REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1349 OF 2015

KENYA AVIATION WORKERS UNION.......CLAIMANT

- VERSUS -

KENYA AIRWAYS LIMITED...................RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 05.08.2015 through Kitheka & Company Advocates. The claimant alleged the unfair termination of its member by the respondent. The member was one Anastacia M. Muli (the grievant). The claimant prayed for judgment against the respondent for:

a. An order for reinstatement of the grievant back to her employment with the respondent.

b. Alternatively payment of general damages for wrongful termination.

c. Terminal benefits.

d. Further or other incidental dues, allowances and benefits subject to company policy and practice commensurate with the grievant's terms of employment.

The respondent filed the memorandum of response on 03.11.2015 through Obura Mbeche & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that the parties were in a contract of service. The respondent employed the grievant by the letter of offer of employment dated 07.08.2006 to the role of In-flight Attendant. The grievant accepted the offer by signing on 11.08.2006 and reported on duty effective 14.08.2006.

There is no dispute that the grievant's employment was terminated by the letter dated 13.01.2015 and effective the same 13.01.2015.

The evidence on record shows the circumstances leading to the termination were as follows.

The grievant arrived in the United Kingdom by KQ 102 at Heathrow International Airport's Terminal 4 on 06.12.2014 at 06.45. The grievant was found in possession of 3Kgs Khat and it was alleged she had not declared that she was in possession of the same and the immigration officer on duty found that the grievant intended to evade payment of tax and chargeable duty which was an offence under section 170(2) and (3) of the Customs and Exercise Management Act, 1979. The immigration officer therefore refused to grant the grievant leave to enter the United Kingdom and proceeded to give directions for the removal of the grievant from the United Kingdom. The removal directives were addressed to the respondent for removal of the grievant to Kenya by flight KQ101 to Nairobi at 1900 on 06.12.2014.

The grievant requested for proceedings against her to be compounded per section 152(a) of the Customs and Exercise Management Act, 1979 and she requested to pay GBP 300 as an alternative to proceedings being taken against her for the offence of failure to declare 3.04Kg of Khat. The grievant paid the sum of money as a penalty and the relevant receipt was exhibited.

By the letter dated 08.12.2014 the respondent suspended the grievant from duty in view of the removal directive from the United Kingdom given on 06.12.2014. During the suspension the claimant would be on full pay.

By the letter dated 07.12.2014 addressed to the respondent's In-flight Performance Manager one Pauline the grievant had admitted and apologised for the events of 07.12.2014 and in that letter the grievant further stated as follows,

> "**I have been going through some personal issues which have thrown me off balance and was honestly using the Khat to calm me to be able to function and counter my challenges and at the same time perform my job. Now I know this might have been the wrong way of countering my issues and am very sorry for any inconvenience my actions have caused. I regret my actions and request for leniency because I still need this job and I have always worked diligently with commitment to my duties. The issues I have been going through are personal in nature and were not easy to share and it was my sincere hope that I was going to overcome. It is my humble plea for forgiveness and to be accorded the help that I need to overcome my challenges. I promise this will not happen again, and will always follow the rules and regulations stipulated of the different countries we fly to.**
>
> **Yours sincerely,**
>
> **Anastasia Mueni Muli**
>
> **C3645**"

The respondent's report on the grievant dated 17.12.2014 stated that in view of the events of 06.12.2014 at the Heathrow Airport, London, the claimant was culpable of smuggling of goods; engaging in conduct likely to bring the respondent into disrepute; breach of professionalism and courtesy; and being a cabin crew member, she had admitted to using a prohibited substance that could produce mood changes or distort perceptions in humans – and all of which were contrary to her terms and conditions of service. The report signed by Pauline Kihara concluded that disciplinary action should be taken against the grievant.

The show cause letter was dated 17.12.2014. The grievant replied by her letter of 18.12.2014. She stated that she had declared the Khat under "**personal effects and foodstuff**" and the Khat was for personal use. She further stated, "**6. As earlier stated in my report to you dated 07th December, 2014, I had personal challenges and I do sincerely and honestly regret the inconvenience that my action caused to the Company....9. I have been and am still remorseful for my action and do kindly request that you do not consider a disciplinary action against me.**"

By the letter dated19.12.2014 the claimant was invited for panel hearing on 22.12.2014 at 1100 hours to answer the allegations as found in the report by Pauline Kihara. The record shows that the meeting must have been rescheduled to 06.01.2015 and the grievant attended with her union representatives. The union representatives took the view that the grievant had failed to pay duty but smuggling had not been established because she honestly believed she had made the declaration under "**personal effects and foodstuff**" and the Khat being for personal use and not having been consumed while on duty, the same did not amount to breach of professionalism and courtesy. They further stated that the grievant's challenges at home were creeping in the grievant's work environment but she was otherwise a good worker and a team player and the previous similar circumstances at the cargo and engineering departments had been resolved by giving assistance so that similar initiatives were necessary to assist the grievant. Further it was difficult to tell the value of the Khat as against the prescribed GBP 145 which equated to Kshs. 20, 000.00 whereas the Khat's Kenyan value was approximately Kshs.3, 000.00.

The record shows that the panel found that the case was unique and the grievant was heard and she stated as follows:

a. She was very sorry, she had no bad intentions, the Khat was for her personal use.

b. Her action was genuine and did not intend to put the company in bad light.

c. She had learnt from it, she still needed to be in KQ to support her children.

d. She was apologetic for carrying the Khat for her personal use.

e. She did not think that it would come to such big mess.

f. She did not see the amount and it was the three bunches of Khat she equated to the Boeing 1Ltr drinking water bottle.

g. She carried the Khat to enable her forget the issues that she had and enable her get some rest.

h. The Khat was normal in Kenya but in UK it was considered a drug. When she arrived in UK she knew that she had the Khat in her bag. When the customs asked every individual crew, she informed them that she had Khat for personal use. It was at that point that she was asked to open her bag and the fine was subsequently imposed. She confirmed that she had declared it as "**personal effects and foodstuff**" and when one had other items not listed in the C909, the crew normally declared it under the personal use.

i. The grievant confirmed that she did not know that it would be that risky.

The meeting concluded that the management was to make submissions by 09.01.2015; the union by 08.01.2015; and the panel chairperson by Friday 09.01.2015. The parties including the grievant signed the record of the proceedings.

At the meeting of 13.01.2015 the grievant was informed that the respondent had decided that her contract of service be terminated effective 13.01.2015. The grievant was informed about her right to appeal to the HR Director; Group MD; and to avail evidence in support of her appeal. The termination letter was dated 13.01.2015.

The grievant appealed to the Group Human Resources Director through her union's letter dated 14.01.2015. The main grounds were that the claimant had not been barred to enter the UK; she had Khat or Miraa for personal use; she had been remorseful and a second chance was appropriate; matters emerging after disciplinary panel hearing had been decided upon without the union and the grievant being given an opportunity to be head or make representations; and therefore the grievant ought to be reinstated. The appeal was heard on 06.02.2015 in presence of the grievant and union representatives. The union representatives urged the appeal and stated thus, " **Anastacia expressed herself that she had personal problems at the time and the khat she carried was for use in those circumstances. Therefore, she ought to be assisted by the company through EAP to overcome her problems instead of being condemned by termination.**" The union stated that the grievant had a family and she was the sole bread winner and the decision to terminate was too harsh. The management stated that by reason of the penalty imposed smuggling had been established and the respondent's reputation brought to disrepute; the grievant knew and admitted at the panel hearing that Khat was considered a drug in the UK; the UK High Commission did not say that she could not be rostered to work in the UK but did not commit that she could not be denied entry in the UK; it was inconsistent to use the Khat at her room while she was going to work in-flight the following day; and in view of previous similar cases termination was appropriate. The management concluded, "**Head of In-flight said she empathized with her but she could have approached HR to get EAP assistance. In this regard Anastasia produced a letter from a counselling firm, *The Raphaelites*, dated 4th February to confirm that she attended therapy there and completed the sessions**."

The decision on the appeal was conveyed by the letter dated 12.02.2015 addressed to the claimant's Secretary General as follows:

> "**Dear Sir,**
>
> **RE: Appeal Against Termination from Employment –Anastasia M. Muli S/N C3645**
>
> **I refer to your letter dated 14th January 2015 and the subsequent appeal hearing on the above subject.**
>
> **I have evaluated the grounds of appeal as well as the facts in the case and find that whereas the appellant had a compelling argument on the ground that khat is not really illegal if taken for personal use, it is however classified as "Class C" drug and is considered a depressant/stimulant in the Company's internal policies. Further, the fact that Anastasia was denied entry into the UK and fined GBP 300 supports the argument an impropriety had been committed by her either knowingly or unknowingly. The result is that the Company is restricted from deploying her on duty to the UK. The law requires the Company to deal with offences of this nature punitively and its Air Operator Certificate is put at risk if it does not do so.**
>
> **In view of the above, the disciplinary action of termination of employment contract, which is less severe than the disciplinary action of dismissal which is provided for in KCARs is upheld.**
>
> **In line with the grievance process, Anastasia is at liberty to appeal to the Group MD & CEO in the event that she is still aggrieved by the disciplinary action.**
>
> **Yours faithfully,**
>
> **Signed**
>
> **Alban Mwendar**
>
> **Group Human Resources Director**"

The appeal to the Group Managing Director and CEO was dated 20.02.2015 and signed by the claimant's Secretary General Moss Ndiema. The appeal was on 2 grounds. First the grievant never consumed the Khat while on duty and therefore, she was not under a psychoactive substance while on duty. Second, the grievant was not restricted to fly to UK as there was no entry in her passport to that effect. Thus the punishment was excessive, the grievant was remorseful as she had since resolved her problems with her husband and had since ceased using Khat to get over her family tribulations.

The Group Managing Director and CEO Mbuvi Ngunze by the letter dated 24.03.2015 stated that he had perused in detail the file and the appeal and upheld the decision to terminate.

The grievant testified to support the claimant's case and the respondent's witness (RW) was one Josephine Odegi, In-flight Performance Manager.

The Court has considered the pleadings, the evidence and the submissions filed for the parties. The Court makes findings as follows.

To determine the **1st issue**, the Court returns that the respondent upheld due procedure throughout the disciplinary proceedings as envisaged in section 41 and 45 of the Employment Act, 2007. The grievant was served a show-cause notice, she replied, she attended the disciplinary panel hearing with the trade union representatives and she exhausted the appeal procedures. The Court finds that she was accorded a fair process.

To determine the **2nd issue** the Court returns that the grievant's termination was on account of established and genuine reasons as envisaged in sections 43 and 45 of the Employment Act, 2007. In particular the respondent has established that the reasons for termination related to the grievant's conduct, compatibility and related to the respondent's operational requirements. The grievant does not deny that a penalty of GBP 300 was imposed as well as a directive that the respondent removes her forthwith from the UK as was directed by the immigration officer.

The removal immediately affected the respondent's operations because the grievant's tour on duty was abruptly stopped and the grievant could not perform to discharge her assigned duties as an In-flight attendant. The claimant delved into future possibility of the grievant's continued service and whether Khat was by its classification a psychoactive substance and whether the UK authorities would not deny the grievant entry on future trips. However the Court considers that such were secondary considerations. The matter which was at hand was that by reason of the penalty and removal order, the grievant was unable to continue on the assignment at hand as an In-flight Attendant. By the grievant's conduct and which the grievant admitted, the Court finds that the reasons for termination were genuine as they were valid as at the time of termination.

To answer the **3rd issue** for determination the Court finds that the termination was not unfair both in procedure and substance. However, as will be shown later in the judgment, in the circumstances of the case, the termination did not amount to a proportionate punishment.

The **4th issue** for determination is whether the termination amounted to excessive punishment or was not proportionate in the circumstance of the case. The grievant admitted her misconduct and mitigated that she had personal challenges which predisposed her to use Khat as a moderating substance and she apologised as she was remorseful in that regard. The respondent appears to admit that it operated employee assistance programme and the Head of In-flight empathized with the grievant and is documented, **"...but she could have approached HR to get EAP assistance.**" RW testified in cross-examination thus, "**I do not work for Human Resources Department. We have employee support system. We had a programme to support employees. From records I see she had a problem. She says she used Khat to manage her issues**." The Court has considered that evidence and the position by the Head of In-flight who was the grievant's line manager and who empathized with the grievant at the appeal stage and that the grievant should have approached the HR to give EAP assistance. The Court considers that the attitude by the Head of In-flight was misguided in that regard because in opening up in her letter of 07.12.2014 the grievant was essentially and thereby reporting her personal challenges and therefore the predisposition to use of Khat - hence providing the respondent with a good opportunity to invoke the staff support system under the EAP by its Human Resources Department. At the panel hearing the claimant's position that the grievant had indicated she had a problem that drove her to use Khat was a clear cry for assistance was not challenged or doubted at all. The claimant's further case that those who had been helped in the past had come back and exceeded expectations in their work was not disputed at all. Further the claimant's position thus, "**The phase the in-flight team is facing has happened before in Cargo and Engineering and it was resolved and this needs to happen at In-flight**" was not challenged.

The Court has considered that evidence and returns that the claimant has established that in the circumstances of the case, the grievant had established a case for invoking of the respondent's EAP but which was not done by the respondent's Human Resources Department as had been done for other staff in similar circumstances. The Court finds that the failure to invoke the EAP and deciding to instead terminate the claimant from employment amounted to unfair labour practice which would justify the Court's interference with the otherwise not unfair termination; in strict consideration of procedure and the reason for termination. Once the respondent undisputedly instituted an EAP, it is the Court's view that it was thereby bound to apply it equally to all employees who deserved it. The grievant had a clean record of service and there was no good reason advanced why the EAP was not invoked in her favour and even after she took efforts to go for counselling on her own initiative and expense, the respondent failed to take action and to reconsider the case within its EAP. The Court finds that it was unfair and not proportionate.

While making that finding the Court considers that it is in section 3 of the Employment and Labour Relations Court Act, 2011 that the Court is required to determine the disputes that come before it taking into account, ***inter alia***, proportionality. In this case the respondent acted against its own employee assistance programme and no justifiable cause has been established for failure to invoke the assistance. The evidence is that the grievant had not been completely excluded from ever performing her work and in particular it had not been ruled out that she could not fly to the UK at all. The letter on appeal by the Group Human Resource Director dated 12.02.2015 acknowledged that Khat was not really illegal if taken for personal use but it was classified as a Class C drug and considered a depressant or stimulant in the respondent's internal policies. However at the panel and other administrative hearings it had been confirmed that the grievant never consumed the Khat while on duty and further that she was to rest for two days in her room in London prior to resuming her assignments on duty for the return flight to Nairobi. It is the Court's findings that it was not established that the grievant had used Khat while on duty. While the Court has found that the imposition of the penalty and removal from the UK of the grievant as was directed disrupted the respondent's operational requirements, in view of the EAP, the circumstances of the case are that the grievant's misconduct did not deny her access to the EAP and the termination was not a proportionate punishment in the circumstances of the case. The Court finds that the respondent in that regard failed to access the grievant the EAP and thereby subjected her to unfair labour practice contrary to Article 41 of the Constitution and section 5 of the Employment Act, 2007 because it has been established that she was treated differently from other employees in similar circumstances that the respondent's EAP had been invoked.

While making that finding the Court follows its opinion in the judgment in **Peter Wambugu Kariuki and 16 others –Versus- Kenya Agricultural Research Institute [2013]eKLR,** thus "**Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work**."

In the present case it was not in dispute that the respondent had instituted the employee assistance programme and it was not disputed that in the circumstances the grievant was entitled to access the employee assistance programme as demonstrated by her line manager's empathy in that regard but she was not emplaced on the programme. The respondent must be commended for instituting such employee assistance programme as a policy that enhanced family life while making it easier for its employees to work. The Court finds that the employee assistance programme (EAP) amounted to a work-life balance policy at the respondent's workplace that was meant to assist employees like the grievant towards appropriately combining personal and work responsibilities. The Court considers that once an employer has instituted appropriate work–life policies such as flexible work arrangements, voluntary employment breaks, information or referral services, or other employee support or assistance programme, the policies should be accessed and implemented equally and uniformly to all deserving employees so as to meet the test of fair labour practices and policies.

In the present case, the Court finds that whereas the policy had undisputedly been instituted and applied in previous appropriate cases involving the respondent's employees, it was unfortunate and it amounted to unfair workplace practice for the policy not to have been

invoked in the grievant's case (and for unexplained grounds) even when the situation was clear that the policy was available, applicable and appropriate. The Court finds that the grievant opened up in replying to the show-cause notice and at the disciplinary hearing and cried out for help so that her openness, in the Court's opinion presented a classical case of an employee who the respondent was required to swiftly emplace on the employee assistance programme. The Court further finds that no material was placed before the Court as establishing that the grievant's case and situation was in any manner inconsistent with placement on the employee assistance programme.

It was urged for the respondent that by imposing a termination with payment of salary to 13.01.2015, payment of pro-rate leave days due, 2 months in lieu of notice, and provident fund dues, the punishment imposed was proportionate in comparison to dismissal. The Court finds otherwise because the respondent clearly failed (and for no good reasons established) to accord the grievant the established employee assistance programme which the Court has found was appropriate in the circumstances of the case.

As submitted for the claimant the respondent has therefore failed to establish why it deviated from the recommendation by the chairperson of the disciplinary panel (one Richard Omoro) dated 13.01.2014 where he found that the grievant was only culpable of smuggling and the specific nature of the smuggling was in relation to tax evasion but she was not convicted of being in possession or handling any illegal substances. The chairperson of the panel then recommended that the grievant be issued with a final warning. The Court finds that recommendation to have been the proportionate punishment and which when implemented would have accessed the grievant to the respondent's employee assistance programme. The Court finds that the termination was therefore excessive and unjustified.

The respondent submitted that the recommendation had not been executed and therefore it had low evidential value. The Court notes that the respondent while being aware of that document failed to file its own panel chairperson's decision and in the circumstances, on a balance of probability, the document as exhibited for the claimant is found to reflect the true position of the decision of the chairperson of the disciplinary panel. Further, in view of the Chairperson's decision and earlier findings in this judgment on failure to access the grievant the EAP, the Court returns that on the steps in assessing existence of proportionality in the decision made as was held in **Dowling –Versus-Ontario (Workplace Safety & Insurance Board) 192 OAC 126 (CA)** thus, determining the nature and extent of misconduct; considering the surrounding circumstances; and deciding whether dismissal was warranted (i.e whether dismissal is a proportionate response), the Court returns that dismissal was not a proportionate response in the present case. The claimant showed that whereas the grievant paid the penalty of GBP 300, it was not apparent that the Khat she possessed was within GBP 145 as prescribed so that the grievant was not clear in that regard and further, Khat had not been specifically listed as a drug and the grievant must have acted in good faith in declaring it as personal effects and foodstuff. The Court has further found that the failure to access the grievant EAP amounted to unfair labour practice in circumstances whereby she had opened up her private situation and therefore eligible for the employee assistance programme.

The **5th issue** for determination is whether the claimant is entitled to the remedies as prayed for. It is clear that the three years of limitation for grant of reinstatement have lapsed as provided for in section 12 of the Employment and Labour Relations Court Act, 2011. The Court has considered the parties respective positions and all material on record. The Court returns that the claimant has established that the termination was excessive. The grievant has since learned her lessons and has gone for counselling to remedy the personal challenges that propelled her thirst for Khat. She was remorseful and she promised to improve and not to repeat the misconduct. She had a clean record of service but for the disciplinary case leading to the present suit. The Court considers that such are attributes of a good employee deserving of a second chance. There is no established reason that she cannot work as an In-flight Attendant or in a comparable position. In alternative to reinstatement section 49 (3)(b) of the Employment Act, 2007 provides for re-engagement of the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage. The Court has considered all the special circumstances of the case as found earlier in the judgment and returns that re-engagement is a just and proportionate remedy in the special circumstances of the case. The Court considers that the period from the date of termination to the date of re-engagement would be treated as leave without pay so as to preserve continuity in service. The Court has considered the parties' respective margins of success and each party shall bear own costs of the suit.

In conclusion the suit is hereby determined and judgment is hereby entered for the parties for:

a. The respondent to re-engage the grievant in the position of In-flight Attendant at the prevailing remuneration and benefits or in work comparable to In-flight Attendant, or other reasonably suitable work, at substantially the same remuneration and benefits and the re-engagement to be effective 01.07.2019 when the grievant will report to the respondent for appropriate assignment.

b. The period from the date of termination to the date of re-engagement is treated as leave without pay for continuity in service.

c. The parties to bear own costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 28th June, 2019.**

BYRAM ONGAYA

JUDGE