Mbarire v Kenya Airways Limited (Cause 2399 of 2017)
[2024] KEELRC 1228 (KLR) (4 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 1228 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2399 OF 2017

NZIOKI WA MAKAU, J

MARCH 4, 2024

BETWEEN

JOHN MIRITI MBARIRE ..... CLAIMANT

AND

KENYA AIRWAYS LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent claiming compensation for unlawful dismissal and payment of allowances. In his Amended Memorandum of Claim dated 29th March 2022, the Claimant averred that the Respondent employed him as a Flight Captain of the Embraer Plane Model by a letter dated 12th August 2012 and his employment was effective on 3rd September 2012. His stance was that on 30th March 2017 and 27th April 2017, the Respondent served upon him two letters of Notice to Show Cause why disciplinary action should not be taken against him. That the reasons for the first Notice to Show Cause were inter alia that he caused the delay of take-off of flight KQA 670 to Kisumu by 34 minutes on 25th March 2017 thus putting the Respondent's name into disrepute. He responded to the first Show Cause through a letter dated 5th April 2017, explaining that his decision not to fly to Kisumu was after considering the technical preparedness of the plane, the prevailing weather conditions, the inadequate runway length and his own stress levels and that he had sought permission to fly another route and was granted to fly to Mombasa. Moreover, that his decision not to fly to Kisumu on 25th March 2017 was in compliance with his responsibility and duties as Captain as set out under the Respondent's Operating Manual items 27 and 31 and landing limitations in the Kenya Civil Aviation Authority Act. The Claimant further averred that the reasons for the Notice to Show Cause dated 27th April 2017 was that he had failed to operate flight KQ 350 resulting in a delay of 44 minutes and yet again put the Respondent's name into disrepute. He responded to the second Show Cause vide a letter dated 4th May 2017 and explained that fell ill and had followed the strict procedures of calling-in sick by telephoning and sending an email on 8th April 2017.

2. It was the Claimant's averment that by a letter dated 8th May 2017, the Respondent invited him for a panel hearing scheduled for 11th May 2017 at the Pride Centre. That the said panel hearing eventually took place on 16th May 2017 attended by five (5) people who included the Chair, Chief Pilot, two KAPLA Representatives and the Claimant herein. The Claimant contended that whereas five (5) charges were levelled against him at the hearing, two of the charges were never raised in the Notice to Show Cause i.e. failing to abide by commitment signed in March, 2013 and inability to work with others. Furthermore, that no evidence and proof was presented in regards to the two extra charges contrary to clause 28 of the Collective Bargaining Agreement 2010-2011. The Claimant averred that on 22nd May 2017, the Chairperson of the hearing panel wrote his decision that found him guilty of all the charges and recommended disciplinary action be taken against him. That the reasons given for the said decision was repeated disobedience, failure to follow instructions, ignoring operational procedures, failure to abide by commitments of 2013 and neglecting to perform duties without valid reasons. That however, the decision completely failed to consider the explanations he had given which completely absolved him from any wrong doing. Secondly, that the Disciplinary Panel as constituted was in breach of clause 17.2.3 of the Respondent's Human Resource Policy Manual, version 7 of 2015 in that the Controlling Manager, Captain Keneth Githuku had been actively involved in the investigations, also sat in the panel and was the author of the Show Cause Letters issued to the Claimant. That in addition, members had expressed reservations on the setting up of the panel and had stated that the Claimant had not committed any serious offence to warrant setting up of the panel. The Claimant's opinion was that the Panel was therefore biased, unfair, unprocedural and illegally constituted.

3. The Claimant's further averment was that the Respondent terminated his employment contract through a letter dated 31st May 2017 but following his appeal against the dismissal on 5th June 2017, he was granted conditional reinstatement by a letter dated 2nd August 2017. That the conditions for his reinstatement were that the period between 31st May 2017 and the date of his resumption of duty would be treated as leave without pay and that he would be subjected to requisite tests, medical and any other examinations required for validation. He asserted that in a letter dated 15th September 2017, he requested for withdrawal of the terms of the letter reinstating him to his employment but the Respondent declined to issue a reply to the same thus effectively terminating his employment. The Claimant averred that he refused to sign the letter of reinstatement because the conditions for return to work were discriminatory, tainted with bad faith and tailored to frustrate him technically make it impossible for him to resume duties. He contended that the Respondent would have delayed or withheld providing the requisite tests or ultimately failed him in spite of his satisfactory and current flying status. According to the Claimant, the termination letter dated 31st May 2017, the letter of reinstatement dated 2nd August 2017 and the reasons thereof were unfair, unjust, unlawful and also did not comply with the CBA and his Contract of Employment. He asked this Court to declare the Respondent's Disciplinary Panel's decisions of 22nd May 2017 as null and void.

4. The Claimant further averred that considering he was due to retire on 14th December 2022, he had a balance of 69 months working days and his dismissal therefore resulted in loss of earning, benefits and loss employment opportunity. He particularised in the Claim that he thus claims 69 months of lost salary from 31st May 2017 to date of retirement, loss of productivity (flying allowance) until date of retirement, medical allowance for each family member, 5 years travel allowance, 12 months' salary compensation for unlawful dismissal, costs of the suit, and interest on the foregoing until payment in full.

5. In his Witness Statement dated 29th March 2022, the Claimant outlined the various occasions when Captain Githuku was openly against him in the Respondent from as far back as 2013. The Claimant asserted that during the disciplinary hearing, Captain Githuku acted as investigator, prosecutor and

judge thus breaching the rules of natural justice and which also resulted in the Panel not considering the Claimant's explanations. He submitted that throughout his employment with Kenya Airways that spanned nine (9) years, none of his first officers, including Captain Bajaber who was once his first officer, raised any issue regarding his attitude, character, personal relations or competence. That it was also noteworthy that the Respondent never served him with even one single warning letter. He further asserted that all the decisions he made were in accordance with his position as a captain of the flight and following technical advice. The Claimant prayed that the Court declares that the decision to terminate his employment was made by an incompetent body and thus null and void.

6. Respondent's Case

In its Reply to the Amended Claim dated 21st June 2022, the Respondent averred that the Claimant was first employed by Flamingo Airlines Limited, a wholly owned subsidiary of the Respondent, on 1st November 2001 in the role of Captain of SAAB 340B aircraft on a three-year fixed term employment contract of service. That the Claimant was issued with a Contract of Employment which he acknowledged and signed acceptance of the terms and conditions stipulated therein on 10th December 2001. That after his appointment, the Claimant was taken for flight training to the SAS Flight Academy in Sweden from 5th November 2001 to 14th December 2001 for Simulator Recurrency Training specific to the SAAB 340B Aircraft. Later on 1st July 2004, the Claimant's employment with Flamingo Airlines Limited was, through an agreement signed between the said Company, the Respondent Company and the Claimant, reassigned to the Respondent after the Respondent acquired the business of airline operations of Flamingo Airlines Limited as a going concern. That the Claimant was duly advised of the change and signed to execute the said agreement on 12th July 2004. It was the Respondent's averment that after the Claimant's initial three-year contract expired, he applied to the Respondent for employment as a Pilot and was issued with an appointment letter dated 9th November 2004 advising him of his engagement as Captain in the SAAB fleet effective 10th November 2004. That the Claimant was promoted to the position of Captain in the E170 (Embraer Fleet) with effect from 23rd September 2007 and was later on offered employment as Captain in the Embraer fleet effective 3rd September 2012 which he accepted and signed the contract of employment on 29th August 2012.

7. The Respondent averred that the Claimant had severally previously been warned. It averred that on 22nd July 2002, the Chief Pilot issued the Claimant with a 1st Warning letter for missing his rostered flight 1654/1658 on 5th July 2002 and also for failing to pick his phone for reasons that the Company could not accept. That the said Warning letter advised the Claimant that any future misconduct of that nature would not be tolerated. That the Claimant had also been issued with a Show Cause letter for reporting 30 minutes late for his flight F7 1662 of 21st July 2002, which was soon after he had missed his rostered flight 1654/1658 of 5th July 2002. That the Claimant was issued with a 2nd Warning letter on 3rd September 2002 for failing to show up for his rostered flight KQ/1660/1661 on 31st August 2002 and also not being reachable on phone, which caused a 15-minute delay as his replacement was being sought. That the then Acting Chief Pilot then informed the Claimant that the 2nd Warning letter was his last warning having been previously warned for missing a rostered flight. The Respondent further averred that on 19th March 2013, the Claimant was undergoing recurrent training for E190 aircraft when he was called to a meeting with a team of Management staff from the Flight Operations department to discuss his noted Crew Resource Management (CRM) deficiencies (the ability to work with others). That the meeting was convened due to the Claimant's negative and disruptive attitude, poor CRM throughout his recurrent training and inadequate decision making. That on 20th August 2014, the Claimant was yet again called to another meeting by the Safety Office to address a Confidential Hazard Report (CHR) raised against him on an incident reported by a member of the Cabin Crew, a Flight Purser on KQ670. That the complaint was on the Claimant allegedly

raising his voice during a briefing session, pointing at crew around him and asking the Flight Purser to leave and go because of her persistent laughing and the Claimant promised to handle future similar situations with calm. The Respondent noted that in another related incident on 13th October 2016, the Claimant while operating flight KQ 656, unprocedurally off-loaded human remains destined to Kisumu for burial without reasonable cause and caused great distress to the family of the deceased who were waiting for the human remains in Kisumu. That the Claimant's said conduct was despite the personal intervention of the Chief Pilot and the incident further put the Company's name to disrepute. That consequently on 8th May 2017, the Chief Pilot wrote a Manager's Report Flight Operations and Human Resources concerning the Claimant and enumerated the several incidents of misconduct by the Claimant for which disciplinary action was then recommended against the Claimant. That the Claimant was thereafter issued with a Show Cause letter on 30th March 2017 and another one on 27th April 2017, to which he duly responded denying all allegations therein. It further asserted that the Claimant was issued with another Show Cause letter on 27th April 2017 in relation to an incident in which he unprocedurally reported in sick via email and after the management considered his responses to be insufficient, he was subjected to a disciplinary panel hearing on 16th May 2017 and a decision to terminate his services made effective 31st May 2017.

8. The Respondent's case was that the Claimant misinterpreted Company policies, failed to make reference to Company manuals easily accessible to him and ignored advice and guidance offered to him by other staff members involved in the flight pre-departure process. It denied the composition of the Disciplinary Panel as outlined by the Claimant in his Claim, averring that the Panel was also attended by the HR Relationship Manager. It further denied that extra charges were made against the Claimant as alleged and asserted that the "extraneous matters" referred to by the Claimant are references to his previous incidences with the Respondent, which for all intents and purposes were relevant in the Panel Hearing. According to the Respondent, the issuance of a notice to show cause by the controlling manager as under clause 17.2.2(a) of the Respondent's HR Manual is a procedural step that does not make the controlling manager impartial and that in the Claimant's case, Chief Pilot Githuku was not the chair of the impugned Disciplinary Panel and was only present during the hearing to clarify any technical issues in accordance with clause 17.5 of the Respondent's HR Manual. That in any event, the recommendation made by the Chairperson of the Disciplinary Panel on 22nd May 2017 considered the explanation given by the Claimant, the submissions made on his behalf by two Union officials, and the submissions and evidence presented on behalf of the management.

9. In regard to the Claimant's averments on reinstatement, the Respondent submitted that the Claimant's termination had already been effected from 31st May 2017 and that he eventually declined reinstatement when the same was offered to him. It averred that the particulars of loss and damage enumerated in his Amended Memorandum of Claim are ill informed, unwarranted and unsubstantiated and prayed that the same be dismissed with costs to the Respondent. The Respondent's averments were reiterated in the Witness Statement made on 25th January 2019 by its Chief Pilot, Captain Bajaber Abubakar.

10. Claimant's Submissions

The Claimant submitted that the Respondent's witness conceded in his evidence before Court that the Claimant operated another flight to Mombasa on the same day he is alleged to have refused to fly to Kisumu because the plane was faulty and he therefore did not refuse to obey lawful instructions of his employer. According to the Claimant, the Respondent had failed to prove that its reason for termination was valid and fair as required by sections 43 and 45 of the *Employment Act* Cap 226 of the Laws of Kenya. He cited the case of Kenfrieght E.A Limited v Benson K. Nguti [2016] eKLR wherein the Court held that it is the burden of the employer to prove the reasons for termination. On

the second charge of having failed to report for duty on 9th April 2017 due to illness and unprocedural reporting via email, the Claimant submitted that clause 6.2.2 of the Respondent's Operating Manual, Part A, version 14, states as follows:

> "when reporting sick at base, crew members must advise the crew planning/scheduling office/ diary manager operators by telephone calls. Email communication shall be sufficient only if acknowledged by the officer (clear com attached)." (Emphasis by Claimant)

It was the Claimant's submission that the Disciplinary Panel established that the staff at crew scheduling do not answer phone calls and also fail to respond to email at times. That nevertheless, Captain Bajaber had admitted that he read the Claimant's email but did not act on it because he saw it at night and the chair of the panel hearing even concluded that action needed to be taken against crew scheduling for failing to respond to the Claimant's email. The Claimant thus argued that he obviously cannot be faulted for not receiving a response on his call and email to crew scheduling and that he actually complied with the laid down procedure despite having been unwell. In this regard, he cited the case of Kennedy Nyaguncha Omanga v Bob Morgan Limited [2013] eKLR quoted with approval in Package Insurance Brokers Ltd v Simon Gitau Gichuru [2019] eKLR, wherein the Court held that while employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise sensitivity. The Claimant asked the Court to find that termination on this particular reason was unfair, not valid and unjustified.

11. The Claimant further submitted that the reasons for termination were also not fair as required by section 45(2) read together with section 41 of the *Employment Act*. That these statutory provisions are underpinned by Articles 47 and 50 of *the Constitution* of Kenya 2010 that impose the right to be heard by a procedurally fair independent and impartial tribunal or body. He argued that the panel hearing held on 16th May 2017 was procedurally unfair, not independent and biased because Captain Githuku sat in the panel contrary to the provisions of clause 17.2.3 (b) (i) of the Respondent's HR Manual on composition of the panel to hear the case. That Captain Githuku then raised issues not captured in the Notice to Show Cause contrary to clause 17.2.2 (b) which states that what is not mentioned in the Show Cause letter should not be a basis for any disciplinary action against the staff. It was the Claimant's submission that the panel hearing as constituted was unfair, biased and impartial when subjected to the test of bias laid down in the case of Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR. He further argued that there is no doubt that Captain Githuku presented a real danger of bias against him and that is why a member of the Panel, Captain Gichinga, remarked that the hearing was a witch hunt because there was an emerging trend of simply issuing show cause letters. The Claimant maintained that the attempt by the Respondent to reinstate him without declaring him innocent of the charges levelled against him and requiring him to go for retraining and medical tests as a precondition can only be deduced to amount to constructive termination. That the Respondent's conduct of issuing show cause letters on matters sufficiently explained by the Claimant showed that the Respondent was not ready to continue employing the Claimant per Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR.

12. It was submitted by the Claimant that having considered the set down statutory limits provided for under sections 49 and 50 of the *Employment Act* together with the decisions of the Court in similar matters, this Court ought to award him 12 months' salary as compensation for unfair termination of employment. He reasoned that whereas he then had only five (5) years remaining in his Contract before he attained the mandatory age of retirement of 65 years, he was currently at that age. That moreover, the chances of him securing similar employment in a major airline were slim and due to the termination, he lost the benefits from increase of productivity allowance and rebated air tickets for himself and his spouse for the rest of their lives, which ensue upon attaining 10 years of employment as provided in the

CRA. On this submission, he relied on several authorities including the case of Emma Carol Wanjiru v Airworks (K) Limited [2015] eKLR in which the claimant was a Captain and was awarded 9 months' pay as compensation.

13. Respondent's Submissions

The Respondent proposed the following issues for determination:

a. Did the Respondent have fair and valid reasons for terminating the employment of the Claimant?

b. Did the Respondent take the Claimant through a disciplinary process which was procedurally fair?

c. Were the conditions for reinstatement offered to the Claimant justified?

d. What reliefs is the Claimant entitled to?

14. It was the Respondent's submission that section 43 of the *Employment Act* places an obligation on the employer to prove the reasons for termination which position was affirmed in the decision of the Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR. It argued that it indeed had justifiable reasons for terminating the Claimant's employment following his refusal to do his job on two occasions. As regards the first occasion on 25th March 2017, the Respondent noted that the technical logs indicating the plane's fault and what was done about it are to the effect that the fault was cleared and the plane was flown to Kisumu, which fact is also repeated in the Minutes of the incident meeting of 28th March 2017. It submitted that the Claimant confirmed during his cross-examination. Furthermore, the Claimant being a Captain does not mean that his actions are immune from review and his decisions cannot be examined or scrutinised by his employer. Regarding the second occasion on 9th April 2017, the Respondent asserted that the Claimant, when reporting that he was unwell, did not call all the telephone numbers given to him in the operations manual, a fact he also admitted in cross-examination. That the Claimant had relied in his Submissions on the Respondent's Operations Manual, Version 14 that came into effect on 1st June 2021, four years after the events of this case. That the said operations manual was not in any of the bundles of documents filed and produced by the Claimant and even if it had been, it cannot apply to events which preceded it. The Respondent noted that whereas the provision states that email communication is sufficient if it is acknowledged, the Claimant's email was not acknowledged. According to the Respondent, the two occasions provided justifiable reasons for it to terminate the Claimant's employment and the grounds for termination were given to the Claimant. Further, it was the Respondent's submission that the decision in Kennedy Nyaguncha Omanga (supra) cannot assist this Court because the Claimant's employment was not terminated because he was ill but because he did not follow the procedure for reporting that he was ill, which led to the delay of a flight. That any reasonable airline would have terminated the employment of the Claimant if faced with the same circumstances as was similarly observed in the case of Laban Kimutai v Eldoret Club [2021] eKLR.

15. The Respondent submitted that the role of the Controlling Manager is to represent management and put their case before the panel or the Chair of the proceedings. That the decision of the panel is made by the Chair of the Panel who in the Claimant's case was Henry Obare who recommended that disciplinary action be taken against the Claimant. The Respondent submitted that despite the Claimant's apprehensions, Captain Githuku did not participate in the decision making process. That clause 17.2.3(b) of the Respondent's HR Manual provides for two types of panels and while the Claimant submitted this he was heard by the three-member panel constituted under 17.2.3(b)(i), his disciplinary proceedings used the two-member panel provided under 17.2.3(b)(ii). The Respondent

argued that Captain Githuku sat in the hearing as the Claimant's Controlling Manager and Chief Pilot to issue the Notices to Show Cause under his hand and the same was not enough to prove bias. That the Claimant had not shown what his Controlling Manager had done during the investigations to demonstrate bias. That furthermore, the issue of Captain Githuku being biased was not raised by the Claimant or his Union representatives during the disciplinary hearing and no request was made for Captain Githuku to recuse himself. In submitting that the Claimant was taken through a fair procedure, the Respondent relied on the decision of the Court in *Onunga v Equator Bottlers Ltd (Cause E006 of 2021)* [2022] KEELRC 13400 (KLR) where the Court held that it is not out of the ordinary for an employee's immediate supervisor to participate in disciplinary proceedings and that in the Court's view, persuasive evidence of bias should therefore be placed before the Court. The Respondent also noted that the purpose of a warning letter is to warn an employee that if conduct of a similar manner happens future, more severe measures may be taken against them. That it is thus unreasonable to seek to prevent the Respondent from referring to a warning letter issued to the Claimant in the past.

16. On the issue of the reinstatement offered to the Claimant, the Respondent submitted that considering that the Claimant had not flown since April 2017, it was reasonable for it to confirm he was healthy in August 2017 before it could entrust him with its passengers. That such validation of flying credentials is required by the Civil Aviation (Operation of Aircraft) Regulations, 2013 which provided in regulation 42 as follows:

> An operator shall not assign a pilot-in-command (PIC) or a co-pilot to operate at the flight controls of an aeroplane during takeoff and landing unless that pilot has operated the flight controls for at least three take-offs and landings within the preceding 90 days on the same type of aeroplane or in a synthetic flight trainer approved for that purpose. (Emphasis by the Claimant)

It was the Respondent's submission that the Claimant having exceeded 90 days without flying on the same type of airplane he was to fly, it was a regulatory requirement for him to be tested before he was given an aircraft. That it could thus not be able to accede to the Claimant's demands leading to him rejecting the conditions for reinstatement.

17. The Respondent submitted that if this Court unfortunately finds that some aspect of the termination was unfair, it ought to consider: a) the behaviour of the Claimant in March and April 2017; b) the elaborate disciplinary process the Claimant was taken through; and c) the gratuitous offer of reinstatement which was made to him. It cited section 45(5) of the *Employment Act* which provides that in assessing damages, the Court should inter alia consider the procedure and communication used by the employer, the handling of any appeal, the conduct and capability of the employee and the existence of previous warning letters. The Respondent relied on the case of Vincent Taabuley Oundo v Royal Group Industries (K) Limited [2020] eKLR, wherein the Court referred to the claimant's work indiscipline and previous warnings and awarded damages of one month's salary. It was the Respondent's submission that if the Court finds that the Respondent was at fault, it should similarly award a maximum of one month's salary.

18. The Claimant lost his employment after an allegation that inter alia he had caused the delay or take-off of flight KQ 670 to Kisumu by 34 minutes on 25th March 2017 which put the Respondent's name into disrepute. The Claimant was also accused of not informing the airline of his inability to operate a flight due to illness. After hearing the Claimant and his chosen representatives, the Respondent terminated the Claimant's employment through a letter dated 31st May 2017. However, following his appeal against the dismissal on 5th June 2017, the Claimant was granted conditional reinstatement by a letter dated 2nd August 2017. One of the conditions for his reinstatement were that the period

between 31st May 2017 and the date of his resumption of duty would be treated as leave without pay and that he would be subjected to requisite tests, medical and any other examinations required for validation. The Claimant vide a letter dated 15th September 2017, requested for withdrawal of the terms of the letter reinstating him to his employment. The Respondent declined to issue a reply to the same and in the eyes of the Claimant thus effectively terminated his employment. The Claimant asserted that he refused to sign the letter of reinstatement because the conditions for return to work were discriminatory, tainted with bad faith and tailored to frustrate him and technically make it impossible for him to resume duties. The Claimant asserted that the reasons for his termination and the conditional reinstatement were unfair, unjust, unlawful and further did not comply with the CBA and his contract of employment.

19. The fault discerned by the Court is that the Disciplinary Panel constituted in the case of the Claimant was in breach of clause 17.2.3 of the Respondent's Human Resource Policy Manual. The Claimant's accuser who was his Controlling Manager, Captain Kenneth Githuku had been actively involved in the investigations. He then sat in the disciplinary panel. He was the author of the Show Cause Letters issued to the Claimant. In my view, where an employer has systems such as the ones in place at the Respondent, a different officer could have handled the panel as chair leaving Captain Githuku to be a witness. The error in having the accuser also the investigator and judge was an error the law cannot pardon.

20. The second aspect of this is the cause of the show cause letter. The Claimant had refused to operate an aircraft into Kisumu given his limited appreciation of the features on the runway, the weather in Kisumu and the technical fault which had even been logged in previous flights. In the safe operation of an aircraft, there is deference to the Captain and where the Captain is not confident in the safe operation of the aircraft, he is entitled, as the Claimant did, to decline to operate the aircraft despite the anticipated losses as the life and safety of the passengers and crew is paramount. Had the Captain operated the aircraft and ended up in a situation similar to that of flights that have crashed shortly after take off, while airborne or upon landing, the Captain would have been vilified as being irresponsible. The Claimant unfortunately lost his employ arising from these circumstances thus denying him the joy of service to the Respondent in his sunset days and a retirement with benefits. He had sought reinstatement, and in the alternative, payment for the remainder of his contract which was a total of 5 years 9 months. The Claimant is not entitled to receive salary for 5 years and 9 months when he declined to work for the Respondent upon reinstatement despite the fact the reinstatement was a poisoned chalice. He spurned the reinstatement which in my considered view was the Respondent's rapprochement with the Claimant and which should have led to a round of negotiations on the tenor of the return to work. Had he taken the employ, he would have retired in good books with the Respondent.

21. The Claimant arguably lost all prospects of future employment or had them diminished significantly given his age relative to retirement. The Court has agonised over whether the Claimant would be best recompensed by getting 12 month's salary as compensation or whether he would be best recompensed by way of an order reducing his termination to ordinary termination. The Court having considered the recompense by way of 12 month's salary would be transient since monetary damages are plagued by devaluation and economic vagaries like inflation, a poorly performing economy and the like, the Court holds that the Claimant would be entitled to a normal termination, meaning he retains his benefits. In regard to costs, the Court finds and holds that the Claimant would be entitled to his costs for the suit granted that he was largely successful in his claim.

It is so ordered.

Dated and delivered at Nairobi this 4th day of March 2024

Nzioki wa Makau

JUDGE