



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 551 OF 2012

AVIATION & ALLIED WORKERS UNION (K).....CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT

JUDGMENT

1. This suit was filed by the claimant on the 2nd April 2012. The file has been before different Judges of this Court since filing and I became seized of the case as a part-heard matter on 8th December 2020. The Claimant, Aviation & Allied Workers Union (K), seeks the following remedies from the Respondent on behalf of its 2 Grievants - Ms Margaret Chao Kimuele and Ms Letty Odongo:

- i. A declaration that the Grievants suffered unfair wrongful termination in the first instance.
- ii. An order for reinstatement of the Grievants to their former employment and positions without any loss of benefits and/or seniority.
- iii. In the alternative, Payment of the Grievants' actual pecuniary loss suffered since their date of suspension, including payment for salary/wages as would have been earned, housing allowance and together with all accruing allowances payable.
- iv. Maximum compensation for loss of employment.
- v. Confirmation of the Grievant's entitlement to lifetime Air tickets in accordance with IATA rules.
- vi. Any other and further relief the Honourable Court may deem fit to grant to award.
- vii. Costs of this suit with interests on iii above.

2. The Respondent filed a Memorandum of Response dated the 5th November, 2012 and filed on 6th November 2012 wherein it denied the claims made by the Claimant in the statement of claim. The Respondent averred that the case is centred around the application of Cabin Crew Regulations which form part of the parties Collective Bargaining Agreement Clause 1.25 of the regulations. It averred that the case arose as a result of the cabin crews led by purser Margaret Kimuele declining to operate the flight back from Johannesburg on the ground that doing so would result in them working beyond 12.5 hours, that is 12 hours 30 minutes. The Respondent averred that according to the Respondent the flight time had been recalculated and the flight time would be within 12 hours 30 minutes. It was averred that upon landing in Johannesburg the Captain indicated that he was willing to fly back the aircraft to Nairobi but could not do so because Margaret maintained that herself and two other members would be working beyond the regulatory time. The Respondent averred that the Grievant insisted on the position despite the pleas by the Ground Manager that the same would not be the case. The Respondent averred that that issue was subject of a disciplinary process in which the Grievant was asked to do a detailed report as to why she declined to operate back but declined indicating that she needed to consult the Union first. It averred that she did not do the detailed report neither did she inform the Manager of the results of the consultations. The Respondent averred that thereafter the Grievant was called to a hearing in which she was represented by the Union and at the hearing the panel chairman presented his report and findings to the management. The Respondent averred that it terminated the services of the 1st Grievant on 10th November 2011. The Respondent averred that the 2nd Grievant was allocated duty to operate KQ 762/763 on 8th/9th October 2011 and that she operated KQ 762 but declined to operate back KQ 763. It averred that she was asked to do a detailed report to which she declined indicating that she needed to consult the Union first and that she did not present the detailed report neither did she inform the Manager of the results of her consultations. The Respondent averred that the 2nd Grievant was duly heard before there was termination of her employment contract. The Respondent averred that Claimants were lawfully terminated and are not entitled to a claim for a wrongful termination and urged the dismissal of their case against the Respondent with costs.

3. At the hearing, Ms Margaret Chao Kimuele and Ms Letty Odongo gave the evidence for the Claimant/Grievant. Ms Margaret Chao Kimuele gave the evidence in chief before Radido J. There was thereafter a cross-examination before me and the testimony of Ms. Letty Odongo who gave both her examination in chief and cross-examination before me. Mr Richard Kyalo, the witness for the Respondent, similarly testified before me.

4. The Claimant's case is that the Grievants had served the Respondent without any problem during their tenure of office and that the Grievants were on standby on the 8th October, 2011 when they were summoned by the Respondent and assigned the duties of operating a flight to Johannesburg and return in accordance with clause 1.22 of the parties collective bargaining agreement. The Claimant asserts that the Grievants complied with the directions given to them by the Respondent's crew scheduling officers and proceeded to operate flight no KQ 762/763 which was scheduled to take off at about 1700 hrs. It was the Claimant's case that upon arrival in Johannesburg, the Grievants who were already behind time schedule having left Nairobi late 1½ hours therefore had a sleep over as had been agreed upon with the Respondent's crew manager on duty that day, and came back the following day. The Claimant avers that the Grievants flew back to Nairobi on the 9th October 2011 and on their arrival, they were asked to indicate their timings on the voyage report to which they did as required but were promptly sent on suspension preceding their termination on the 10th November 2011. The Claimant took up the matter and had it processed through the pre-industrial machinery where nothing substantial was achieved paving the way for filing of this matter before court. The Claimant avers, *inter alia*, that the Respondents violated the provisions of the Clause 1.25 of the Parties Collective Bargaining Agreement as well as the Crew Fleet Regulations in place at the material time and Section 59 of the Labour Relations Act and assert that the Respondent failed to give Notice of the Intended termination.

5. The Claimant's first witness Margaret Chao Kimuele adopted the witness statement filed on the 2nd December 2015 as part of her testimony. She testified that there were 6 flight crew from in the flight from Nairobi to Johannesburg and that there was a voyage report made by the Captain who operated the flight. She stated that the flight name was KQ 762 and the flight time was 12 hrs 30 minutes. She testified that she asked to be given another flight since she was at home on standby and needed 35 minutes to get to work. She stated that the Report once prepared cannot be changed via email and that the home standby of 35 minutes was not factored when she was given the termination letter. She testified that the flight time back and taxi time was also not factored in. She stated that flying time should have been 4 hours 9 minutes and that the Captain recognised this in his Voyage report. She stated that 3 cabin crews were flight time limited (FTL) on arrival in Johannesburg. She stated that the 3 of them were suspended and that 2 of the crew have sued. She testified that no disciplinary action was taken against one Ndugu as he was still working when she left employment. She stated that she feels victimised on basis of gender as no disciplinary action was taken against the said person. She testified that there should have been 50 minutes ground time as indicated in the manuals but only 40 minutes ground time was given. She seeks the remedies set out in the statement of claim. She asserted that she was not taken through a disciplinary process and there was a lot of mental anguish. She testified that they went through an arbitration which the Respondents did not participate in. She stated that the chair of the Disciplinary Committee was not fair and that this was challenged on their behalf by the union

6. Upon cross examination she stated that she was conversant with duties of a flight purser and that her boss would be the Captain on board. She stated that she did not refuse to fly back from South Africa as had been alleged. She said that she was on standby at home from 9.00 GMT which is 12.00pm Kenyan time and that she was assigned to operate KQ 762 to Johannesburg and it was to leave at 17.00 GMT, that is 21.00hrs Kenyan time. She stated that she was to report at 18.30pm Kenyan time for the flight and that Reporting was to be at 15.00 GMT. She stated that she was to report one and a half hours before departure of flight. She testified that she was invited to disciplinary hearing where she was represented by the union. She stated that phone calls were made and she was told to be on standby. She said that she was told to remain on standby not cancel and that this was true as she was called 6 seconds past noon. She testified that as long as one is called and told to be on standby the standby starts. She stated that the time would not fail to be reckoned as was told she would remain on duty. She was referred to the minutes of the disciplinary hearing that she said that she did not sign and stated that the flight delayed one and a half hours. She testified that she was the flight purser and that as per the Captain's report there was a delay of 1hour 20 minutes. She testified that the flight to Johannesburg was 4 hours 9 minutes and that the turnaround time was 50 minutes. Upon being referred to page 26 of the Report she said that the turnaround time was 40 minutes. She testified that the difference comes to 43 minutes in total as the turnaround time was varied. She stated that was raised by her boss in the report and that she was told to remain on standby until the flight. She stated that standby is on duty and that the pilot told her of a call from the operator's office but did not say that the flight back would be 3 hours 36 minutes. She said that the Captain did not inform about 12 hours and that he told her they would be FTL. She said that it is not true that only 2 of them were FTL. She said the Ground Manager told them they would turn around the flight in 40 minutes and that at the time of the departure they were on red alert. She testified that safety would have been hampered and that the 50 minutes would also have been impossible to turn around. She admitted that she was in charge of the cabin crew and upon being referred to page 6 of the Response at Paragraph 3.4 she disputed that was the manual. She stated that FTL is calculated before you leave Nairobi and that they would exceed 12.30 hours only in unforeseen circumstances. She stated that the situation was unforeseen and that she had her own voyage report which she did not do after the statement.

7. In re-examination she stated that the one recorded as speaking is Richard Kyalo and that he is the one who gave the statement. She stated that the turnaround was 50 minutes because it was quick turnaround and that the maximum is 50 minutes and it is not possible to turn around in 40 minutes. Upon being referred to page 11 she said that it was not the Captain's voyage report but Richard Kyalo's statement. Upon being referred to the exhibit marked AAWU 9 page 80, she confirmed that it was the Captain's report. She testified that the voyage report is authoritative.

8. The second witness for the Claimant was Letty Odongo Nyaoke who testified that she worked for Kenya Airways for 3 years and that on the material day had been rostered to be on standby from 9.00 GMT. She stated that she was given a flight to Mombasa on 8th October 2011 but before the flight to Mombasa, she was rescheduled to operate a flight to Johannesburg. She stated that the office told her that the flight had no departure time and that she was told to wait for the flight to be notified. She stated that she was on standby as they waited for notification and that after 1 hour she was called by crew reschedule and they told her that the departure was 17.00 hrs. She testified that standby time had been 1 hour 2 minutes. She said that if calculated pro- rated it is 15 minutes of standby. She testified that there was delay on the ground for 1 hour 20 minutes and that they were told they were on FTLs and would rest in Johannesburg. She testified that on arrival at Johannesburg they picked their bags and went to the hotel and that they were met by Cabin Crew Manager Mr Kyalo on their return. She stated that they were not told anything whilst at Johannesburg and that Richard Kyalo met them and told them to write a report. She stated that there were 2 Purser's and they asked them to do the report. She testified that they were later summoned and asked to explain what had happened and that she verbally informed them about had happened and was given a suspension letter the following day. She stated that the suspension was for refusal to operate the flight back to Nairobi. She testified that she did not decline to operate the flight and that they had

already been informed they were FTL. She testified that they used the Ramp Manual to guide the subject flight and that the fastest you can turnaround the plane is 50 minutes because of the procedures. She stated that according to the voyage report the flight time was 4 hours 9 minutes which taking into account night factor was supposed to be 5 hours 11 minutes. She stated that this takes into account the level of fatigue to the attendant and that 15 minutes is added to any hour one works. In cross examination, she said that sometimes the time planned is not the actual due to variety of factors such as the tail wind. She said that ground time should not take shorter time as one would be flouting the regulations. She testified that she was not the ground manager but was speaking as an attendant and that there are regulations which are to be adhered to. She testified that she was called in the morning at 6.30am and that her standby was to start at 9.00 GMT. She stated that she was later called and was reassigned at 12.00pm. She stated that she was notified of the new duty but no duty time was assigned. She stated that she was called and informed an hour later that she would be operating a flight to Johannesburg and that this was at 1.42pm. Upon being asked that she was told she was supposed to be on standby from 12.00pm and that she was not on standby between 6.00am to 12.00pm, she said that she was on standby and was at home. She testified that she could go nowhere at the time and that flight time is different from block time. She stated that block time is 'chocks off' and that FTL is normally calculated before one leaves. She stated that the Operating Control said that they were FTL out of Nairobi. In re-examination she said that the Captain is in charge of anything that happens and that there are two different times to remember – that the flight time refers to the time when the chocks are put to the time they are removed. Then there is actual flight time when the wheels leave the tarmac to the touching the tarmac on landing. She stated that flight time takes into account chocks on and chocks off. She testified that the 3 hours 36 minutes was probably just the wheels up and down and that there was no emergency to warrant turnaround of 40 minutes. She stated that there is no emergency in the report and that she was called and rostered to be on standby at 9.00 GMT. She testified that in the morning she was called and rostered to be on a flight to Mombasa and that she was later called 1 hour later and informed that she would be on the flight to Johannesburg. She testified that if they had flouted the rules they would have been sacked and not even allowed to operate the flight back.

9. The Respondent's witness Richard Kyalo Eliud testified that he is the Regional Station Manager at the Respondent and that he worked with Kimuele and Letty. He stated that the 1st Grievant was a flight purser and the 2nd Grievant was a flight attendant and that they were answerable to him at the time. He testified that he is aware of the circumstances of their termination. He adopted his witness statement dated the 19th February 2012. He adopted the documents as exhibits for the Respondent. He stated that the Grievants were scheduled to operate flight to Johannesburg in October 2011, that it was KQ 762 on 8th October and return on the same day on the flight KQ 763. He stated that it was a turnaround flight and they left late from Nairobi. He stated that they recalculated the time and were to stay over in Johannesburg and return the next day. He testified that the Flight Control looked at speed and realized if they flew back, they would be able to fly back and that as they flew to Johannesburg they were notified that they would be required to return. He stated that they declined and the return flight was cancelled. He stated that they were in hotels and he had to talk to them so that they could return as they were within their duty time. He said that this led to the disciplinary process.

10. He stated that at the disciplinary hearing the Grievants were represented by Union officials and that the flight time is calculated and Operations Control looks at distance, the speed of the aircraft and before departure they know the flight time. He stated that they look at the wind and determine the wind and fuel and that the flight time is then calculated. He testified that the flight time is in the control of the Operations Control. He stated that the pilot is not the one who determines the flight time and that the Operations Control gave a recalculated flying time based on the weather situation. He stated that there is a difference between planned and actual. He said that planned is on the worst-case scenario and that the planned time is never the actual in most cases. He was referred to Appendix (f) and testified that the planned time was 4 hours 9 minutes for flight to Nairobi and the time was indicated as 3 hours 36 minutes on recalculations. He stated that ground time is planned per type of aircraft and that the time is based on full flight for 116 passengers on the flight which was 60 minutes. He said that the flight was half full so around 59 passengers and that they factored in the time it takes to have every passenger off and even in terms of boarding, the time is different. He stated that according to the Station Manager the turnaround was to be 40 minutes. On being referred to submission by the Union on turnaround time he testified that the 50 minutes is not cast in stone and it is also possible to fly back for shorter time. He testified that the next day, the flight back was 3 hours 22 minutes. He stated that night factoring is taken into account in the Kenya Civil Aviation Regulations and that the calculation is 1.5 of actual flying time at the time. He stated that night flight time did not factor in the flight and added that Kenya Airways does 10-11 hours to China and if it was to factor in the flight time no KQ flight would go to China as everyone would be FTL. He testified that they have never been rebuked by KCAA on the night factoring and that the Respondent was justified in taking disciplinary action. He stated that when he gave the Grievants time to explain they told him to wait to hear from the Union. He said that they refused to talk to him and said they could talk through the Union. He stated that they disobeyed lawful orders to fly back and that during the panel hearing they called the Captain and he was not FTL. He stated that the pilot has 45 hours less. He testified that the pilot was willing to fly back but could not fly back without crew. He said there were 2 flight pursers and the 1st Grievant being senior was in charge.

11. In cross-examination he was referred to the supplementary affidavit of Letty Odongo and he testified that the flight is the one where it is indicated had 50 minutes turnaround. He stated that it is from Kenya Airways and that the documentation on turnaround cannot be changed. He stated that the captain was Captain Njoroge and that the Union answered questions for the Captain. He testified that the question as to whether FTL was declared by Cabin crew before leaving Nairobi was indicated by Captain's report that the crew were running FTL before leaving Nairobi. He stated that based on the planned flight time 4 hours 9 minutes they were FTL. He stated that it is the Captain who prepared voyage report and that the captain is in charge of the plane. He testified that the pilot has right to operate flight and is in command of the plane. He stated that he spoke of Operations Control and that there is a document known as flight plan that nobody challenged. He stated that planned time and actual time is not discussed and that before the crew left Nairobi based on the planned flight time they were FTL. He stated that night factoring applied if the flights would be FTL and that it is based on evidence that can be produced. He said that flight to China is more than 10 hours. He testified that what he has given as evidence is correct and the report by Malowa is based on flight plan. He stated that it is based on the document used by the Captain to fly. He stated that the KCARs are used to calculate the rest period and that it is used to calculate the cumulative hours and is captured for that purpose on the voyage report. He testified that the flight purser does a voyage report and the pilot does his own. He stated that planned time is a guide to calculate the flight time and it is not actual time but planned time. He stated that Operations Control come up with flight plan and they come up with the time. He stated that the pilot has no control over the time and is at mercy of Operations Control. He stated that the pilot must get a flight plan and is the authoritative one as he uses to calculate flight time. He stated that the night factor is given to ensure the factoring of the hours taken and is not used to in factoring time taken to fly. That marked the end of oral hearing and parties were to file written submissions.

12. The Claimant on behalf of the Grievants submitted that employment contracts should only be terminated on genuine reasons and the employer should prove that the reasons leading to termination are valid as required by Section 43(1) of the Employment Act. The Claimant

submitted that even where the reasons are genuine it must be assessed as to the validity, fairness and reasonableness based on each case regard being had to the conduct of the employee, the policy procedures given by the employer and fundamentally the procedures adopted by the employer leading to the termination. The Claimant submitted that what is of paramount importance even where the Court finds that there was gross misconduct is whether the employee was given a fair chance to challenge the decision through the internal disciplinary process as outlined under Section 45(5) of the Employment Act, 2007. The Claimant submitted that the Grievants were terminated on 10th November 2011 for reasons that they had declined to operate back KQ 762/763 on 8th October 2021. The Claimant submitted that the Grievants were not charged but instead suspended with failure to operate return flight, KQ 762/763 on the 8th October 2011 even though they would have been within 12.5 hours. The Claimant submitted that is despite the fact that the Chairman of the Respondent in his report on findings and recommendations which appear to agree that indeed turnaround of 40 minutes was not possible. The Claimant submitted that in spite of miscalculating the flight time to the disadvantage of the Grievants and in breach of the Cabin Crew Fleet Regulations the Respondent proceeded to terminate the Grievants yet they had followed lawful command, and they followed instructions to perform their duties. Further, the Claimant submitted, the Grievants were suspended and no notice to show was given to them to accord them a fair hearing in accordance with Articles 41, 47 and 50(1) of the Constitution. The Claimant submitted that the Grievants were not given fair hearing as there was no show cause letter and the Grievants had no notice of the intended termination. The Grievants also submitted that no report containing the recommendations and findings of the Panel was provided to the Grievants. The Claimant relied on the Court of Appeal decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR** where it was held that unfair termination involves breach of statutory law and that where there is fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, which still amounts to unfair termination. The Claimant submitted that this is the case with the Grievants herein as the Respondents failed to comply with Section 41 and no fair hearing was accorded to the Grievants as contemplated by the Court in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where it was held that the employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets. On the remedies sought, the Claimant relied on the case of **Benson K. Nguti v Ken-Freight (EA) Ltd [2014] eKLR** wherein this Court in finding that the termination of the Claimant's employment was both substantially and procedurally unfair made an award of 12 months gross salary at the rate of Kshs. 676,362/- per month in the sum total of Kshs. 8,116,344/- which award was exclusive of the *ex-gratia* payments already made to the claimant. The Claimant submitted the Grievants be accordingly awarded the maximum compensation for loss of employment as well as the declarations in their suit plus costs.

13. The Respondent submitted that the case hinged on whether by asking the Grievants to operate Flight KQ 763 from Johannesburg to Nairobi the Respondent was compelling the Grievants to commit a statutory wrong and that therefore the Grievants were justified in not carrying the unlawful instructions. The Respondent submitted in considering the import of the Flying Duty Period, Flight Time/Block Time and the Home Standby, that the refusal of the Grievants to fly flight KQ 763 back to Nairobi was deliberate and cannot be justified. The Respondent submitted that there is no doubt that the Grievants willingly neglected to fly Flight 763 back to Nairobi. To buttress this argument, the Respondent referred to Appendix D to the Respondent's memorandum where Mr Andrew Malowa who was in-charge of the control office in Nairobi states that he received a telephone call from the station manager Johannesburg informing him that the 1st Grievant who was the head of cabin crew had declined to operate the flight and that her main reason was that she had to have minimum rest in Johannesburg. The Respondent submitted that Mr. Malowa tried to explain to the 1st Grievant the reason why there was a change of plan and that they had to fly back to Nairobi but she could not have any of that explanation and that Mr Malowa challenged the Captain on the legality of the grievants' refusal to fly back to Nairobi but the Captain merely stated that he could not fly back to Nairobi if the cabin crew have declined to accompany him. The Respondent submitted that it was justified to have the Grievants summarily dismissed and that instead terminated from service and paid the Grievants salary in lieu of notice which they should be grateful for. The Respondent urged the dismissal of the suit by the Claimant with costs.

14. This case relates to the question as to whether the crew of the flight KQ 763 were flight time limited. It is a well-known fact one of the major concerns in modern aviation is fatigue. The duty hours of those who operate flights, cabin crew and pilots, must therefore be reckoned when the issue of FTL is considered. In the factoring of the time determines whether the operation of the flight will be safe or not. In the operation of the flight to Johannesburg, the crew stated that they were on active duty standby from 9:00 GMT. This is to be contrasted with the reporting time of 15:00 GMT. Standby as understood in the case, was a situation where the staff was told he could be called for duty and therefore could not (in the case of the 2 Grievants) take a long journey out of town but must be within 1 or so hours from work. Indeed, in the course of that day the staff were called and assigned a flight to Johannesburg. As soon as they got the call they knew they were to report to work at 15:00 GMT for the flight which was to depart at 17:00 GMT. The flight was delayed and upon arrival in Johannesburg they declined to operate the flight back on account of their being FTL. The Pilot in his voyage report indicated he would not be FTL yet he reported to work earlier than the Grievants. From a calculation sent by Operations Control, the flight back would be shorter due to tailwinds and as such the crew would have arrived in Nairobi within the limits of their flight times and they would not have been FTL. They incorrectly calculated time and had they been keen to listen to the Respondent's witness Mr. Kyalo they would not have been in the mess they find themselves in. Unfortunately for the Claimant, the Grievants were taken through a thorough disciplinary process by the Respondent which process the Court was not able to fault. It resulted in the threat of summary dismissal which the employer graciously reduced to normal termination. The suit was unproved to with the result that the suit therefore fails and is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2021.

NZIOKI WA MAKAU

JUDGE