Oyuga & 46 others v Kenya Airways Company Limited (Employment and Labour Relations Cause 2390 of 2017) [2023] KEELRC 2913 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2913 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 2390 OF 2017

BOM MANANI, J

NOVEMBER 16, 2023

BETWEEN

JOSEPH OTIENO OYUGA ..... 1ST CLAIMANT

GERRY PHILIP RAJORO ..... 2ND CLAIMANT

DANIEL KIPLANGAT NG'ETICH ..... 3RD CLAIMANT

KEVIN ARIANDA MUJIMBA ..... 4TH CLAIMANT

JOSEPH NJOROGE NDUNG'U ..... 5TH CLAIMANT

ALEX KILONZO MUTHUI ..... 6TH CLAIMANT

PAULINE WAMBUI NJOROGE ..... 7TH CLAIMANT

EUTHYCHUS NJOROGE KOIGI ..... 8TH CLAIMANT

STEVE MUNGATIA ..... 9TH CLAIMANT

CHARLES KIPLANGAT RONO ..... 10TH CLAIMANT

TABITHA WANJA WAMBUGU ..... 11TH CLAIMANT

ANNASTACIA TATU RANDU ..... 12TH CLAIMANT

BERNARD MBIJA OOKO ..... 13TH CLAIMANT

GEORGE MUTUKU KYENGO ..... 14TH CLAIMANT

ERIC HEZRON MAKOKHA ..... 15TH CLAIMANT

CHRISTINE KAVATA KILONZO ..... 16TH CLAIMANT

DAMARIS NDUNGE SILVANA ..... 17TH CLAIMANT

GEOFFRY RONO ..... 18TH CLAIMANT

MATHEW IRUNGU NJOROGE ..... 19TH CLAIMANT

DANIEL MWANGI MURAGE ..... 20TH CLAIMANT

ABNER SAUL MOYWAYWA ..... 21ST CLAIMANT

CHARLES OMBENG OULO ..... 22ND CLAIMANT

CORNELIUSCHERUIYOT KORIR ..... 23RD CLAIMANT

JACOB OGADO ONYANGO ..... 24TH CLAIMANT

MILLICENT AUMA SULWE ..... 25TH CLAIMANT

KURIA JAMES KIHUNGI ..... 26TH CLAIMANT

JOEL SHEM ONYANGO ..... 27TH CLAIMANT

PAUL M MUTHINI WANGA ..... 28TH CLAIMANT

MUCHAI SAMUEL KINOTI ..... 29TH CLAIMANT

JULIUS MULI NGUMBI ..... 30TH CLAIMANT

STEPHEN ONYANGO WERE ..... 31ST CLAIMANT

ELPHAS OJWANG ..... 32ND CLAIMANT

CHARLES AYAGA ..... 33RD CLAIMANT

MOSES HOMBE ..... 34TH CLAIMANT

FAITH GACHERI KAMANDI ..... 35TH CLAIMANT

MARTIN NJAU ..... 36TH CLAIMANT

SAMSON MARAGE ..... 37TH CLAIMANT

LEMMY NJENGA ..... 38TH CLAIMANT

MORRIS MWENDA MURITHI ..... 39TH CLAIMANT

FRANCIS MASIBO WELLE ..... 40TH CLAIMANT

EVANS MIKE MBITHI ..... 41ST CLAIMANT

AUGUSTINE MUSYOKA MWATHANI ..... 42ND CLAIMANT

DANIEL MATHENGE MUTHONDIO ..... 43RD CLAIMANT

PHILIP OUMA ODHIAMBO ..... 44TH CLAIMANT

PAUL THAIRU MUGI ..... 45TH CLAIMANT

TEDDY MUTUKU ..... 46TH CLAIMANT

GEROGE IRUNGU WANGOO ..... 47TH CLAIMANT

AND

KENYA AIRWAYS COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. This suit relates to the alleged unfair termination of contracts of employment of the 47 Claimants. The Claimants aver that the Respondent's decision to terminate their aforesaid contracts was without valid reason and in violation of due process. In addition, the Claimants have accused the Respondent of other constitutional and tortious breaches which they contend have infringed on their rights.

2. The Respondent does not admit the claim. It is the Respondent's position that the Claimants were lawfully relieved of their employment after they participated in an unauthorized strike.

Claimants' Case

3. Although the Claimants instituted these proceedings in their names, they executed an instrument dated 4th December 2017 and titled ''Authority to Act, Plead and Testify'' under which they appointed Joseph Otieno Oyuga to prosecute the claim on their behalf. Consequent upon this, the proceedings have been conducted by the said Joseph Otieno Oyuga who is also a Claimant in the action.

4. The Claimants aver that at the material time to this action, they were employees of the Respondent holding positions of either engineers or technicians. They all worked in the Respondent's Technical Department where they were responsible for maintenance and servicing of aircrafts operated by the Respondent.

5. The Claimants contend that their terms and conditions of service were poor and unfavourable in comparison with their compatriots working for other players in the aviation industry. As a result, there was severe attrition of members of staff to join the Respondent's competitors in a bid to secure better terms and conditions of service.

6. The Claimants contend that in a bid to stem this movement and ensure equity of treatment, they commenced negotiations with the Respondent over their terms and conditions of work. It is contended that these negotiations resulted in a tentative agreement under which the Respondent was to effect a staggered upward review of the Claimants' terms and conditions of service starting end of February 2017.

7. The Claimants contend that the Respondent's Board approved the new terms and conditions of engagement and communicated this to members of staff on 24th February 2017. The Claimants contend that despite the Board's approval of the new terms and conditions of service, the Respondent's management reneged on the matter and kept shifting goalposts regarding whether and when the new terms would come into effect.

8. Faced with this uncertainty, the Claimants aver that on 16th November 2017, they constituted a 7 member committee to engage the Respondent directly on the matter instead of working through their Trade Union. To ensure that they were working within the law, the Claimants aver that they withdrew their membership from their Trade Union before they formed the committee to directly engage the Respondent.

9. The Claimants state that they also wrote to the Respondent's management asking the latter to indicate by 17th November 2017 when the two could have a meeting to address the matter. The Claimants contend that the Respondent's management did not respond to the letter of 16th November 2017 until 27th November 2017 when the latter wrote to the Claimants accusing them of scheming to instigate an unlawful industrial action.

10. The Claimants aver that despite serving the Respondent's management with letters of withdrawal of their membership from their Trade Union, the Respondent insisted on only engaging the union over the matters that were under consideration. It is the Claimants' contention that the Respondent's attempt to negotiate with the Trade Union notwithstanding withdrawal of their membership from the union amounted to an attempt to force the Claimants to be members of a particular union in violation of their constitutional rights.

11. The Claimants aver that their representative called one Latiffa Cherono, the acting Head of Human Resources Relations of the Respondent on 27th November 2017 asking for a meeting with the management on 28th November 2017 which had been declared a public holiday in Kenya. The Claimants aver that the said Latiffa confirmed that the Respondent's management were going to be at their workstations on 28th November 2017. It was the Claimants' case that M/s Latiffa undertook to notify the Respondent's management of the proposed meeting.

12. It is the Claimants' case that on 28th November 2017, they congregated at one of the Respondent's hangars as they awaited the Respondent's management to join them for the meeting. They contend that they tasked a few of their representatives to call in the Respondent's management.

13. The Claimants contend that when their representatives attempted to exit the hangar around 8.30 am to fetch the Respondent's management, they realized that their movement passes within the airport had been deactivated effectively stalling their ability to access any section of the airport other than the hangar where they had congregated. The Claimants contend that efforts to access the Respondent's management through the security guards at the airport failed.

14. The Claimants aver that the Respondent called in the police on the morning of 28th November 2017 to forcibly remove them from its premises allegedly on grounds that they were involved in an illegal strike. However, the police allegedly declined to execute the instructions when they visited the premises and noted that there was no strike as alleged and that the workers were peaceful.

15. The Claimants aver that the Respondent's management refused to hold the proposed meeting with them and at the same time declined to activate their access passes in order to allow them exit the premises thus falsely imprisoning them at the premises. The Claimants aver that for the duration that they were unlawfully held at the hangar, the Respondent subjected them to inhumane and degrading treatment. It is their case that they were forced to spend the night at the hangar without water, food, beddings, toiletries, bath and change of clothes.

16. It is the Claimants' case that it took the intervention of their advocates to secure their freedom. They contend that the Respondent only released them after it received their lawyers email on the evening of 29th November 2017 demanding to know why they had been detained.

17. After their release, the Claimants state that they were issued with letters dated 29th November 2017 through which their contracts of service were summarily terminated. It is the Claimants' case that the decision to terminate their contracts of service was without valid reason. The Claimants contend that the assertion in the letters of termination that they had participated in an unlawful strike was without basis since there had not been a strike at the workplace.

18. The Claimants argue that since 28th November 2017 was a public holiday, they were not expected to be at work. They contend that they only went to the workplace for the scheduled meeting and not for purposes of working. As such, it does not make sense for the Respondent to accuse them of participating in an unlawful strike.

19. The Claimants also assert that before they were issued with the letters terminating their contracts of service, they were not subjected to a disciplinary hearing. They contend that the failure to subject them to a disciplinary hearing violated section 41 of the *Employment Act* and the Respondent's Human Resource Policy.

20. The Claimants also contend that after their contracts were terminated, the Respondent wrote to Kenya Airports Authority (KAA) asking the latter to deactivate their airside access passes and to blacklist them from accessing airport facilities across the country. According to the Claimants, the information that the Respondent relayed to KAA to enable their blacklisting was false. They contend that the Respondent described them as persons who had been involved in pilferage of the Respondent's assets and deserters. It is the Claimants' case that this false information irreversibly damaged their images thereby destroying their chances of securing alternative employment.

Respondent's Case

21. On its part, the Respondent avers that from 2013, it began experiencing operational challenges. According to the Respondent, these challenges have persisted to date.

22. The Respondent contends that due to the aforesaid challenges, it has not been able to review terms and conditions of service for its members of staff to match those that are offered by its competitors. However, it has endeavored to revise the aforesaid terms and conditions within realistic limits.

23. The Respondent avers that the Claimants and other members of staff totaling approximately 156 individuals began agitating for terms and conditions of service that are equivalent to their compatriots working for airlines in the Middle East. Despite the challenges it was experiencing, the Respondent asserts that it tried to improve the Claimants' terms of service.

24. The Respondent asserts that on 28th November 2017, the Claimants together with their compatriots engaged in an unauthorized industrial action in a bid to push the Respondent to revise their terms so as to match those of their counterparts in the Middle East. It is the Respondent's case that despite discouraging the Claimants from engaging in the action, they pushed ahead with it.

25. The Respondent avers that the Claimants moved to hangar one (1) where they staged a sit in demanding to be addressed by the Respondent's management. The Respondent avers that the Claimants vowed to stay at the hangar until they were addressed by the management.

26. The Respondent contends that it immediately wrote notices to the Claimants asking them to call off the unprotected industrial action and resume duty. However, the Claimants allegedly declined to heed the Respondent's call in this respect.

27. The Respondent avers that after it made three attempts to have the Claimants call off the strike without success, it made the decision to deactivate their access passes after 1.00 am on 29th November 2017. The Respondent contends that it took this step purely for security reasons.

28. The Respondent contends that the airport is a high security area and the Claimants' conduct exposed the facility to risk. To mitigate this risk, a decision had to be taken to block the Claimants from accessing vital installations within the airport. At the time, this could only have been done through deactivating their access passes.

29. The Respondent denies unlawfully holding the Claimants within its premises. The Respondent contends that despite deactivating their access passes, the Claimants were free to exit the airport through the gates manned by the Respondent's security. Further, the Claimants were at liberty to exit

the facility through the airside using their KAA passes. It is the Respondent's case that indeed a few of the employees who wished to leave the premises were allowed to exit.

30. The Respondent avers that the Claimants remained at the airport hangar out of their own volition. Therefore, it is not true that they were detained there.

31. The Respondent also contends that whilst at the hangar, the Claimants had access to a kitchen, desktop computers, toilets and water. The Respondent therefore denies that the Claimants were denied water, food and toilet facilities. The Respondent contends that the Claimants were able to access its notices calling on them to resume duty through the desktop computers that were available at the hangar.

32. The Respondent contends that being an essential service provider, its employees work throughout including on public holidays. Therefore and contrary to their assertions, the Claimants were required to be on duty on 28th November 2017. Instead, they left their workstations and went to congregate at hangar one (1) thereby severely disrupting services at the airport.

33. The Respondent contends that this behavior amounted to participating in unauthorized industrial action. According to the Respondent, this action constituted gross misconduct for which the Claimants' contracts of service were terminated summarily.

34. The Respondent further contends that it accorded the Claimants an opportunity to be heard before their respective contracts of service were terminated. According to the Respondent, when the Claimants commenced picketing, they were issued with three calls to resume duty but failed to heed them. The Respondent contends that each of these calls provided the Claimants with the chance to be heard but they declined the opportunity.

Issues for Determination

35. The parties did not prepare a joint list of issues for determination at the pretrial stage. In their submissions, the Respondent's lawyers have framed the following as the issues for determination:-

    a. Whether the Claimants' action qualifies as a representative action.

    b. Whether there were substantial reasons to justify the summary dismissal of the Claimants.

    c. Whether the Claimants were given an opportunity to be heard before their summary dismissal.

    d. Whether the Claimants are entitled to the prayers contained in the Memorandum of Claim and in the closing submissions dated 23rd June 2023.

36. On their part, the Claimants' advocates did not expressly isolate the issues for determination. However, from the pleadings and or evidence and or submissions tendered by or on behalf of their clients, the following appear to be the issues for determination:-

    a. Whether the Claimants' contracts of service were unfairly terminated.

    b. Whether the Claimants were unlawfully detained at the workplace between 28th November 2017 and 29th November 2017 in violation of their constitutional rights.

    c. Whether the Respondent instigated KAA to publish false information on the Claimants thus injuring their reputation and career prospects.

    d. Whether the Claimants are entitled to the various reliefs as set out in their pleadings.

37. Having regard to the foregoing, I consider the following to be the issues for determination:-

a. Whether the Claimants' suit was intended as a representative action.

b. Whether the Respondent's decision to summarily terminate the Claimants' contracts of service was substantively and procedurally fair.

c. Whether the Claimants were unlawfully detained at the workplace between 28th November 2017 and 29th November 2017 in violation of their constitutional rights.

d. Whether the Respondent caused KAA to publish false information on the Claimants thus injuring their reputation and career prospects.

e. Whether the Claimants are entitled to the various reliefs as set out in their pleadings.

Analysis

38. A careful review of the pleadings does not suggest that the Respondent flagged the issue of the competence of the suit as one of the matters for determination. The issue was also not raised during the trial. It appears to have arisen after the close of the case at the stage of submissions by the Respondent and after the Claimants' Advocates had filed their closing submissions.

39. The above scenario cast doubts on whether the Claimants were accorded a fair opportunity to respond to the matters that are raised by the defense in this respect. Indeed, because of the stage at which the matter was raised by the defense, the Claimants' Advocates appear not to have remarked on it.

40. In their submissions, counsel for the Respondent rightly indicate that it is neither their role nor that of the court to scrutinize pleadings filed by the Claimants with a view to assisting them tie up loose ends. However, this cannot be reason to encourage what appears to amount to trial by ambush.

41. It is desirable that issues which a party proposes to frame for determination are flagged early through pleadings in order to give the opponent a fair opportunity to react to them. That said and being a question of law, I will make my brief comments on the matter.

42. The Respondent's Advocates contend that the suit by the Claimants does not meet the legal threshold for a representative suit. It can only qualify as an ordinary action by the 47 Claimants. This is because the names of all the 47 Claimants were included in the heading of the Amended Memorandum of Claim.

43. The Respondent's lawyers submit that rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 contemplates a representative suit to be one which is filed in the names of the individuals who are the actors in the cause on behalf of the intended beneficiaries. They submit that the beneficiaries' names are not supposed to appear in the body of the pleadings.

44. Consequently, the lawyers submit that the Claimants having filed the case in their individual capacities, ought to have appeared individually to prosecute their individual causes. Alternately, if the action was considered as a representative action, the Claimants ought to have supplied the particulars that are specified under rule 9 aforesaid.

45. I have looked at the Further Amended Memorandum of Claim that is dated 31st January 2018. Nothing in the instrument describes the instant suit as a representative action. As a matter of fact, all the Claimants' names appear in the action suggesting that the suit was intended as a joint action as opposed to a representative suit.

46. Owing to the commonality of the circumstances that led to termination of their contracts of service, the Claimants appointed one of them, Joseph Otieno Oyuga, to testify in the cause. They signed and filed a document dated 4th December 2017 which reads as follows:-

''AUTHORITY TO ACT, PLEAD AND TESTIFY

We, the undersigned, do hereby authorize Mr. Joseph Otieno Oyuga to act, plead, testify, swear affidavits and take any other steps necessary for the prosecution of the claim herein on our behalf.''

47. This statement is followed by a list of the several individuals in the action who include the Claimants. Against their names, the individuals affixed their signatures.

48. For all purposes and intents and by this instrument, the 46 Claimants constituted Joseph Otieno Oyuga as their mouthpiece for purposes of swearing affidavits and presenting evidence in the joint cause. Therefore, the said Joseph Otieno Oyuga gave evidence for and on behalf of himself and the 46 other Claimants. Indeed during his evidence in chief, this litigant produced the entire set of documents that relate to him and the other Claimants.

49. Although it is desirable that a litigant should give evidence in support of his case, there is no rule of evidence that bars him from authorizing another person who has personal knowledge of the issues under consideration to tender evidence on his behalf. Such evidence, so long as it is relevant, is sufficient to prove the litigant's claim.

50. Indeed, if it were to be accepted that in order for a case to succeed, the Claimant or Defendant must testify in person, I do not see how corporate persons would ever have their day in court. Such artificial persons always rely on evidence that is tendered on their behalf by individuals other than themselves.

51. It is also not lost to the court that the court's rules permit the determination of a cause based on evidence that is tendered without the physical attendance of the litigants. Under rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the court can determine a dispute before it based on the pleadings and documents that the parties have filed without them appearing to testify orally.

52. The defense has relied on the decision in Jonathan Karanja Thuo & 6 others v Bata Shoe Company Ltd & another [2014] eKLR to submit that this action is a nullity and should be dismissed for want of compliance with the rules that govern representative actions. The decision in the aforesaid case was in reaction to an oral application by counsel for the Claimants seeking to convert the suit into a representative action under rule 9 of the Employment and Labour Relations Court (Procedure) Rules in order for one of the Claimants to testify. In rejecting the application, the court observed that for a suit to be considered as a representative action, the parties must have moved the court in accordance with the aforesaid rule.

53. In the case before me, there is no assertion by the Claimants that their suit is a representative action. And neither have they applied that the case be considered as such. Therefore, the observations in the Jonathan case (supra) do not apply.

54. The defense has also relied on the case of Jared Mangera & 11 others v Professional Clean Care Limited [2018] eKLR, to advance their argument on this point. In this case, one of the Claimants purported to testify on behalf of the other Claimants without the other Claimants having granted him authority to do so. The court observed that no such authority to testify had been produced and neither had it been demonstrated that the suit was filed in compliance with rule 9 of the Employment and Labour Relations Court (Procedure) Rules.

55. In the instant case, all the Claimants have donated authority to Joseph Otieno Oyuga to testify on their behalf in the cause. Therefore, the two cases are distinguishable.

56. The Respondent submits that the authority alluded to does not have a cause number. Therefore, it is impossible to link the document to this cause. In the Respondent's view, it is not possible to reasonably arrive at the conclusion that the authority was intended for use in this action.

57. Notwithstanding that the instrument does not have the cause number, I note that it was filed in this cause. Further, the instrument contains the names of the 47 Claimants. In a subsequent consent that was executed between the Advocates for the parties on 21st March 2023 and placed on the court file, they confirm that the 47 are the Claimants in the action. Therefore, the authority can only have been intended for prosecuting the claim by the 47 individuals in this action.

58. In the premises, I reach the conclusion that the decision by the Claimants to have Joseph Otieno Oyuga testify on their behalf does not compromise the validity of their claims. This is because Mr. Joseph Otieno Oyuga has personal knowledge of the circumstances that resulted in the Respondent's decision to terminate the contracts of service for the 47 Claimants who include him.

59. The next issue for determination is whether the Respondent's decision to summarily terminate the Claimants' contracts of service was substantively and procedurally fair. For the court to be able to uphold the employer's decision to terminate an employee's contract of service, the employer must demonstrate that there was valid reason to support his decision and that the termination was done in accordance with fair procedure.

60. Section 41 of the *Employment Act* sets out some of the substantive grounds upon which the employer may terminate a contract of service. These include: misconduct, poor performance; and physical incapacity of the employee. Misconduct under section 41 aforesaid includes gross misconduct as defined under section 44 of the Act.

61. Section 41 of the Act also addresses the procedural requirements that should guide the employer when making the decision to terminate a contract of service. The employer is required to: notify the employee of the infraction that is complained of in the presence of a co-employee or trade union representative of the employee's choice; permit the employee the opportunity to respond to the accusation; and hear the employee's witnesses on the matter if any.

62. Section 47 of the Act obligates the employee to prove the unlawfulness of the decision to terminate his contract of service. The section also requires the employer to justify the decision to terminate the contract.

63. In the instant case, the Claimants, through Joseph Oyuga, stated that their contracts of service were terminated without justification and in violation of due process. It was their case that on 28th November 2017, they were at the Respondent's premises for purposes of having a meeting with the Respondent's management but not for work. In their evidence before the court, the Claimants contend that they were not expected to work on this day since it was a public holiday.

64. The Claimants contend that the Respondent could not have validly accused them of participating in an unlawful strike on a day that they were lawfully off duty. In the premises they contend that the Respondent's decision to terminate their contracts of service on grounds of participating in an unlawful strike was baseless and thus unfair.

65. The Claimants further contend that on 29th November 2017, the Respondent issued them with letters of summary termination of their contracts without the benefit of a hearing. In their view, this

action by the Respondent contravened the requirements of section 41 of the *Employment Act* and the Respondent's Human Resource Policy on the procedure to be adopted in terminating a contract of service.

66. In their submissions, the Respondent's lawyers argue that the Claimants have not tendered evidence to show that their contracts of service were summarily terminated. The basis for this argument is that the 46 Claimants did not attend court to identify the letters through which the Respondent terminated their respective contracts of service. The Respondent contends that the Claimants' witness who is also a Claimant in the action simply produced a bunch of letters of termination without linking them to the individual Claimants.

67. I have looked at the record. The letters of summary termination of the Claimants' contracts are contained in the Claimants' bundles of documents dated 4th December 2017 and 17th November 2022. Both of these bundles were produced in evidence by the Claimants' witness.

68. Importantly, the witness statement by the Respondent's witness which was adopted by the witness as his evidence in chief acknowledges that the 47 Claimants are part of the approximately 156 employees whose contracts of service were summarily terminated on 29th November 2017. This is evident at paragraph 19 of the said statement. In addition, during his oral testimony, the Respondent's witness confirmed that the 47 Claimants are among the several employees that the Respondent dismissed from employment on 29th November 2017.

69. In any event, the Employment and Labour Relations Court (Procedure) Rules, 2016 contemplate the possibility of a suit proceeding without the oral testimony of the litigants. Rule 21 provides that ''the Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.'' In view of the foregoing, the submission by counsel for the Respondent that evidence of termination of the Claimants' contracts was not tendered is unmerited.

70. The requirement under section 47 of the *Employment Act* that an employee establishes that his contract of service has been unfairly terminated is sufficiently met once the employee tenders prima facie evidence that suggests that the decision to terminate the contract by the employer was unfair (Muthaiga Country Club v Kudheiha Workers [2017] eKLR). In the instant case, the evidence by the Claimants meets this threshold.

71. Once the employee discharges the burden under section 47 of the *Employment Act*, the burden shifts onto the employer to justify the decision to terminate the contract in terms of sections 43, 45 and 47 of the Act. Alluding to this fact, the court in Muthaiga Country Club v Kudheiha Workers (supra) observed as follows:-

> ''As noted above, the fact that the grievants' employment was terminated through summary dismissal was not denied. The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment.''

72. For the reasons referred to earlier in this judgment, the Claimants disputed the Respondent's assertion that they participated in an unlawful strike on 28th November 2017. They also contended that they were dismissed without a hearing.

73. Once the Claimants presented this evidence, they discharged the burden of proof under section 47 of the *Employment Act*. The duty shifted onto the Respondent to justify its assertion that the Claimants had engaged in an unlawful industrial action on 28th November 2017. At this point, the Respondent was required to table evidence to demonstrate that the Claimants failed to report to work without lawful cause opting instead to engage in industrial action.

74. The court takes judicial notice of the fact that through gazette notice number 11491, 28th November 2017 was declared a public holiday in Kenya. Indeed, both parties agree that 28th November 2017 had been declared a public holiday in Kenya as the country's President Elect was to be sworn into office.

75. The court's attention has been drawn to clause 8.4 of the Respondent's Human Resource Policy which provides as follows:-

> ''The company shall observe public holidays as stipulated in the laws of the countries of operation. These public holidays shall only be applicable to staff whose base of operation is in the affected countries.
>
> If a holiday occurs during an employee's annual or compassionate leave, then that day will not be counted as part of the said leave.
>
> In the event a shift is scheduled to work/off during a public holiday, then the same will be credited as part of his annual leave.''

76. In their evidence through Joseph Oyuga, the Claimants stated that they were not expected to have been on duty on 28th November 2017 as it (the day) had been declared a public holiday. They relied on the foregoing clause in the Respondent's Human Resource Policy to advance this argument.

77. On the other hand, the Respondent asserted that its business (running passenger and cargo flights) was of a continuous nature. Therefore, maintenance works for aircrafts goes on every day including during public holidays. As a result, employees in its (the Respondent's) technical department are required to work in shifts to enable the department remain functional throughout including during public holidays. The witness gave details of the shift program.

78. The witness further stated that since 28th November 2017 was the day of swearing in of the country's President Elect, several foreign dignitaries were expected to fly into the country to attend the function and fly out shortly thereafter. Consequently, the airport was going to be exceptionally busy on that day. As such, all staff in the technical departments were required to be at work.

79. I have considered the contrasting positions by the parties against the evidence that is on record on the matter. It is clear to my mind that the Respondent's Human Resource Policy recognizes that the Respondent's employees are entitled to be off duty during public holidays. However, the policy provides for the possibility of employees who work in shifts to be at work during public holidays.

80. I have considered the Respondent's three call letters that were issued on 28th November 2017. The letters asked employees in the Respondent's technical department to resume duty at various times in accordance with their shifts on that day. It is clear from the letters that the calls were directed at employees in the Respondent's technical pool. This is because there were those in the pool who were required to be on duty during the afternoon and night shifts.

81. The Respondent's witness stated that not all employees in the technical department were required to be on duty at the same time. However, they were required to work during different shifts in the day.

82. It is difficult to explain why the Respondent's management would issue letters to the 156 employees on 28th November 2017 asking them to resume duty on that day if they were not expected to have been at work then notwithstanding that the day was a public holiday. The only sensible account for this action is that there were employees in that pool who were expected to have been at work on that day but had failed to report.

83. The Claimants do not dispute the authenticity of the call letters. They only contend that the letters were not received by them because they were sent to their email addresses which were allegedly inaccessible at the time because they (the Claimants) had been detained within the hangar without access to computers.

84. In view of the above evidence, I am convinced that the letters asking the 156 employees to resume duty were issued on the 28th November 2017. I am also convinced that the letters required the 156 employees to report back to their workstations on that day in accordance with their shift schedule.

85. I am also convinced that due to the activities that had been planned for 28th November 2017, it is more likely than not that the Claimants, being in the Respondent's maintenance department, were expected to have been on duty that day notwithstanding that it (the day) was a public holiday. Consequently, the court accepts the Respondent's evidence that this date, having been set aside for the swearing in of the country's President Elect, attracted heightened activities at the airport with foreign guests flying in to grace the occasion. As such, employees at the facility and particularly those in critical departments such as aircraft maintenance, were more likely than not expected to have been at their workstations.

86. In his oral evidence in court, Joseph Otieno Oyuga confirmed that all the individuals who assembled at the hangar on 28th November 2017 were directly involved in aircraft maintenance at the Respondent's premises. Having regard to the nature of their work and in view of the foregoing analysis, the court is convinced that these individuals were expected to have been on duty on that day during different shifts.

87. Importantly and contrary to the position that was expressed by the Claimants in their evidence, their Further Amended Memorandum of Claim dated 31st January 2018 confirms that they were indeed at the Respondent's premises on 28th November 2017 pursuant to their call of duty. At paragraph 7 of the Memorandum, the Claimants stated as follows:-

> ''From the same day, 28.11.2017 running until Wednesday 29.11.2017, the Respondent deactivated the passes of the Claimants who were on duty at the hangar as a result locking the Claimants within the hangar thereby leading to unlawful detention of the Claimants for two days without food, water, toilets and clothes to change into and the Claimants aver that the Respondent subjected them to very degrading and inhuman treatment for which they hold the Respondent liable.'' Emphasis added by underlining.

88. Joseph Otieno Oyuga verified the correctness of the contents of the Amended Memorandum of Claim through an affidavit that he swore on 31st January 2018. The above averment by the Claimants confirms that they were on duty at the Respondent's hangar between 28th November 2017 and 29th November 2017 when their access passes were deactivated.

89. The net effect of the above finding is that the 156 employees were on duty on 28th November 2017. They were issued with calls to resume work because they had abandoned their workstations in order to convene at the hangar to be addressed by the Respondent's management. In effect, the Claimants had stopped working in accordance with their shift schedule until they were declared persona non grata at the airport.

90. The Respondent accused the entire lot of 156 employees who had assembled at the hangar of having taken part in an illegal strike. Section 2 of the *Labour Relations Act* defines a strike in the following terms:-

> "Strike" means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employer or an employers' organization of which their employer is a member to accede to any demand in respect of a trade dispute."

91. The 156 employees assembled at the hangar in order to have their grievances addressed. As they awaited to be addressed on this matter, their shift work obligations were affected. And hence the three calls by the Respondent on that day that they resume duty.

92. There is no evidence to demonstrate that the 156 employees who engaged in the aforesaid action had complied with the requirements of section 76 of the *Labour Relations Act* as regards protected industrial action. In the premises and having regard to the evidence on record, I am convinced on a balance of probabilities that the employees' action, innocent as it may have appeared, constituted an unprotected industrial action.

93. The Claimants have raised an interesting argument regarding whether the Respondent was entitled to invoke the provisions of the *Labour Relations Act* to declare their action unlawful. They argue that since they had withdrawn their Trade Union membership at the time that they sought to be addressed by the Respondent's management on 28th November 2017, they were no longer bound by the provisions of the *Labour Relations Act*. As such, the provisions of the Act and in particular section 80 thereof did not apply to them at the time. As a result and in so far as the Respondent invoked this provision to justify its decision to summarily dismiss them from employment, the decision was null and void.

94. The preamble to the Act provides as follows:-

> '' An Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratization of trade unions and employers organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes."

95. The above provision gives the impression that this legislation is exclusively concerned with activities that pertain to Trade Unions and Employers' Associations. However, this supposition may be misleading.

96. In my view, the appropriate way to conceptualize this legislation is by appreciating that it was meant to regulate all forms of collective as opposed to individual labour activities. Collectivism in employment law covers all forms of collective action by or on behalf of actors at the workplace irrespective of whether they are members of a Trade Union or Employers' Association.

97. For withdrawal of labour at the workplace to graduate into a strike, it must involve two or more employees acting with the common intent of pushing the employer to accede to their demand in respect of a trade dispute. Once a group of employees engages in such action, they are deemed to have engaged in a strike irrespective of whether they were, at the time, members of a Trade Union. Thus, their actions constitute collective labour action which falls for regulation under Part X of the *Labour Relations Act*.

98. Indeed, the preamble to the *Labour Relations Act* confirms that the Act is intended to regulate a wider range of matters than trade unionism. Other than trade unionism, the Act also deals with trade disputes generally. This is evident in the following excerpt from the preamble:-

''An Act of Parliament to consolidate the law relating to trade unions and trade disputes....'' Emphasis added by underlining.

99. Under the Act, the term ''trade dispute'' does not connote only those disputes that arise between employers and/or Employers' Association and Trade Union. It also covers disputes that arise directly between employers and employees if the latter are acting collectively irrespective of whether they are members of a Trade Union at the time. The Act defines the term as follows:-

> ''"trade dispute" means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organization and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.'' Emphasis added by underlining.

100. The Claimant's demand that the Respondent reviews their terms and conditions of service constituted a trade dispute. When the Claimants opted to congregate at the hangar in order to be addressed by the Respondent instead of being at their respective workstations, they withdrew their labour in a bid to push the Respondent to accede to their demands in respect of the aforesaid trade dispute. Thus, their action constituted a strike which fell within the purview of Part X of the Labour Rleations Act. Thus, the argument by the Claimants' counsel that the statute did not apply to the Claimants' actions is unmerited.

101. Despite the employer having legitimate grounds to terminate an employee's contract of service, he can only do so in accordance with fair procedure. As indicated earlier in this decision, this requires that the employer accords the employee a fair hearing.

102. The Claimants have stated that the Respondent issued them with letters dated 29th November 2017 summarily terminating their contracts of service without the benefit of a hearing in contravention of section 41 of the *Employment Act*. Indeed, the Respondent does not deny that when the Claimants allegedly failed to exit the hangar, they were issued with letters of summary dismissal which were sent to them through their emails.

103. The Respondent suggests that the three calls to resume duty issued on 28th November 2017 provided the Claimants with the opportunity to be heard. According to the Respondent, when the Claimants failed to heed the calls, it was presumed that they had refused to take advantage of the chance to be heard. Hence, the decision to summarily terminate their employment contracts.

104. The procedure for a disciplinary hearing is provided for under section 41 of the *Employment Act*. The employer is required to notify the employee of the infraction that he is accused of. This ought to be done in the presence of a fellow employee or trade union representative of the employee's choice. The employee and his witnesses ought to be granted a hearing before the decision to terminate the contract is made

105. This procedure is reiterated at chapter 17 of the Respondent's Human Resource Policy. Under chapter 17(2) of the policy, an employee who is accused of gross misconduct is supposed to be subjected to what the Respondent describes as ''formal disciplinary procedure''.

106. This procedure commences with the Respondent investigating the matter and preparing a formal investigation report on the issue. This is then followed with the employee being issued with a notice to show cause letter setting out the infraction that he is accused of. The show cause letter is required to indicate the timeframe within which the employee should offer his response.

107. Where the employee's response to the show cause is considered unconvincing, the Respondent is required to constitute a Disciplinary Panel to hear the case against the employee. The Panel is then to appoint a date for hearing the case against the employee and issue him with notice for the hearing.

108. During the hearing, the employee is entitled to be heard in his defense. After the hearing, the Panel is required to make its recommendations to the Respondent's Group Human Resource Director and Staff Departmental Director who are to render a decision on the matter.

109. There is no evidence to demonstrate that the Respondent followed the above procedure before terminating the Claimants' contracts of service. The call letters that the Respondent relies on to suggest that the Claimants were accorded the chance to be heard were not addressed to individual employees. They were general letters addressed to the general employee population within the Respondent's technical department. In my view, these cannot qualify as letters notifying individual Claimants of the infractions that they were accused of.

110. The calls did not require the Claimants to show cause as required under the Respondent's Human Resource Policy. Neither did they frame a charge against them.

111. Rather, the first two calls required the staff to report to their respective section heads to be allocated duties. The last call indicated that if the members of staff did not report to their section heads as directed, they will be deemed as having absconded from duty and engaged in insubordination. Consequently, they will be summarily dismissed from employment without further recourse.

112. None of the above documents can be considered as notices to show cause. None of them can be considered as charge documents in terms of the Respondent's own Human Resource Policy.

113. The documents did not require any of the Claimants to appear before a Disciplinary Panel for a hearing. Similarly, no investigations were conducted into the Claimants' cases as required by the Respondent's policy.

114. The Respondent's counsel has argued that the Claimants were accorded the chance to be heard but frustrated the exercise. As such, the Respondent cannot be blamed for failure to grant them a hearing.

115. Counsel relies on various decisions to advance the argument that a party who has been offered an opportunity to be heard but failed to take advantage of it cannot turn around thereafter and complain that he was denied the chance to be heard. That may be true. However, the reality in the instant case is that no such chance was granted to the Claimants more so in terms of the Respondent's own Human Resource Policy.

116. In Jackson Butiya Vs Eastern Produce Limited (Industrial Court Cause No 335 of 2011), the court emphasized that in order for it (the court) to find that an employee had forfeited the opportunity to be heard in a disciplinary process, the employer must demonstrate that the employee snubbed the process. The court observed on the matter as follows:-

> " An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal

grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law".

117. In effect, the decision in the case of Jackson Butiya (supra) emphasizes the need to accord an employee the opportunity to be heard in accordance with the employer's internal grievance resolution processes. It is only when the employee declines to submit to this process that he will be considered to have forfeited the opportunity to be heard.

118. In the instant case, the Respondent did not attempt to subject the Claimants to its internal disciplinary process as envisaged in its Human Resource Manual. Therefore, the Jackson Butiya case cannot be relied on to justify its (the Respondent's) flawed disciplinary action against the Claimants.

119. In David Njeka v Lavage Dry Cleaners Limited [2013] eKLR, the employee was accused of stealing a customer's coat. When he was asked to explain what transpired in writing, he declined to do so and left the workplace.

120. Unlike in the above decision, the Claimants in the instant case were not subjected to a disciplinary process. As indicated earlier, the calls to resume work were not notices to show cause why disciplinary action should not be taken against the Claimants. The calls did not require the Claimants to explain their alleged misconduct.

121. In view of the foregoing, it is difficult to reach the conclusion that the Respondent afforded the Claimants a fair hearing as contemplated under the law and its policies. As a result, I reach the conclusion that the procedure that was adopted by the Respondent in terminating the Claimants' contracts of service was flawed.

122. The next issue for consideration is whether the Claimants were unlawfully detained at the workplace between 28th November 2017 and 29th November 2017 in violation of their constitutional rights. There is no dispute that sometime on the 28th November 2017, the Claimants and several other employees totaling about 156 individuals assembled at the Respondent's hangar purportedly for a meeting to address outstanding concerns regarding their terms and conditions of service. There is no dispute that the meeting failed to take place and that a majority if not all of the Claimants spent their night at the hangar. What is in dispute is whether the Claimants spent their 28th November 2017 and 29th November 2017 at the hangar out of choice or because their ability to exit the facility had been restricted by the Respondent.

123. The Claimants' case is that after they congregated at the hangar on the morning of 28th November 2017, they sent a few of them around 8.30 am to fetch the Respondent's management to address them. When the team reached the exit area, it (the team) realized that it could not move beyond it. The team members' access passes had allegedly been deactivated by the Respondent. The Claimants assert that their unlawful detention commenced from this moment until after 4.00 pm the following day when they were released following intervention by their lawyers.

124. It is the Claimants' case that when they realized that they could not exit the hangar area, they sent a security guard who was stationed at the exit to call the management to come and address them. However, the management did not react to this call. As a result, the Claimants were allegedly forced to spend the entire of 28th November 2017 and 29th November 2017 at the hangar.

125. The Claimants assert that due to deactivation of their passes, they were unable to access facilities such as toilets and change of clothes. They contend that they were forced to spend their night in the cold without food and water.

126. The Claimants aver that the treatment that the Respondent subjected them to was dehumanizing. They contend that the treatment went against their constitutionally protected rights.

127. On its part, the Respondent has denied detaining the Claimants at the hangar. The Respondent contends that the Claimants insisted on remaining at the hangar in order to be addressed by its management.

128. It is the Respondent's case that it only deactivated the Claimants' access passes on 29th November 2017 at 1.29 am after it became apparent that they were unwilling to exit the premises. The Respondent contends that the decision to deactivate the Claimants' access passes was in order to secure the airport since the Claimants' continued presence at the facility had become a security risk.

129. The Respondent contends that despite deactivating the Claimants' passes, they were still free to exit the premises through manned security gates. In addition, the Respondent contends that the Claimants were free to exit the airport through the airside using their KAA passes. The Respondent asserts that indeed some of the Claimants left the premises that night through the available gates.

130. I have analyzed the contrasting positions by the parties on this aspect of the case. The Respondent was in control of the facilities for activating and deactivating security passes for its employees at the airport. Therefore, only the Respondent was in possession of the data that could show when the Claimants' passes were deactivated.

131. In terms of section 112 of the *Evidence Act*, the burden of proof of a fact that is within the special knowledge of a particular individual lies with such individual. Thus, in the instant case, the Respondent bore the burden of demonstrating when the security passes for the Claimants were deactivated as it (the Respondent) had exclusive control of the data on this fact. From the evidence record, it (the Respondent) did not discharge this burden.

132. That said, there is evidence on record that the Respondent wrote to the 156 employees three times on 28th November 2017 asking them to disperse and report to their respective work stations. In the last of the three correspondence, the Respondent asked those employees who were required to have been on duty during the day to report to their respective section heads by 1.30 pm that day. It is implausible that the Respondent would require some of the 156 employees who were at the hangar to report to their workstations by 1.30 pm if it (the Respondent) had already deactivated their passes thus restricting their free movement.

133. In effect, the fact that the Respondent was still asking some of the 156 employees to report to their respective section heads by 1.30 pm on 28th November 2017 suggests that their passes were still active at least until 1.30 pm that day. It would otherwise have been ridiculous for the Respondent to have issued the employees with such a call whilst knowing that it had already restricted their free movement from the hangar. Having regard to the foregoing, I arrive at the conclusion that the Claimants' passes were not deactivated at least until after 1.30 pm on 28th November 2017.

134. According to the last call that was issued to the employees, they were warned that if they did not resume duty by 1.30 pm or implement the other instructions in the call by 2.30 pm, they would be deemed to have absconded from duty and engaged in acts of insubordination. Hence, they were to be considered as having committed acts of gross misconduct for which they were to be liable for summary dismissal. There is no evidence that the Respondent engaged the 156 employees after 1.30 pm that day.

135. The Respondent asserts that despite having been declared persona non grata after 1.30 pm, the 156 employees including the Claimants defiantly remained on its premises with their movement passes still

active until 1.29 am on 29th November 2017. At this time, the Respondent contends that it deactivated the passes in order to secure the facility.

136. The Respondent only made a bare assertion that the Claimants' access passes were deactivated at 1.29 am on 29th November 2017 and not earlier as asserted by the Claimants. Having regard to the Respondent's failure to provide data to demonstrate the exact time it deactivated the Claimants' access passes and in view of the provisions of section 112 of the *Evidence Act*, I reach the conclusion that the Claimants' passes were deactivated any time after 1.30 pm on 28th November 2017 after they failed to heed the Respondent's last call to resume duty.

137. The Claimants have asserted that due to the deactivation of their passes, they could not move out of the airport. On the other hand, the Respondent contends that the Claimants were still able to exit the facility through the security gates or the airside. As a matter of fact, it is the Respondent's case that some of the Claimants left the premises that night.

138. Despite this contention, the Respondent did not call any of its security officers or an official of KAA to confirm that indeed the Claimants' egress from the hangar was unhindered. At the same time, the names of the employees who allegedly exited the airport after their passes had been deactivated were not presented in evidence.

139. In the absence of this evidence, it is difficult to come to the conclusion that the Claimants' egress from the hangar was unhindered after 1.30 pm on 28th November 2017. This is particularly so after the Respondent confirmed that it indeed deactivated the Claimants' access passes on the night of 28th/29th November 2017.

140. On the evening of 29th November 2017, a lawyer representing the affected employees wrote an email to the Respondent's management demanding their release from their unlawful detention. The email was produced in evidence. The evidence on record shows that the Claimants exited the Respondent's premises around the same time that their lawyer sent the email to the Respondent.

141. It is curious that despite the serious accusations that the employees' Advocates leveled against the Respondent in the said email, it (the Respondent) did not respond to it. Yet, it (the Respondent) does not deny receipt of the email.

142. It is also curious that the Claimants' exit from the airport happened almost contemporaneously with the dispatch of their lawyer's email to the Respondent. This tends to suggest on a balance of probabilities that the Respondent only lifted the restriction on the Claimant's freedom of movement after it became apparent that the incident had attracted external attention.

143. The Claimants assert that they were allowed to exit the Respondent's premises after 4.00 pm on 29th November 2017 after their lawyer wrote to the Respondent demanding an explanation for their illegal detention. On the other hand, the Respondent's case is that the Claimants exited the hangar around 4.00 pm on 29th November 2017 after security personnel from the KAA asked them to leave. There is therefore concurrence that the Claimants eventually exited the Respondent's premises after 4.00 pm on 29th November 2017.

144. It is not in dispute that the Claimants' passes were deactivated by the Respondent. The Respondent concedes that it deactivated the said passes effective 1.29 am on 29th November 2017.

145. There is also no dispute that the Claimants (or a majority of them as purported by the Respondent) exited the hangar on 29th November 2017 after 4.00 pm several hours after their access passes had been deactivated. Although the Respondent has contended that the Claimants were still able to exit

the hangar after their cards were deactivated at 1.29 am on 29th November 2017, it has not presented persuasive evidence to demonstrate that the Claimants still enjoyed freedom of movement once their access passes were deactivated.

146. In the absence of this evidence, it is difficult to reach the conclusion that the Claimants' exit from the airport at least between 1.29 am on 29th November 2017 and about 4.00 pm on the same day was unhindered. In the premises, I arrive at the conclusion and do hereby declare that the Respondent unlawfully restrained the Claimants' freedom of movement between the aforesaid hours.

147. The Respondent has asserted that the reason for deactivating the Claimants' access passes was to disable their free movement within the airport facility for security reasons. That could as well have been true. However, the Respondent ought to have considered less restrictive ways of addressing the matter instead of detaining the Claimants at the hangar. For instance, it (the Respondent) could still have considered calling in the police once again to remove the Claimants after they had been declared persona non grata after the final call at 1.30 pm on 28th November 2017.

148. The Claimants have stated that when their freedom was curtained following deactivation of their passes, they could not access food, water and other facilities for the duration that they remained at the hangar. On the other hand, the Respondent contends that there were water points, lavatories and a kitchen that were accessible by the Claimants from the hangar.

149. Although the Respondent contends that there was a kitchen within the hangar, it (the Respondent) does not indicate whether the facility had food to be cooked by the employees whose movement had been restricted. The evidence that was tendered suggested that the facility had a microwave for warming food for members of staff who work in the department. However, it was unclear whether the 156 employees could access food for cooking at the facility.

150. It is also apparent that in the face of their restricted movement, the Claimants could not get change of clothes and access shower facilities. This subjected them to degrading treatment.

151. In the premises, I arrive at the conclusion and do hereby declare that the Claimants' freedom of movement and right not to be subjected to inhumane treatment were violated. It is declared that the Respondent, through this conduct, violated the Claimants' right to human dignity.

152. The next question for consideration is whether the Respondent caused KAA to publish false information on the Claimants thus injuring their reputation and career prospects. The Claimants have accused the Respondent of prompting KAA to publish a circular dated 30th November 2017 through which they were blacklisted from accessing security sensitive areas in airports around the country. It is the Claimants' case that the notice that was published at the Respondent's instance described them as persons who had engaged in pilferage and theft and who deserted duty.

153. The Claimants contend that the Respondent is aware that the reason why their contracts of service were terminated was their alleged participation in an unprotected strike. Yet, it (the Respondent) allegedly asked KAA to publish that they had deserted duty and had been involved in theft and pilferage.

154. The Claimants state that this publication ruined their career prospects. They argue that all prospective employers have declined to engage them because of the misleading information about them.

155. A scrutiny of the Claimants' Further Amended Memorandum of Claim discloses that this claim was not specifically pleaded. Indeed, this concern has been raised by the Respondent's counsel in their closing submissions.

156. The only time that the Claimants referred to their blacklisting by KAA is when their witness contended at paragraphs 6, 7 and 8 of his amended Witness Statement that whilst more than 150 employees participated in the events of 28th November 2017, the Respondent asked KAA to blacklist only 150 of them. The witness's contention in the said statement was that the Respondent's action in this respect was discriminatory. There was no mention of the decision having impacted negatively on the Claimants' reputations and career prospects.

157. This development brings to the fore the perennial question whether it is appropriate for parties to frame their case outside the pleadings that they have filed. The general position in law is that parties must only litigate in respect of that which they have pleaded. They should neither seek to prove what has not been pleaded nor re-characterize their claim at the stage of trial.

158. The above position was articulated in the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR which was referred to by the defense. In the case, the court observed on the subject as follows:-

> ''It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.''

159. Given that the Claimants did not plead this particular claim and in view of the position that is expressed above, it is impermissible for the court to adjudicate on it. Consequently, I decline to pronounce myself on this limb of the claim.

160. The final issue for determination is whether the parties are entitled to the various reliefs that they seek through their respective pleadings. I will begin to consider this matter by first addressing an issue which the Respondent has raised in its final submissions regarding whether this court can grant constitutional reliefs in an ordinary claim.

161. The Respondent appears to express the view that because the Claimants filed this action as an ordinary claim and not a constitutional petition, they cannot ask the court to grant them remedies under articles 22 and 23 of *the Constitution* of Kenya 2010 (*the Constitution*). That such remedies can only issue in proceedings commenced through a constitutional petition. I disagree.

162. Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides in part as follows:-

> ''A party who wishes to institute a petition shall do so in accordance with *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules, 2012.''
>
> ''Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.'' Emphasis added by underlining.

163. Clearly, the above rules contemplate litigants approaching the court for constitutional reliefs through ordinary statements of claim. Therefore, the contention by counsel in this respect is unmerited.

164. In the earlier parts of this decision, the court observed that the Respondent's decision to terminate the Claimants' employment was procedurally flawed. As a result, I arrive at the conclusion that the Claimants are entitled to compensation for unfair termination of the respective contracts of service.

165. Under section 49 of the *Employment Act*, the court is required to take into account various elements whilst determining the quantum of damages to grant an employee whose contract of service has been unfairly terminated. In the instant case, I note that the Claimants' decision to assemble at the hangar when they were expected to be on duty contributed to the employer's decision to terminate their contracts of service. Taking this factor into consideration, I award every of the 47 Claimants compensation that is equivalent to their gross salary for four months. Where practicable, the particulars of the quantum of compensation under this head shall appear in the table that will be affixed at the tail end of the decision.

166. The court also found that the Respondent illegally detained the Claimants at the hangar when it deactivated their access passes without letting them out. The court found that the Claimants were denied access to amenities such as food, bath and change of clothes. In the court's view, the Respondent's action exposed the Claimants to degrading treatment thereby violating their rights to human dignity and freedom of movement.

167. In the premises, the Claimants are entitled to general damages for violation of the aforesaid rights and for their false imprisonment. The case of Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR confirms that in addition to the remedies provided under section 49 of the *Employment Act*, this court can award a litigant a separate relief of general damages for violation of constitutional rights.

168. After evaluating a series of decisions which considered the various principles that undergird assessment of damages to redress violations of constitutional rights, the High Court in Akusala A. Borniface v OCS Langata Police Station & 4 others [2018] eKLR expressed itself on the matter as follows:-

> ''Having regard to the above judicial experience and philosophy, it is clear that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court but that such discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case in view of the fact that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements.''

169. In the above case, the Petitioner had been wrongfully confined in a police cell for approximately 24 hours before he was released without charges. The circumstances under which the Petitioner was held were found to have been dehumanizing. The court awarded him general damages of Ksh. 2,000,000.00 as compensation for violation of his constitutional rights under articles 28, 29, 32, 33, 35, 47 and 49 of *the Constitution*.

170. In Emmah Muthoni Njeri v Nairobi Women's Hospital [2021] eKLR, the learned Judge expressed himself as follows on the question of monetary compensation for infringement of one's constitutional rights:-

> ''From the cited decisions, it is my conclusion that monetary compensation may be awarded where a petitioner's rights have been violated in order to vindicate the infringed constitutional right. Moreover, an additional award may be made which will serve to vindicate the public and act as a deterrence to a respondent from carrying out other breaches.''

171. In the above case, the Respondent unlawfully detained the Petitioner due to an outstanding medical bill. Although the Petitioner was discharged from hospital on 14th May 2018, she was not allowed to leave until 19th October 2018 after she had executed a commitment to settle the outstanding amount in instalments. The court awarded the Petitioner general damages of Ksh. 3,000,000.00 for violation of her constitutional rights under articles 28, 29 and 39 of *the Constitution*.

172. In the case, the Petitioner was detained for about five months. However, the court observed that the conditions under which she was held were not inhumane. In making the award, the court considered the long period that the Petitioner had been held unlawfully.

173. I have considered the case before me in the context of the aforesaid decisions. The Claimants in this case were unlawfully confined for not less than 15 hours in conditions that deprived them of basic necessities such as food, bath and change of clothes. Having regard to the foregoing and in order to vindicate their rights to freedom of movement and human dignity, I award every of the Claimants Ksh. 2,700,000.00 as compensation for violation of their aforesaid rights.

174. In making this award, I have also considered that the decisions referred to above were rendered much earlier in time. In assessing general damages, the court is required to take into account inflationary trends occasioned by passage of time.

175. In their closing submissions, the Claimants have prayed for an order for re-engagement. I note from their pleadings that this was an alternative prayer to the one for compensation for unfair termination. Since I have granted the alternative relief, the relief for re-engagement is not available. However, it is necessary to indicate the reasons why I opted for the alternative relief.

176. First, the law leans against an order for specific performance of contracts of a personal nature. Although an order for re-engagement is, strictly speaking, not one for specific performance, it is nevertheless closely related to it. Such order forces parties who have gone separate ways to go back together. The reality that having the relationship work flawlessly thereafter may pose a challenge dictates against issuing orders for reinstatement or re-engagement.

177. Second, both parties alluded to the fact that the Claimants' positions were advertised shortly after their contracts were terminated. This means that the positions are no longer available. Although re-engagement does not lead to the Claimants going back to their previous positions, the reality of the matter is that once an employee's position is taken up by another employee, there is no guarantee that the employer will have an alternate position that is equivalent to the lost position for the employee. There was no evidence placed before me to suggest that the Respondent has positions that are equivalent to those that were previously held by the Claimants where they can be accommodated should an order of re-engagement issue.

178. Finally, the record shows that the Respondent's decision to sever the employment relation with the Claimants has been faulted because of procedural flaws. This means that had the Respondent upheld due process, the impugned decision would most likely have been sustained.

179. I award the Claimants interest on the sums awarded herein at court rates from the date of this decision.

180. The award shall be subject to the applicable statutory deductions under section 49 of the *Employment Act*.

181. I award the Claimants costs of the suit.

Summary Of The Award

a. The court finds that the suit was properly filed as a joint and not representative action. Similarly, the court finds that the 46 Claimants validly appointed Joseph Otieno Oyuga to testify on their behalf. Having had personal knowledge of the circumstances that informed the Respondent's decision to summarily dismiss the Claimants from employment, Joseph Otieno Oyuga was in a position to testify as the common witness for all the Claimants.

b. The court declares the Respondent's decision to terminate the contracts of service for the 47 Claimants as procedurally unfair. The Respondent failed to adhere to the procedure for terminating an employee's contract of service as prescribed under section 41 of the *Employment Act* as read with chapter 17 of the Respondent's Human Resource Manual.

c. Consequently, the court finds that the Claimants are entitled to compensation for unfair termination of their respective contracts of service in the sum that is equivalent to every of the 47 Claimants' four months' gross salary as more particularly set out in the table below.

No.	Name	Compensation For Unfair Termination	General Damages For Infringment Of Constitutional Rights
1	Joseph Otieno Oyuga	Ksh. 403,790.27 X 4 = Ksh. 1,615,161.08	Ksh. 2,700,000
2	Gerry Philip Rajoro	Ksh. 2,700,000	
3	Daniel Kiplangat Ng'etich	Ksh. 346,977.38 X 4 = Ksh. 1,387,909.52	Ksh. 2,700,000
4	Kevin Arianda Mujimba	Ksh. 393,500.00 X 4 = Ksh. 1,574,000.00	Ksh. 2,700,000
5	Joseph Njoroge Ndung'u	Ksh. 188,150 X 4 = Ksh. 752,600.00	Ksh. 2,700,000
6	Alex Kilonzo Muthui	Ksh. 382,626.50 X 4 = Ksh. 1,530,506.00	Ksh. 2,700,000
7	Pauline Wambui Njoroge	Ksh. 256,621.61 X 4 = Ksh. 1,026,486.44	Ksh. 2,700,000
8	Euthychus Njoroge Koigi	Ksh. 124,757 X 4 = Ksh. 499,028.00	Ksh. 2,700,000
9	Steve Mungatia	Ksh. 131,219 X 4 = Ksh. 524,876.00	Ksh. 2,700,000
10	Charles Kiplangat Rono	Ksh. 128,119 X 4 = Ksh. 512,476.00	Ksh. 2,700,000
11	Tabitha Wanja Wambugu	Ksh. 117,148 X 4 = Ksh. 468,592.00	Ksh. 2,700,000
12	Annastacia Tatu Randu	Ksh. 122,048.00 X 4 = Ksh. 488,192.00	Ksh. 2,700,000
13	Bernard Mbija Ooko	Ksh. 249,912.72 X 4 = Ksh. 999,648.00	Ksh. 2,700,000
14	George Mutuku Kyengo	Ksh. 439,165.97 X 4 = Ksh. 1,756,663.88	Ksh. 2,700,000
15	Eric Hezron Makokha	Ksh. 135,807 X 4 = Ksh. 543,228.00	Ksh. 2,700,000

16	Christine Kavata Kilonzo	Ksh. 195,526 X 4 = Ksh. 782,104.00	Ksh. 2,700,000
17	Damaris Ndunge Silvana	Ksh. 199,199.75 X 4 = Ksh. 796,799.00	Ksh. 2,700,000
18	Geoffry Rono	Ksh. 157,975.75 X 4 = Ksh. 631,903.00	Ksh. 2,700,000
19	Mathew Irungu Njoroge	Ksh. 125,191.32 x 4 = Ksh. 500,765.28	Ksh. 2,700,000
20	Daniel Mwangi Murage	Ksh. 131,219 X 4 = Ksh. 524,876.00	Ksh. 2,700,000
21	Abner Saul Moywaywa	Ksh. 2,700,000	
22	Charles Ombeng Oulo	Ksh. 323,224.25 X 4 = Ksh. 1,292,897.00	Ksh. 2,700,000
23	Cornelius Cheruiyot Korir	Ksh. 164,425 X 4 = Ksh. 657,700.00	Ksh. 2,700,000
24	Jacob Ogado Onyango	Ksh. 194,685 X 4 = Ksh. 778,740.00	Ksh. 2,700,000
25	Millicent Auma Sulwe	Ksh. 2,700,000	
26	Kuria James Kihungi	Ksh. 137,183.31 X 4 = Ksh. 548,733.24	Ksh. 2,700,000
27	Joel Shem Onyango	Ksh. 404,268 X 4 = Ksh. 1,617,072.00	Ksh. 2,700,000
28	Paul M Muthini Wanga	Ksh. 167,576 X 4 = Ksh. 670,304.00	Ksh. 2,700,000
29	Muchai Samuel Kinoti	Ksh. 119,948 X 4 = Ksh. 479,792.00	Ksh. 2,700,000
30	Julius Muli Ngumbi	Ksh. 181,548.82 X 4 = Ksh. 726,195.28	Ksh. 2,700,000
31	Stephen Onyango WerE	Ksh. 197,417 X 4 = Ksh. 789,668.00	Ksh. 2,700,000

32	Elphas Ojwang	Ksh. 185,714.69 X 4 = Ksh. 742,858.76	Ksh. 2,700,000
33	Charles Ayaga	Ksh. 100,368 X 4 = Ksh. 401,472.00	Ksh. 2,700,000
34	Moses Hombe	Ksh. 2,700,000	
35	Faith Gacheri Kamandi	Ksh. 237,193.41 X 4 = Ksh. 948,773.64	Ksh. 2,700,000
36	Martin Njau	Ksh. 108,234 X 4 = Ksh. 432,936.00	Ksh. 2,700,000
37	Samson Marage	Ksh. 167,168.80 X 4 = Ksh. 668,675.20	Ksh. 2,700,000
38	Lemmy Njenga	Ksh. 139,943 X 4 = Ksh. 559,772.00	Ksh. 2,700,000
39	Morris Mwenda Murithi	Ksh. 261,518 X 4 = Ksh. 1,046,072.00	Ksh. 2,700,000
40	Francis Masibo Welle	Ksh. 357,036 X 4 = Ksh. 1428,144.00	Ksh. 2,700,000
41	Evans Mike Mbithi	Ksh. 167,242.31 x 4 = Ksh. 668,969.24	Ksh. 2,700,000
42	Augustine Musyoka Mwathani	Ksh. 323,550 X 4 = Ksh. 1,294,200.00	Ksh. 2,700,000
43	Daniel Mathenge Muthondio	Ksh. 152,427.00 X 4 = Ksh. 609,708.00	Ksh. 2,700,000
44	Philip Ouma Odhiambo	Ksh. 320,445.22 X 4 = Ksh. 1,281,780.88	Ksh. 2,700,000
45	Paul Thairu Mugi	Ksh. 345,150 X 4 Ksh. 1,380,600.00	Ksh. 2,700,000
46	Teddy Mutuku	Ksh. 169,645 X 4 = Ksh. 678,580.00	Ksh. 2,700,000
47	Geroge Irungu Wangoo	Ksh. 242,554.40 x 4 = Ksh. 970,217.60	Ksh. 2,700,000

d. Claimants numbers two (2), twenty one (21), twenty five (25) and thirty four (34), that is to say, Gerry Philip Rajoro, Abner Saul Moywaywa Millicent Auma Sulwe and Moses Hombe did

not provide their exit pay slips to enable the court work out the equivalent of their four months' salary that is to cover compensation for their unfair dismissal from employment. However, the Respondent is required to pay them an amount that is equivalent to their gross salary for four months based on the Respondent's payroll records relating to the four at the time of termination of their respective contracts.

e. The court finds that the Respondent unlawfully restrained the Claimants at its hangar after it had deactivated their access passes on 28th November 2017. As a result, the court arrives at the conclusion and hereby declares that the Respondent violated the Claimants' constitutional right to freedom of movement in contravention of articles 29 and 39 of the *Constitution*.

f. The court finds that whilst so restrained, the Claimants were denied access to food, bath and change of clothes. As a result, the court arrives at the conclusion and hereby declares that the Respondent violated the Claimants' constitutional right to human dignity in contravention of article 28 of the *Constitution*.

g. The court awards every of the 47 Claimants the sum of Ksh. 2,700,000.00 (per Claimant) as compensation for violation of their constitutional rights aforesaid as set out in the table above.

h. The court finds that the Claimants' claim that the Respondent caused KAA to publish false information about them thereby injuring their reputations and career prospects was not pleaded in their Further Amended Memorandum of Claim. Consequently, the court finds that this matter does not fall for determination in the cause. As a result, the court declines to pronounce itself on it.

i. The prayer for re-engagement was an alternate relief to that of compensation for unlawful termination. As such, the relief for compensation for unfair termination having issued, it (re-engagement) cannot be granted.

j. The court awards the Claimants interest on the sums awarded herein at court rates from the date of this decision.

k. The award is subject to the applicable statutory deductions under section 49 of the *Employment Act*.

l. The court awards the Claimants costs of the suit.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on 12**th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI