REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 185 OF 2020

KENYA AIRLINE PILOTS ASSOCIATION.....CLAIMANT

VERSUS

KENYA AIRWAYS PLC.....RESPONDENT

JUDGMENT

The claimant is a trade union registered under the Labour Relations Act. The Respondent is a public limited company registered under the provisions of the Companies Act and is the national airline carrier.

The claimant and the Respondent have a valid recognition agreement signed on 5th May 1978 and the two have since then negotiated many collective bargaining agreements, the current one being the one dated 2nd August 2017. The CBA between the parties covers persons employed by the Respondent as pilot, flight engineer and flight navigator as defined under the term *"employee"* in the recognition agreement.

Following the outbreak of the novel COVID 19 the world took drastic

measures to curb the spread of the pandemic which included restrictions on travel both locally and internationally. The Respondent, being a global carrier, was significantly affected by the travel restrictions.

On 12th January, 2020, the first corona virus case was reported in Kenya and mitigation measures such as social distancing was introduced. Other control measures included the imposition of lockdown within certain cities in the country that the Respondent flies to.

On 31st January, 2020, the Respondent suspended its flights to Guangzhou following the coronavirus outbreak in China. The Respondent states that it suffered a loss of $8 million.

On 17th March, 2020, the Chief Executive Officer (CEO) of the respondent issued an internal memo to all the Respondent's employees informing them of 25% and 35% pay cut for the leadership team and for the CEO, respectively.

On 22nd March, 2020, the Government issued a directive that all incoming and outgoing international passenger traffic to and from Kenya would cease from midnight on 25th March, 2020. The Respondent duly complied with the orders.

On 31st March, 2020, the Claimant and the Respondent entered into a Memorandum of Agreement ('MoA') in a bid to mitigate the effects of the virus on its operations and finances. The MoA came into force on 1st April, 2020 and was valid for one (1) month. The MoA was to be reviewed for necessary changes, cancelations, or extensions before 30th April, 2020.

On 28th and 29th April, 2020, the Claimant and the Respondent held consultative meetings to discuss the review of the MoA but did not reach an agreement on the issue of leave. On 2nd May, 2020, the Respondent issued a circular to all employees informing them that due to the pandemic, operations and revenue for April, 2020 had been negatively impacted reducing to approximately 4% of average monthly revenue. It advised that pending conclusion of negotiations with respective unions the following guidelines were to apply to all staff:

> a) All employees would be planned for duty or leave and would be paid their salary at a reduced rate applicable to basic salary, fixed and guaranteed allowances. The rate of reduction for the month of May would be equivalent to what was applied in the April 2020 payroll;

b) Each employee would be owed by the company the difference of the monthly pay that was not paid for the period of salary reduction. The money would be owed whether the employee was on leave or on duty or a mixture of both leave and duty;

c) For pilots, achieved BLH will be paid individually.

d) Employees who are not willing to accept the above proposals were free to apply for 100% unpaid leave and no monies would be owed to them and that their leave days would not be impacted.

On 5th May, 2020, the Respondent sent an email to its employees advising them that the Respondent had reached a decision to allow staff to participate in temporary pay and sought their express consent for the temporary pay reduction for May and June 2020, based on the CEO's email message of 2nd May 2020.

It is the claimant's contention that by sending the emails dated 5th May 2020 to all its members, the Respondent bypassed the Claimant in violation of the Recognition agreement, the CBA and MoA. That in the emails the Respondent threatened to withhold pay if the consent was not given in the following terms; -

"If you have not consented by 7th May 2020, the Company will withhold the payment of your reduced salary until such a time that an agreement is reached with the respective union OR you can opt to apply for 100% unpaid leave, i.e., you will have zero pay for the payment period, and your paid leave days will remain intact. Additionally, if you opt for unpaid leave, no monies will be owed to you by the Company for the said period."

It is this email that offended the claimant, and prompted it to file the instant suit.

In the statement of claim dated and filed on 6th May 2020, the claimant seeks the following orders –

a. A declaration be issued that the Respondent action effecting and/or implementing in any manner whatsoever, any detrimental and unilateral variation of the Claimant's members' terms and conditions of service is unlawful for want of consent and in breach of Article 41 of the Constitution.

b. A declaration be issued that the Respondent's direct engagement of the Claimant's members without the involvement of and bypassing the Claimant is in breach of the provisions of the recognition agreement dated 5th May 1978, the Collective Bargaining Agreement dated 2nd August 2017, and that it goes against the tenets and principles of collective bargaining as recognized by inter alia section 59 of the Labour Relations Act, Article 41 of the Constitution and the provisions of ILO Convention No. 98 on the Right to Organise and Collective Bargaining Convention.

c. A Permanent injunction be issued restraining the Respondent from effecting and/or implementing in any manner whatsoever, any detrimental and unilateral variation of the Claimant's members' terms and conditions of service. In particular, and for greater certainty, the Respondent be permanently restrained from effecting and/or implementing in any manner whatsoever, all proposals contained in its communication dated 5th May 2020 to the Claimant's members on inter alia, reduced salary, annual leave on reduced pay and unpaid leave (and/or any other such detrimental unilateral variations), pending the hearing and determination of this application.

d. A permanent injunction be issued restraining the Respondent from harassing, coercing, intimidating or any other manner directly engaging the Claimant's members regarding salary reduction, unpaid leave, annual leave or any other changes to the members' terms and conditions of service.

e. A permanent injunction be issued restraining the Respondent from breaching the terms of the Collective Bargaining Agreement dated 2nd August 2017 (the CBA) and the Respondent be compelled to strictly adhere to the terms of the CBA. For greater certainty, the Respondent be restrained from issuing duty rosters to the Claimant's members outside the provisions of the CBA or in any other manner breaching the terms of the CBA.

f. The letters sent by email on 5th May 2020 to the Claimant's members on inter alia, reduced salary, annual leave on reduced pay and unpaid leave (and/or any other such detrimental unilateral variations) be declared null and void and be set aside.

g. A declaration be issued that any consent that may have been given individually by the Claimant members pursuant to the emails of 5th May 2020 are null and void.

h. A declaration be issued that the terminal dues payable to the Claimants' members upon termination of employment in any manner whatsoever be based on full pay in accordance with the terms of the Collective Agreement dated 2nd August 2017.

i. The court does grant any other relief that is just and fair in

the circumstances.

j. The costs of the suit be borne by the Respondent.

The claim was filed simultaneously with a notice of motion under certificate of urgency in which the claimant sought the following orders –

1. Spent.

2. In view of the quarantine and containment measures imposed as a result of the COVID-19 pandemic, any order made herein, this application and the substantive pleadings be served upon the Respondent by electronic means to the official email addresses of the Respondent's Group Managing Director/Chief Executive Officer and the Respondent's Chief Human Resource Officer.

3. Pending the inter-partes hearing and determination of this application, an interim injunction be issued restraining the Respondent from effecting and/or implementing in any manner whatsoever, any detrimental and unilateral variation of the Claimant's members' terms and conditions of service. In particular and for greater certainty, the Respondent be restrained from effecting and/or implementing in any manner whatsoever, all proposals contained in its communication dated 5th May 2020 to the Claimant's members on inter alia, reduced salary, annual leave on reduced pay and unpaid leave (and/or any other such detrimental unilateral variations), pending the inter-partes hearing and determination of this application.

4. Pending the inter-partes hearing and determination of this application, an interim injunction be issued restraining the Respondent from harassing, coercing, forcing, intimidating or any other manner whatsoever directly engaging the Claimant's members regarding salary reduction, unpaid leave, annual leave and/or any other changes to the members' terms and conditions of service.

5. Pending the hearing and determination inter-partes hearing and determination of this application, the Respondent be restrained from breaching the terms of the Collective Bargaining Agreement dated 2nd August 2017 (the CBA) and the Respondent be compelled to strictly adhere to the terms of the CBA. For greater certainty, the Respondent be restrained from issuing duty rosters to the Claimant's members outside the provisions of the CBA or any other manner breaching the terms of the CBA.

6. Pending hearing and determination of this suit, an interlocutory injunction be issued restraining the Respondent from effecting and/or implementing in any manner whatsoever, any detrimental and unilateral variation of the Claimant's members' terms and conditions of service. In particular and for greater certainty, the Respondent be restrained from effecting and/or implementing in any manner whatsoever, all proposals contained in its communication dated 5th May 2020 to the Claimant's members on inter alia, reduced salary, annual leave on reduced pay and unpaid leave (and/or any other such detrimental unilateral variations), pending the hearing and determination of this application.

7. Pending the hearing and determination of this suit, an interim injunction be issued restraining the Respondent from harassing, coercing, intimidating or any other manner directly engaging the Claimant's members regarding salary reduction, unpaid leave, annual leave or any other changes to the members' terms and conditions of service.

8. Pending the hearing and determination of this suit, the Respondent be restrained from breaching the terms of the Collective Bargaining Agreement dated 2nd August 2017 (the CBA) and the Respondent be compelled to strictly adhere to the terms of the CBA. For greater certainty, the Respondent be restrained from issuing duty rosters to the Claimant's members outside the provisions of the CBA or any

other manner breaching the terms of the CBA.

9. This court does issue any other order it deems fair and just to issue.

10. The costs for this application be borne by the Respondent.

Upon considering the application, the court granted orders as follows –

1. The application dated 6th May 2020 is certified urgent.

2. The application is fixed for inter partes hearing on 13th May 2020 before the Duty Judge.

3. In the meantime, parties are urged to meet and try to resolve this issue amicably taking into account the present circumstances.

4. Applicant to serve the Respondent in the manner proposed in prayer 2 of the application.

There are also two other pending applications filed by the parties. The first is the Respondent's application dated 11th June 2020 seeking inter alia to set aside the order made on 8th June 2020 through which the court granted interim orders restraining the Respondent from assigning annual leave at reduced pay, and also an order restraining the Respondent from proceeding with the impugned disciplinary action. The application also prays that the court to finds the dispute to be an economic dispute and for the court to direct that the Central Planning and Monitoring Unit do compile a report. The second is the Claimant's application dated 19th June 2020 seeking to cite and punish the Respondent for disobedience of the orders of 8th June 2020.

The parties appeared before the court severally when the court encouraged them to continue with the negotiations that had commenced under a Conciliator in the Ministry of Labour and Social Protection. The Minister set up a Conciliation Committee which submitted its report dated 27th July 2020 to the Court.

After hearing the parties, the Conciliation Committee set out the issues as follows-

ANALYSIS OF THE ISSUES LEADING TO THE DISAGREEMENT

- Whilst KALPA would want the leave taken during Covid-19 pandemic when the airline is operating at its lowest capacity to be treated as Covid leave without affecting accrued leave as long as 65 % deferred salary has not been paid , Kenya Airways PLC contends that there is no Covid leave in Law, Human Resources Policy Manual or Collective Bargaining Agreement and therefore any leave taken by pilots should be treated as normal annual leave to be deducted from their accrued leave which translates to huge liability for the employer.

- Whereas Kenya Airways PLC is deducting every leave taken by pilots from the accrued annual leave, KALPA favours deduction of their members accrued leave to be effected only upon full payment of the deferred portion of their salary by Kenya Airways PLC to the extent that one cannot be deemed to have cleared their leave when payment arising from the leave has not been paid.

The Conciliation Committee made the following findings and recommendations –

FINDINGS

- Parties to this dispute have a valid Recognition Agreement and a Collective Bargaining Agreement (CBA).

- Kenya Airways PLC sent the pilots on Leave at reduced salary of 35% and deferred payment of 65% to a time when they are either back in operations or have received funds from the treasury.

- While Kenya Airways PLC leave liability of Kshs.1,857,355,393.20 which accrued for a period of up to 8 years up to and including April 2020 is attributed to low number of pilots required to handle passenger and cargo flights, KQ management terminated the services of some 22 pilots in May 2020 which will only compound the pilot shortage and leave liability further.

- Both parties signed MOA on 31st of March 2020 which was to cover the Month of April 2020 addressed how leave will be utilized during the month of April 2020.

- Before the current trade dispute, the disputants had entered into an agreement on 15th of March, 2016 before a conciliator from the Ministry of Labour on how to manage accrued Leave after being referred to conciliation by the court (ELRC Cause no. 2133 of 2015).

- KQ suspended all local and international passenger flights in line with government directive to mitigate the spread of COVID-19 pandemic.

- Both parties agreed to periodical meetings to discuss any emerging issues related to COVID-19

- The management varied the pay cut upward from 25% to 35% and informed KALPA accordingly and was included in MOA for May, 2020.

- There is no provision for Covid -19 Leave in parties CBA, Human Resources Policy Manual, or the Law.

RECOMMENDATIONS

Having considered the disputants written and oral submissions during various conciliation meetings in addition to the above findings, we do recommend as here below:

- As Kenya Airways PLC, mitigate the negative effects of Covid-19 on its business by pursuing business survival and saving jobs, the disputants should give consultation a chance to be reduced in a written memorandum of agreement to fix pilots' leave at 35 % salary under the prevailing pandemic period and further provide for deferment of 65% salary with certainty on when and how the deferred salary will be paid.

- In the alternative, the pilots should be sent on unpaid leave in mitigation of negative effect of Covid-19 on KQ business and accrued leave to be utilized when the airline resumes its normal business operations so that any pilot leaving employment shall be paid their accrued leave entitlement plus the deferred 65 % salary in full.

- Considering that the Covid-19 pandemic happened long after Kenya Airways PLC had accumulated leave liability worth Kshs.1.8 billion only attributed to low manning level of pilots, vis a vis work load, the management should employ more pilots, and promptly send pilots with outstanding leave balances on leave to avoid further accumulation of leave days which translates to a huge liability to the company and negatively affects performance of pilots.

- Accrued annual leave should be handled within the provisions of parties CBA, Employment Act, Laws of Kenya and Human Resources Policy Manual without referring to leave taken during the pandemic period as Covid-leave to the extent that it is eventually set off against the pilot's earned leave days. An employee's unequivocal right to accrued leave is better emphasized by Court's main holding in ***ELRC Cause No. 226 of 2011, Jane Nekesa Baraza Vs. Social Service League MP Shah Hospital*** *to the effect that a contract of employment does not take away what the statute has granted.*

In view of the fact that there was no agreement at conciliation level, the court directed that the parties dispose of all pending applications and the claim by way of written submissions.

Submissions by the Claimant

The claimant filed submissions dated 14th September 2020 and supplementary submissions dated 27th October 2020.

The claimant contends that the Respondent has mismanaged annual leave to an extent that many pilots have huge leave balances accrued over the years. It produced a summary of leave outstanding in respect of 443 pilots which reflected that the total leave accrued was in excess of 500,000 leave days.

It is the claimant's contention that the huge leave balances arose because the pilots worked long hours and sacrificed their rest/annual leave. That the pilots were denied leave days in the past when they needed to take them because the Respondent needed them to work due to exigencies of work. These included denial of even essential leave such as paternity leave.

According to the Claimant, the other reason for the high leave balances is the Respondent's failure to employ/engage and train pilots despite the Claimant's calls to ensure that the pilot shortage was addressed. The claimant annexed a sample of letters exchanged between the parties on the issue of staff shortage, staff fatigue and huge leave balances.

It submitted that in the past the Respondent insisted that it would unilaterally issue leave rosters as it deemed fit. That this prompted the Claimant to file **ELRC Cause Number 2133 of 2016 Kenya Airline Pilots Association v Kenya Airways Limited** which was ultimately resolved through conciliation. That one of the key terms of the conciliation agreement was that the Association members were not to be compelled to take annual leave. That in the absence of any agreement on taking annual leave, the Respondent's actions are in breach of this conciliation agreement.

Besides annual leave, the claimant objected to disciplinary action taken by the Respondent against its members. The claimant submitted that Schedule VIII of the CBA is the *"Fleet Agreement"* which provided for flight times, duty periods, rest periods and time off duty. That these timelines were geared to ensure safety in flights and were derived from local and international legislation as well as best practices.

That one of the key provisions of the Fleet Agreement was that the maximum flight duty was to be 12 hours. That the parties have agreed from time to time on extension of the duty time limits in the various MoAs and other agreements in order to allow the Respondent to undertake long cargo flights at a time when passenger flights were banned.

The Claimant submits that there was no such agreement for the period between 1st May 2020 after the expiry of the April MoA, and 8th May 2020 when the May 2021 MoA was signed. It is the claimant's contention that the foregoing effectively meant that the CBA provisions on maximum 12 hours' duty time limits applied during this time when no MoA was in place. That this was captured in the May 2020 MoA at clause 2.4 which states that *"A new roster be published to run from 1st to 31st May 2020 and that roster from 1st to 8th May 2020 be done as per the CBA"*. That the same agreement is captured in the minutes of the meeting held on 29th April 2020

It is the claimant's averment that despite the foregoing and without any consultation with the Claimant, the Respondent rostered and planned flights that exceeded the CBA duty time limits when parties had reverted back to the CBA position on duty time limits.

That the Respondent thereafter commenced disciplinary action against certain members of the claimant and issued show cause letters to pilots who indicated that they would not operate flights that had the duty time of over 12 hours contrary to the provisions of the CBA which was in place between 1st and 8th May 2020.

The Claimant further submitted that the court restrained the Respondent from continuing with the disciplinary action by an order made on 13th May 2020 which was extended severally.

The Claimant contends that the Respondent's decision to issue show cause letters to its members was outright victimization and intimidation and was unlawful given that the members' actions were strictly in line with the provisions of the provisions of the CBA.

The Claimant avers that the Respondent has continued to harass and intimidate pilots and has resorted to excluding them from new duty rosters on the basis of the pending case challenging the disciplinary action. That exclusion from duty negatively affects the pilots as they are not able to attain their currency, a situation that has an impact on renewal of their licenses.

According to the claimant, the issues for determination are the following –

I. Whether the Respondent's unilateral assignment of annual leave days at reduced pay was (is) unlawful.

II. Submissions on the conciliation report.

III. Whether the disciplinary proceedings instituted against Claimant members were justified.

IV. Whether the Respondent should be punished for contempt.

V. What orders should be made on the Respondent's application dated 11th June 2020?

VI. What reliefs should issue to the Claimant?

Respondent's Submissions

The Respondent filed submissions dated 21st October 2020. It is the contention of the Respondent that following the directive issued by the Government on 22nd March 2020 ceasing incoming and outgoing international passenger traffic from midnight of 25th March 2020 due to the Covid-19 pandemic, its revenues plummeted to approximately 4% of average monthly revenue. As the virus spread globally, there were increased travel restrictions imposed across the world to the extent that the Respondent was forced to reduce its network by over 65%. That as a consequence it became extremely difficult to continue offering international passenger services.

The Respondent submitted that its financial position is a matter of public knowledge. That it reported a loss of Ksh.7.5 billion for the year ending December, 2018 and a pre-tax loss of Ksh.8.56 billion in its 2019 half year earnings to June 30. That the pandemic worsened its already fragile financial position.

It is submitted that at the end of April, 2020, the Respondent's leave liability stood at Kshs.1,857,355,393.20 so that granting of the proposed COVID-19 leave by the Claimant would jeopardize the current financial position of the Respondent further.

It is submitted that the Respondent's decisions during this pandemic was informed by guidance issued by several associations such as the International Air Transport Association (IATA). In Kenya alone, IATA indicates that the disruptions from COVID-19 could result in 622,000 loss in passenger volumes and US$125 million loss in base revenues. The disruptions to air travel could also put at risk over 36,800 jobs. That according to IATA, if the situation spreads further, approximately 1.6 million passengers and US$320 million of revenues can be lost.

The Respondent submitted that it has neither the resources to meet the full salaries of the Claimant's members nor to send the said employees on annual leave with full pay at their previous salary before the pandemic.

The Respondent submitted that the ravages of COVID 19 have been acknowledged by several courts. Ogola J. in the case of **Muslims for Human Rights (MUHURI) v Attorney General & 2 others [2020] eKLR** was of the view that;

> *"...the Covid-19 pandemic has caused a public confusion over standards and parameters along which we do things. In this pandemic, new directions emerge almost on a daily basis, and the Court also should not rush to make any orders without hearing parties substantively."*

That in the case of **Moses Kamau & 6 others v Signature Holdings (E A) Ltd [2020] eKLR** Radido J. noted that the primary duty of the Court is to uphold the law. It submitted that the Court may order the employer to meet its obligations under the contract, but the ripple effect would be that the employer may be forced to declare redundancies.

The Respondent submitted that COVID-19 has led to frustration of contracts and cited the case of **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR**, where the Court of Appeal while dealing with the issue of frustration of contracts quoted from **Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897** where it was stated that;

> *"As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach."*

It submitted that without the default of the Respondent, the contractual obligation has become incapable of being performed because of the circumstances beyond its control.

The Respondent submitted that although there needs to be consensus on the utilisation of leave days, the Claimant should take cognisance of the effect of the pandemic on the Respondent and consider the best interest of both parties.

That the Claimant is seeking some special kind of leave to apply during this time and with the current financial crisis of the Respondent, such special consideration would not be viable.

That contrary to the Claimant's submissions, Covid leave is not recognised by the law and would be a double liability on the part of the Respondent. That some of the employees, being cognisant of the current situation, consented to salary reductions and to the leave arrangements. That at no time did the Respondent coerce any employee.

On whether disciplinary proceedings instituted against some of the

claimant's members were justified, the respondent submitted that it issued Special COVID 19 operation measures which adjusted the duty time limits and crew compliments. That the measures were duly approved by the Kenya Civil Aviation Authority ('KCAA'). The duty time limits and crew compliments were adjusted in terms of the special OMA procedures and the Claimant's members were advised that the OMA

special procedures had been discussed with the Claimant and agreed upon. That all standing instructions issued by the Respondent such as the COVID-19 procedures applied to all members of the Claimant who were required to report on duty and operate as assigned. That Clause 4 of the 2017 the CBA provides that staff rules and regulations, staff notices and any other standing instructions issued by the Respondent from time to time would apply to members of the Claimant.

It is submitted that the Claimant's members who were issue with Show Cause Notices acted in breach of the guidelines issued by the Respondent, the Respondent's Human Resource Manual (HR Manual) and their employment contracts and the Code of Conduct.

That the disciplinary action was justified and in line with the Respondent's Human Resource Manual.

It is submitted that the CBA provided for flight time limits of 12 hours but special operation measures which were approved by KCAA allowed pilots to operate beyond the flight time limits. That the refusal of some of the members of the Claimant to fly beyond the time limit of 12 hours affected the repatriation flights from India on 7th May, 2020 and Guangzhou on 8th May, 2020. This also caused a delay to a cargo flight to Accra.

The Respondent submits that there is no basis for the Court to interfere with the internal disciplinary processes of the Respondent. For emphasis the Respondent cited the Court of Appeal decision in the case of **Judicial Service Commission v Gladys Boss Shollei, Civil Appeal No. 50 of 2014** where the Court expressed the proper position as follows: -

> *"It is worth noting that Courts ought to be slow to make determinations that are on the face of them, unrealistic and bordering on the cynical. Courts do intervene in employer-employee disputes but even as they do so, they must appreciate that the work-place must be allowed and enabled to operate in a manner that is productive and harmonious. Courts cannot micro-manage the human resource function of other institutions be they in the public or in the private sector. It is thus clear to me that a judge oversteps his mandate when he fails to give due and grave consideration to the intractable difficulty an employer faces when faced with insubordination which is really a form of headstrong defiance and open rebellion to lawful authority. In such instances, the act of firing the employee properly taken should not invite the Courts' quashing power by way of certiorari as happened herein. In this respect I fully agree with the decision of the* ***South African Labour Court in Nampak Corrugated Wadeville vs Khoza (JA 14/98(1998) ZALAC 24*** *in which Ngocobo JA stated as follows:-*
>
> *"33 The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A Court should, therefore, not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable".*

The Respondent further relied on the decision of Wasilwa J. in the case of **Nixon Otieno Awuor & 4 others v Inspector General of the National Police Service & 4 others [2018] eKLR** as follows: -

> *"In this Court's view, the employer/Respondent acted within its mandate after suspecting some wrongdoing on the part of the Applicants.*
>
> *40. The process of unearthing the wrongdoing may have been hasty and improper but once there was reasonable suspicion and the Applicants were asked to respond, they should have responded. Rushing to Court was in my view imprudent and premature.*
>
> *41. In the circumstances, I do not find the Petitioners orders tenable. I will not allow the prayers sought.*
>
> *42. The Petitioners are free to respond to the show cause letters issued against them within 14 days from the date of this judgement and allow the Respondents to proceed with the disciplinary process in order to allow due process. In the same vain, the Respondents are free to restart their internal disciplinary process as they had begun in order to ensure fairness on their part and also on the Petitioners part."*

It is submitted that at the time the Claimant filed this suit, its members had not even responded to the Show Cause notices. It urged the Court not to interfere with the disciplinary processes initiated by the Respondent and find that the Respondent acted within its mandate.

The Respondent further relied on the decision Mbaru J. while dealing with the court's jurisdiction to intervene in the employer's disciplinary process in the case of **Mulwa Msanifu Kombo v Kenya Airways [2013] eKLR** and urged the Court to uphold its right to discipline its employees.

On the application for contempt, the Respondents submitted that with the increased travel restrictions, the Respondent was forced to reduce its network by over 65%. That with the uncertainty over how long the pandemic was going last, it was only prudent that the Respondent take measures to safeguard not only its business but to also consider the best options available. That the Respondent being fully aware that it did not have the resources to meet the full salaries of the members of the Claimant or send the employees on annual leave with full pay, sought the court's intervention to vary its orders.

That the members of the Claimant having been sent on annual leave on reduced pay before the order was issued by the court, the status quo as at the time the order was made was that some of the Claimant's members had already been sent on annual leave on reduced pay.

The Respondent relied on the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** and **Basil Criticos v Attorney General and 8 Others [2012] eKLR** on the burden of proof in contempt applications.

The Respondent submitted that the Claimant has failed to prove beyond reasonable doubt that the Respondent's CEO who has been cited for contempt had notice of the orders made in court on 8th June, 2020. The Respondent further submitted that there was no wilful disobedience of the court orders on its part.

The Respondent submitted that the fear by the Claimant that the Respondent seeks to take advantage of the COVID-19 to wipe out the accrued leave to the disadvantage of the members of the Claimant is baseless.

On the conciliation report, the Respondent submitted that with the uncertainties brought about by the Covid-19 pandemic and its financial position which has been marked with recorded significant losses over the last 6 to 7 years, it will not be possible to either specify when it will pay the differed salary or to employ more pilots as recommended. The respondent however concurred with the recommendation that any leave granted should be in accordance with the law and that the additional leave is untenable.

Analysis and Determination

Having carefully considered the pleadings, submissions and the conciliation report, the issues for determination are:

i. How leave taken during the COVID period should be handled,

ii. Whether the disciplinary process commenced against some of the Respondents members should be allowed to proceed to conclusion, and

iii. Whether the Respondent's officers cited for contempt are guilty of contempt.

Annual Leave

Annual leave is provided for under Section 28 of the Employment Act as follows –

28. Annual leave

(1) An employee shall be entitled—

(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

(2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under subsection (1)(a) into different parts to be taken at different intervals.

(3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave-earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.

(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.

(5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.

These are very elaborate provisions. In addition, the parties herein have the collective bargaining agreement which provides for annual leave as follows–

"15. ANNUAL LEAVE

a) On completion of twelve (12) months continuous service from the date of appointment, each employee shall be entitled to annual leave at the rate of thirty (30) working days. For purposes of calculating annual leave, Saturdays, Sundays and Public Holidays on earned off days shall not be included.

b) Every employee will be required to take all his/her earned leave during his/her leave year. However, due to exigencies of services, an employee will be allowed to accumulate his/her leave and carry it forward to the next year.

c) In the case of sale of accumulated leave under (b) above, computation will be based on the following: -

i) Basic pay.

ii) Housing allowance or owner occupier housing allowance.

iii) All other fixed allowances."

As has been acknowledged by the parties, the Respondent has managed annual leave in a manner that has led to huge accumulation thereof which at the time the dispute herein arose, amounted to an unenviable liability of Kshs.1,857,355,393.20. The disagreement of the parties was therefore how to manage this accumulated leave during the lockdown when the Respondent was not operating at full capacity and some of the claimants' members had to take leave while on reduced pay.

As is provided by the Employment Act, annual leave is an entitlement. The parties in the CBA have agreed on how to value the same. Specifically, that in the case of sale of annual leave the same will be pegged on basic salary, housing allowance or owner occupier allowance and all other fixed allowances.

The Respondent wishes to deduct leave during the COVID period on a 1:1 ratio. The claimant however proposes that leave during COVID be treated as special leave and that the same should not be recovered from annual leave.

It was inevitable that the Claimant's members be on leave during the lockdown as there were no flights allowed. In my view it is not logical to expect an employee who has lots of accumulated leave to go on special leave that does not affect the accumulated leave. At the same time, it is not logical to send an employee on leave at reduced pay when the leave was accumulated at full pay. It is thus logical that when an employee is on leave on reduced pay, the leave should be valued based on the reduced salary being earned at that time such leave is taken. This means that if an employee is on leave at a 25% reduced salary as was the case in April 2020, a day's leave will still be equivalent to a full days' salary at the rate provided in the CBA. A reduction of leave on 1:1 ratio as proposed by the Respondent would mean that the employee is not on leave at full pay as provided by the law. Thus the employee would be owed the difference between the lower salary earned during that time and the normal full salary.

At a reduced salary of 25%, a day's leave would be equivalent to only 25% of a day's salary. This is therefore what should be deducted from the leave as that is the monetary equivalent.

This means that all leave taken during this period should be converted into days based on the fractions of salary being paid to the employee at the relevant period, then this is what should be recovered from the accumulated leave. This should not be difficult in view of the fact that the Respondent has already converted all leave into monetary value.

The only other option is to pay full salary for the period when the employees are on leave in which event the leave days can be offset from accumulated leave on a one to one basis. Taking into account the Respondents financial position as compromised by COVID -19 travel restrictions, this may not be practical.

As is provided in Section 28 of the Employment Act, annual leave should be on full pay.

Disciplinary Proceedings

Section 44(4)(e) provides that an employee who knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer is guilty of gross misconduct so as to justify the employee's summary dismissal.

In the instant case, both parties were at fault. The employees, cognisant of the circumstances in which they were operating, ought to have been co-operative to ensure the operations of the employer were uninterrupted, and to take up any issues they had against the employer with their union later, rather than disobeying instructions from their employer to the detriment of operations. Their action therefore amounted to insubordination. Being asked to work longer hours in itself is not outside the employer's prerogative.

On the other hand, in the circumstances in which the parties were operating, which was hostile because of disagreement over the COVID agreement for the month of May, the employer was insensitive to impose the longer working hours on the employees without consultation. Trying to *"flex its muscles"* at this time was incautious.

For these reasons, I find no justification in the Respondent continuing with disciplinary action against the claimant's members against whom disciplinary action was commenced on the grounds of refusing to work for longer hours during the impasse between the claimant and the Respondent on the working hours. I therefore direct that such disciplinary action be terminated.

On the last issue of disobedience of this court's orders, the court takes cognisance of the uncompromising stance taken by both parties at the relevant time, which in the opinion of the court was contributed to equally by both parties. Taking into account the fact that the parties thereafter relaxed their positions and were able to come to a compromise, I do not think the circumstances of the case would qualify as contempt. I do not think the Respondent and its named officers *"deliberately"* set out to disobey the court orders. I have further taken into account the explanation given by the Respondent to the effect that some of the claimant's members were already on annual leave on reduced pay and that they only maintained the status quo. I think it would be best to forget what happened at that time and find a more productive manner of rebuilding the relationship between the claimant and the Respondent.

For these reasons I decline to grant the orders sought in the claimant's application.

Conclusion

In the end, I make the following orders –

1. The application to cite the named officers of the Respondent for contempt is dismissed.

2. The disciplinary process against members of the claimant arising from disagreement over extended flight times are terminated.

3. The Respondent is directed to handle leave during Covid period in either of the following ways –

    (i) Assign the leave taken proportionately to the salary earned during the period of leave, or

    (ii) Pay full salary during the days on which the employees were on leave on reduced pay.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE