the employees to be declared redundant had due***
>
> ***regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affect by the redundancy,***
>
> ***d) …***

IN THOMAS DE LA RUE (K) LTD VS DAVID OPONDO OMUTELEMA (supra) this Court stated:-

> ***"Although Mrs. Guserwa, learned counsel for the respondent argued that there was no evidence adduced by the appellant to show that it had applied***
>
> ***the criteria set out in section 40 (1) (c) to the employees who were declared redundant Exhibits Resp 4 and 5 showed that the 12 Kugler operators, among them the respondent were evaluated on 14 criteria covering skill levels, ability, performance appraisal record, attendance reliability and dependability, length of service and***

disciplinary record."

Clearly, the selection process is required to be based on seniority, skill and experience, reliability and ability of the employee.

The Redundancy Notification of 1st August 2012, stated,

> ***"The key criterion to be used in the identification of staff affected in this process will be their fit in the revised organization structures based on their skills and experience, standard of work performance, display of work initiative, and respective competencies defined for the different roles in the organisation design."***

From the evidence of Mr. Shivo and Mr. Kireru, the Head of Employee relations of the appellant, testified that various assessment tools were adopted to assess the employees overall performance. The procedure to be followed to identify affected staff were their skills and experience, standard of work performance, displayed work initiative, respective competencies defined for the different roles in the organization design. The affected employee would selected on the basis of low productivity, and performance.

When the evidence is considered, it is doubtful whether the appellant's outlined selection process was followed. I say this because, where an employer adopts a selection criteria, they must be able to show that the criteria was applied systematically and uniformly across the board, and where the numbers involved are large, it must be structured and comparatively based.

In the instant case, the redundancy notice provided that the procedure to be followed to identify affected staff were their skills and experience, standard of work performance, displayed work initiative, respective competencies defined for the different roles in the organization design. There is no evidence to demonstrate how this was determined. The appellant stated that it had applied various assessment tools online assessments, psychometric tests, comprising the Hogan Business Reasoning Inventory and Morrisby Aptitude Tests, to determine the overall performance of each employees, yet no test results were produced to show how the affected employees performed, or how their results compared with those of successful employees. It was the appellant's case that, due to the existence of the court Order, it resorted to evaluating the employees' annual performance appraisals as the basis for the selections. With this in mind, it is ironical that, it was the 1st respondent's members who produced their own annual performance appraisals rather than the appellant. More disconcerting is the failure by the appellant to produce any score sheets derived from the annual appraisals to explain how the affected employees were scored. Instead, the appellant only relied on the employees' past records, mainly warning letters and show cause letters to identify the employees whose contracts were to be terminated.

Another concern is the timeframe for undertaking the selection exercise. It is clear that following the injunction obtained by the 1st respondent, the entire redundancy exercise was stopped. The injunction was discharged on 31st August 2012, and the letters of redundancy were issued to the affected employees on 4th September 2012. Given the limited time available, I am not convinced that the affected employees were assessed, and therefore constrained to find for the 1st respondent in this regard.

On whether LIFO was the sole criteria to be adopted to the exclusion of the other lawful criteria, I do not agree with the Industrial Court that LIFO is the sole mandatory criteria to be applied in redundancies. It is evident that section 40 (1) (c) requires the employers to apply all the selection criteria specified, with due regard to seniority in time, skill, ability and reliability of each employee. A sole application of LIFO would no doubt, be detrimental to any employer, as continuity and succession planning within the organization could be jeopardized.

As a consequence, I find that the appellant did not apply a fair selection procedure as required by section 40 (1) (c) of the Act, and in so doing unfairly terminated the contracts of the 447 affected employees.

On the issue of reinstatement, Mr. Oraro submitted that the Industrial Court erred in holding that the

appellant's redundancy exercise was unfair and wrongful, and in so doing, ordered that the employees be re-employed *en masse* despite acknowledging the appellant's

financial constraints. Counsel cited ***ERIC MAKOKHA & 4 OTHERS VS LAWRENCE SAGINI & 2 OTHERS*** Civil Application No Nai 20 0f 1994 and ***MUHIA & 2 OTHERS VS KENYA POWER AND LIGHTING COMPANY LTD [2004]*** eKLR, where under the previous

constitution, reinstatement amounted to coercion and bondage. Counsel pointed out that, though prayed, reinstatement was not pleaded, and neither did the parties canvass the question of reinstatement before the trial court, and finally that the more appropriate remedy should have been damages. Mr. Mwenesi argued that the learned judge rightly ordered reinstatement, as a consequence of the wrongful termination, which order was based on the 1st respondent's prayers for reinstatement. Counsel cited ***CHANDER DUTT VS NEHRUYURU KENDRA SANGATHAN*** W.P. (c) 156/2011where it was considered that where the redundancy is unlawful, the redundancy is declared null and void and is followed by reinstatement.

The Industrial Court awarded reinstatement and back pay to the affected employees on the basis of the considerations specified in section 49 (4) of the Act, in that the 1st respondent's members prayed for it; that it was practical on the appellant's part to reinstate them; that the employee's services had been terminated due to no fault of their own; and there were no the opportunities available to the employee to secure comparable or suitable employment with another employer.

In considering whether to interfere with the decision of the Industrial Court's award of reinstatement, it will be necessary to consider whether the learned judge misdirected himself, took into account extraneous considerations, or was just plain wrong in arriving at this decision.

Section 49 provides for remedies where in the opinion of the labour officer, the summary dismissal or termination of a contract of an employee were unjustified.

> ***Section 49 (3)- provides***
>
> ***Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labor officer may recommend to the employer to***
>
> ***a) Reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or***
>
> ***b) Re-engage the employee in a work comparable to that in which the employee was employed prior to the dismissal, or other reasonably suitable work at the same wage."***

As to whether or not an order for reinstatement should be granted is part of the adversarial process of litigation, and the parties should have been accorded an opportunity to address the court on the issue. It is apparent from the pleadings that though reinstatement was not pleaded it was prayed by the 1st respondent. No evidence was tendered by the parties on the practicability or otherwise of such an award.

In ***NEW ZEALAND EDUCATIONAL INSTITUTE VS BOARD OF TRUSTEES OF AUCKLAND NORMAL INTERMEDIATE SCHOOL [1994] 2 ERNZ 414 (CA)***, the New Zealand Court of Appeal stated,

> ***"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 no 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."

The Industrial Court took it upon itself to unilaterally argued a case for the reinstatement of the 1st respondent's members, and consequently, in awarding reinstatement, condemned the appellant unheard to reinstate the 1st respondent's 447 members, in flagrant violation of Article 50 of the Constitution.

I consider that the Industrial Court indiscriminately awarded reinstatement without due regard for the nature of each position declared redundant, the length of employment of each and every employee, and whether or not their positions remained in existence. Without evidence the court concluded, ***"…the majority of KQ employees are not likely to fit elsewhere in the Kenyan job market…"*** and in so doing, disparaged the ability of the other local, regional and international airlines, operating in Kenya and globally, to employ Kenyan airline personnel and also failed to recognize that accountants, finance personnel, technicians are careers that are not exclusive to the airline industry. Additionally, nothing estopped the affected employees from seeking employment in the same firms contracted to outsource services to the appellant.

On the question of practicability, the Industrial Court having considered it practicable to reverse the retrenchment of 447 employees, and to order their reinstatement to a financially constrained employer, without sufficient regard for the implications of such a decision, including whether the employer could accommodate the affected employees in the workplace, or effectively deploy them within its operations. In my view, the practicability of such an order is implausible having regard to the very nature of the appellant's business. Further, reinstatement would amount to a committal to servitude and bondage on the part of the employee and employer respectively.

In the circumstances, I find it necessary to interfere with the award of reinstatement and back pay, for reasons that it was inappropriate and impractical to re-establish the employer/employee relationship with the affected employees.

The final issue is on the terminal dues payable to the affected employees. From the evidence, the appellant had offered an attractive terminal package based on clause 49 of the CBA, but a dispute had arisen on whether this clause was applicable. This is because, at the time of negotiation of the 2010/2012 CBA, the parties were unable to agree on the redundancy provisions that would form part of the agreement. It was subsequently agreed that the redundancy provisions of the 2008/2010 CBA be incorporated as the redundancy terms of the 2010/2012 CBA, and a letter to that effect was signed by the parties and registered at the Industrial Court in accordance with section 60 (5) of the Labour Relations Act. Given that clause 58 of the CBA allows for amendments, I consider this to be a contractual agreement between the parties, and as such it is binding and enforceable. Consequently, for the purposes of the terminal dues payable to the 1st respondent's members, I find clause 49 of the CBA to be applicable, and that the appellant pay the affected employees in terms of the applicable redundancy provision forthwith, if it has not already done so.

In terms of section 49 (1) (c) of the Act which provides that where termination of the employees has been unjustified, an award equivalent to a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal can be awarded. Consequently, as the selection procedure for termination of the 1st respondent's 447 members was unfair and I consider an award of damages equivalent to six months gross monthly wage or salary of the employee at the time of dismissal appropriate.

In conclusion,

1. I find the redundancy notice issued by the appellant to be valid and in compliance with Section (40) (1)(a) of the Act.

2. I find that the appellant complied with the requirement to consult, and consider that the Industrial Court was wrong in finding that the appellant failed to consult with the 1st respondent, and that it had a mandatory obligation to consult with the Ministry of Labour.

3. I find that the appellant was justified to declare the redundancies, having regard to its bad financial performance, and declining profitability over the last five years.

4. I find that, the appellant did not apply a fair selection procedure set out on section 40 (1) (c) of the Act, and consequently unlawfully terminated the employment of the 447 employees.

5. I find that the Industrial court misdirected itself and unjustifiably ordered the reinstatement of the 447 affected employees, and is hereby set aside the award for reinstatement and back pay.

6. I find that for the purposes of determining the terminal dues of the affected employees, that the applicable redundancy terms as agreed by the parties, is clause 49 of the 2008/2010 CBA which amount should be paid forthwith to the 447 affected employees, if such amounts have not already been paid.

7. I consider an award of damages equivalent to six months gross monthly wage or salary of the employee at the time of dismissal appropriate, having found that the appellant unfairly terminated the 447 affected employee's employment contracts.

For this reason, I would allow the appeal in part, set aside the order for reinstatement, and in lieu thereof order that the each of the 447 affected employees be paid damages equivalent to six months gross monthly salary for unfair termination of employment in addition to the three months' salary in lieu of notice, 20 days severance pay for each completed year of service and any other outstanding dues, payable by the appellant nett of all statutory deductions.

I would make no orders as to costs. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of JULY, 2014.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR