



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1515 OF 2017**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 9<sup>th</sup> October, 2019)*

**HENRY OWINO OBONYO.....1<sup>ST</sup> CLAIMANT**

**ALLOICE ODHIAMBO LUMUTU.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. The Claimants filed the Cause herein on 3<sup>rd</sup> August 2017, seeking to challenge the termination of their employment. However, they filed an Amended Memorandum of Claim wherein they sought the following prayers:-

**1<sup>st</sup> Claimant**

- a. *A declaration that the termination process as carried out by the Respondent was unlawful and that the same amounted to unfair termination.*
- b. *A mandatory order of injunction compelling the Respondent to reinstate the Claimant to the position of employment he held prior to his termination without loss of benefits.*
- c. *Payment of salary from the time of termination to the time of judgment.*
- d. *Punitive damages for malicious and oppressive conduct by the Respondent.*
- e. *Damages for loss of reputation and earnings.*
- f. *General damages for pain, suffering and emotional distress to Claimant.*
- g. *Air ticket refund amounting to KShs. 250,000.00.*

**In the Alternative**

- h. *Payment of salaries for the remaining period of time before retirement.*
- i. *Payment of provident fund contribution from the employer.*
- j. *A mandatory injunction compelling the Respondent to pay the Claimant all salary and privileges lost and not paid since the date of termination to the date of judgment.*
- k. *An order compelling the Respondent to ensure that the Claimant and his dependents continue to enjoy rebated tickets as they did prior to their termination, the Claimant having worked for 10 years with the Respondent which is the minimum requirement for life rebate benefits.*
- l. *A declaration that the internal dispute resolution mechanism initiated by the Respondent through its structures which upheld the termination of the Claimant's employment contract was unfair, malicious, unprocedural and against natural justice.*

- m. 12 months salary pursuant to section 49 (1) (c) of the Employment Act 2007 being compensation for wrongful dismissal, unfair and/or unlawful termination of employment in the sum of KShs. 4,165,536.00.
- n. Punitive damages for malicious and oppressive conduct by the Respondent.
- o. Damages for loss of reputation and earnings.
- p. General damages for pain, suffering and emotional distress to Claimant.
- q. Air ticket refund amounting to KShs. 250,000.00.
- r. Costs of the suit and interest in (c) and (m).
- s. Any other order the court may deem fit to issue.

2<sup>nd</sup> Claimant

- a. A declaration that the termination was unlawful and that the same amounted to unfair termination.
- b. A mandatory order of injunction compelling the Respondent to reinstate the Claimant to the position of employment he held prior to his termination without loss of benefits.
- c. Payment of salary from the time of termination to the time of judgment.
- d. Punitive damages for malicious and oppressive conduct by the Respondent.
- e. Damages for loss of reputation and earnings.
- f. General damages for pain, suffering and emotional distress to Claimant.
- g. Air ticket refund amounting to KShs. 250,000.00.

**In the Alternative**

- h. Payment of salaries for the remaining period of time before retirement.
- i. Payment of provident fund contribution from the employer.
- j. A mandatory injunction compelling the Respondent to pay the Claimant all salary and privileges lost and not paid since the date of termination to the date of judgment.
- k. An order that the Respondent does ensure that the professional license held by the 2<sup>nd</sup> Claimant is renewed and updated.
- l. An order compelling the Respondent to ensure that the Claimant and his dependents continue to enjoy rebated tickets as they did prior to their termination, the Claimant having worked for 10 years with the Respondent which is the minimum requirement for life rebate benefits.
- m. A declaration that the hearing initiated by the Respondent through its structures which upheld the termination of the Claimant's employment contract was unfair, malicious, unprocedural and against natural justice.
- n. 12 months' salary pursuant to section 49 (1) (c) of the Employment Act 2007 being compensation for wrongful dismissal, unfair and/or unlawful termination of employment in the sum of KShs. 6,993,468.00.
- o. Punitive damages for malicious and oppressive conduct by the Respondent.
- p. Damages for loss of reputation and earnings.
- q. General damages for pain, suffering and emotional distress to Claimant.
- r. Air ticket refund amounting to KShs. 250,000.00.
- s. Benevolent fund amounting to KShs. 50,000.00.
- t. Costs of the suit and interest in (c) and (m).

***u. Any other order the Court may deem fit to issue.***

2. The 1<sup>st</sup> Claimant was employed by the Respondent on 7<sup>th</sup> August 2000 as a graduate trainee and thereafter rose to the position of Manager Technical Materials and Services Procurement. At the time of termination, he was earning a salary of Kshs. 347,128.00.
3. The 2<sup>nd</sup> Claimant was employed by the Respondent on 15<sup>th</sup> October 2001 as an apprentice and rose through the ranks to the position of Senior Licensed Aircraft Engineer. At the time of termination, he was earning a salary of KShs. 582,789.00. The Claimants were also entitled to other benefits such as air tickets rebates and benevolent benefits.
4. The Claimants aver that they were diligent and hardworking employees who discharged their obligations with utmost commitment as demonstrated in the performance appraisal conducted on 8<sup>th</sup> August 2010 where they were found to have exceeded their expectations. This culminated into a salary increase.
5. In the year 2013 to 2016, the Respondent conducted a forensic audit, through Deloitte Kenya, due to the financial difficulties it was experiencing and a report was prepared which implicated the Claimants.
6. Consequently, on 24<sup>th</sup> May 2016 the Claimants were issued with suspension letters to proceed on suspension for 60 days in order to pave way for investigations. They were recalled from suspension on 21<sup>st</sup> July 2016 and issued with letters to show cause on the same day.
7. They responded to the same on 27<sup>th</sup> February 2016 (sic) and 25<sup>th</sup> July 2016, respectively. However, their response was found to be inadequate and they were subjected to disciplinary proceedings which were conducted on 25<sup>th</sup> August 2016 and 11<sup>th</sup> August 2016 respectively.
8. The allegations against the 1<sup>st</sup> Claimant were that he was operating parallel businesses that offered aviation services to other airlines, poaching the Respondent's employees and receiving payment from Lufthansa for exchange of information.
9. He contends that the company is a family company which has never operated since 2008. He further contends that such consultation did not violate the Respondent's Code of Business Conduct and Ethics as employees were allowed to take additional part-time jobs or do consultancies. His further contention is that there is no evidence of the Respondent's allegations.
10. On the other, the 2<sup>nd</sup> Claimant contends that he was not a director of the 1<sup>st</sup> Claimant company neither did he have any relationship with it. He avers that the charge of conducting business under Buseka Investments Limited was dropped at the disciplinary hearing.
11. The Claimants aver that the disciplinary proceedings were unfair and unlawful because the Respondent failed to give them the forensic audit report despite their numerous demands, and which formed the basis of the Respondent's termination decision.
12. Further, the Respondent failed to substantiate the allegations made against them as their submissions were never taken into consideration both at the hearing and on appeal. To date, the Claimants do not know why their employment was terminated. They aver that the reason indicated on the termination letter did not reflect the disciplinary process.
13. The Claimants aver that they have been unable to secure employment due to the unique nature of their specialty. They also aver that they have suffered mental anguish, financial strain and reduced creditworthiness.
14. CW1 and the 2<sup>nd</sup> Claimant in this case, adopted his witness statements and relied on the documents filed, as his evidence. He testified that when he was invited for his disciplinary hearing, he requested to be issued with the details of directors of the impugned company and the evidence against him.
15. Further, he disputed the hearing date arguing that there was not sufficient time but was he not given more time. It was also his evidence that he raised the issue of the panel constitution, being that, the Technical Director was not supposed to sit in the panel as he was senior to the Chair and was also to sit on appeal. His appeal was later placed before the said Director. It was his testimony that unethical issues were to be dealt with in a different manner.
16. During cross-examination by Counsel for the Respondent, he testified that his contract forbade him from issuing services to another company without the Respondent's consent. It was also his testimony that Clause 17.2.1 allowed the Respondent to rely on any report to suspend him.
17. He conceded that when he requested for information, the Respondent informed him that the same could not be availed as investigations were still ongoing, but maintained that he had wanted information from the forensic audit report and the investigations. He conceded that his name appeared in one of the letter heads. He maintained that the appeal process was flawed as it was not done during the required timelines.
18. CW2 and the 1<sup>st</sup> Claimant in this case, adopted his witness statements filed on 3<sup>rd</sup> August 2017 and 21<sup>st</sup> March 2018 and relied on the documents filed, as his evidence. It was his testimony that the 3<sup>rd</sup> charge was not there initially.
19. He testified that the Director sat in the appeal proceedings yet he was also in the panel that made the decision to terminate his employment, which was against the principles of natural justice.

20. During his cross-examination by Counsel for the Respondent, he confirmed that he was supposed to get consent of the Respondent before engaging in other business.
21. He admitted that there was no express communication indicating that he had been exonerated of the charges. When presented with a document from page 12 of the Respondent's bundle of documents, he confirmed that he had indeed drafted the proposal to issue consultancy services to Astral Aviation. However, he denied knowledge of their being a contract between the Respondent and Astral Aviation.
22. He contended that at the time he wrote the proposal, the Respondent was not buying aircrafts. He admitted that he had indicated that the 2<sup>nd</sup> Claimant was a director of Henpen but denied that he ever operated Henpen.
23. It was his testimony that he was aware that he was not supposed to engage in any duties where there would be conflict of interest. He denied dealing with Leki Aviation and indicated that an affidavit sworn by a representative of the company was withdrawn. He denied employing one Victor Onyango. He then conceded that clause 17.4 (b) related to receiving of the appeal.
24. The Respondent filed its Statement of Response on 4<sup>th</sup> October 2017 urging this Court to dismiss the claim. They contend that the Claimants had a fiduciary duty to the Respondent because their roles impacted on the Respondent's performance. They aver that the Claimants are not entitled to the rebated air tickets as they were privileges accorded to them.
25. They contend that the Claimants did not request to be furnished with a copy of the Forensic Audit Report. Further, the 1<sup>st</sup> Claimant confirmed that he was aware of the Report as he had discussed it with an officer from Deloitte.
26. The Respondent avers that the Claimants were sent on suspension after the Report revealed that they were directors of a company that conducted similar business with regards to aircraft engineering maintenance activities, which they had failed to declare.
27. They contend that the letters to show cause were issued with supporting documentation and further contend that during the disciplinary hearing, the charges were explained to the Claimants. They aver that the appeal decision was based on the notes on record from the previous hearings as against the grounds of appeal and deny the allegations of biasness.
28. The Respondent avers that the offences under clause 17.11 of the Manual were not exhaustive. They contend that the non-inclusion of an offence in the clause did not make the Claimants' actions any less of an offence or bar the Respondent from taking any appropriate disciplinary action.
29. It is also their contention that lifting the Claimants' suspension did not mean that the allegations against them had been cleared. The Claimants were on full pay throughout their suspension.
30. It is the Respondent's averment that clauses 17.9 (ii) and 17.10 regarding the timelines, were not couched in mandatory terms.
31. The Respondent further avers that the termination of the Claimants' employment was fair as the reason was valid and the procedure was fair. The termination was based on breach of their contracts and the Procurement Policies Manual.
32. RW1, Grace Wamuti, testified on behalf of the Respondent. She adopted her witness statement filed on 21<sup>st</sup> June 2019. She testified that the Claimants never disclosed their business to the Respondent. She stated that reinstatement was impossible as the Claimants' positions did not exist anymore because of the change in structure.
33. Upon cross-examination by the 2<sup>nd</sup> Claimant, she admitted that the report relied upon to terminate the Claimants' employment was not in Court. She admitted that the Statement of Purpose from Henpen at page 297 of their bundle, did not have any signature and whose source was the 1<sup>st</sup> Claimant.
34. She also admitted that it was a mere proposal and not a contract. It was her testimony that the letter to show cause indicated that the 2<sup>nd</sup> Claimant was an employee rather than a director.
35. It was also her testimony that a technical director could sit in the panel. She conceded that when the issue of conflict of interest was raised, the panel ruled that there was no breach. She further conceded that there was no evidence that the 2<sup>nd</sup> Claimant was consulting for Henpen.
36. Upon cross-examination by counsel for the 1<sup>st</sup> Claimant, she conceded that the 1<sup>st</sup> Claimant was not involved in the procurement of jet fuel. She admitted that the 1<sup>st</sup> Claimant's employment was terminated before the entire report was received and that there was never conclusive evidence found because the Respondent transitioned thereafter.
37. She conceded that the issue of confidentiality and conflict of interest, though included in the termination letter, was not part of the charges in the letter to show cause. It was also his concession that Henpen never conducted any business.

#### **Submissions by the Parties**

38. The Claimants in their submissions, each filed on 4<sup>th</sup> July 2019, submit that the termination of their employment was unfair and unlawful. Crucial documents such as the forensic report were not availed in the course of the disciplinary process, a fact that was admitted by RW1. This was contrary to Article 50 (2) of the Constitution.

39. Further, there were no justifiable reasons to terminate their employment and the internal disciplinary procedures were not followed. For instance, their employment was terminated for a charge that was never stated in their letters to show cause, this was contrary to clause 17.2.2. of the Human Resource Manual.
40. It is therefore their submissions that they have discharged their burden of proof for unfair termination hence entitled to the reliefs sought and especially compensation for wrongful employment. They rely on the case of **Moses Ochieng vs. Unilever Kenya Limited [2018] eKLR.**
41. They also submit that their employment should be reinstated as it is difficult to get employment, the termination of their employment having been centered on integrity. They rely on the cases of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR** and **Peter Njoroge Kibe vs. Teachers Service Commission [2017] eKLR.**
42. They submit that if the remedy is unavailable, they are entitled to loss of future emoluments as they had legitimately expected to work for the Respondents until retirement.
43. The Respondent in their submissions filed on 17<sup>th</sup> July 2019, submit that the Claimants were suspended under clause 17.2.1 (b) (ii) of the HR Manual where an employee can be sent on suspension if there is a likelihood that they will interfere with investigations.
44. It is their submissions that they availed all the relevant documents to the Claimants and solely relied on this information to arrive at a decision. As such, they followed the right procedure in law and as per their manual.
45. The Respondent submits that it has proved that it discharged procedural fairness requirements as set out in section 41 of the Employment Act, the Claimants contestations notwithstanding.
46. The Respondent further submits that it was justified in terminating the Claimants' employment because the 1<sup>st</sup> Claimant was operating rival businesses while the 2<sup>nd</sup> Claimant worked for it, which gave rise to the issue of conflict of interest thus in breach of their contract.
47. The Claimants did not produce any evidence to the contrary at the disciplinary proceedings. They rely on the case of **Rajab Barasa & 4 Others vs. Kenya Meat Commission [2016] eKLR.**
48. The Respondent therefore submits that it had valid reasons for terminating the Claimants' employment and did not depart from the findings and decision of the disciplinary panel, contrary to the Claimants' allegations. They rely on the cases of **Lawrence Nyamichaba Ondari vs. National Hospital Insurance Fund [2018] eKLR**, **Polkey vs. A.E. Dayton Services Limited [1987] UKHL**, **Mwanajuma Juma Kunde vs. KAPS Municipal Parking Services Limited [2013]** and **British Leyland UK Limited vs. Swift [1981] I.R.L.R 91.**
49. The Respondent submits that the Claimants are not entitled to reinstatement because of the lapse of time since their employment was terminated and due to the fact that the Respondent has lost confidence in them. They rely on the case of **Lawrence Onyango Oduori vs. Kenya Commercial Bank Limited [2014] eKLR**, **Kenya Airways Limited vs. Allied & Aviation Workers Union Kenya & 3 Others [2014] eKLR.**
50. The Respondent submits that it has proved that the termination was fair. However, should the Court find otherwise, it should be guided by section 49 of the Employment Act 2007 in awarding compensation.
51. They urge this Court to take into consideration its financial constrains and award the Claimant 3 months gross salary at the time of termination. They rely on the case of **CMC Aviation Limited vs. Mohammed Noor [2015] eKLR.**
52. The Respondent submits that the Claimant is not entitled to the air ticket rebate because it was not specifically pleaded or proved and was a privilege, not a right. They rely on the case of **Jimi Masege vs. Kenya Airways Limited [2010] eKLR.**
53. The Respondent submits that the Claimants are not entitled to the claim for salary until retirement, as the same are not provided for in law. They rely on the case of **Alphonse Maghanga Mwachanya vs. Operation 680 Limited [2013] eKLR**, **Engineer Francis N. Gachuri vs. Energy Regulatory Commission [2013] eKLR**, **Elizabeth Wakanyi Kibe vs. Telkom Kenya Limited [2014] eKLR** and **D.K. Njagi Marete vs. Teachers Service Commission [2013] eKLR.**
54. The Respondent submits that the Claimants are not entitled to benefits sought from the date of termination to the date of judgment as the same are not available to a former employee since such privileges are predicated on the actual performance of the employment contract. They rely on the case of **Pravin Bowry vs. Ethics & Anti-Corruption Commission [2013] eKLR** and **Kenya Ports Authority vs. Silas Obengele [2018] eKLR.**
55. I have examined all evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. *Whether there were valid reasons to warrant termination of the Claimants.*
2. *Whether the Claimants were accorded a fair disciplinary process before being dismissed.*
3. *Whether the Claimants are entitled to the remedies sought.*

#### **Reasons for termination**

56. CW1 herein was the 2<sup>nd</sup> Claimant who testified that he was terminated as per the letter dated 9<sup>th</sup> November 2016 (Page 351) which indicated as follows:-

**“STAFF FILE COPY**

**DI/00C1974/P**

**9th November, 2016**

**Through Technical Director**

**Lumutu, Mr. Aloice Odhiambo**

**S/N: 00C1974**

**Dear Aloice,**

**RE: Termination of Contract**

**We refer to the show cause letter under reference DE/0001974/PF dated 21<sup>st</sup> July 2016, your response thereto dated 25<sup>th</sup> July 2016 and to the subsequent panel hearing in the matter held on 11<sup>th</sup> August 2016.**

**We wish to advise you that after considering all the facts and evidence in the matter, including adduced during the panel hearing, the charge as leveled against you in the show cause letter with regards to**

**M/S Henpen Aviation Consultancy Services has been confirmed. It has been established that you breached Clause 16 (a & b) of your contract of employment on conflict of interest and confidentiality.**

**Your conduct as stated in the show cause letter amounts to misconduct in accordance with the provisions of Clause 7.12.1 (b) of the Company's Human Resources Policies Manual.**

**Consequently, Management has decided to terminate your contract of employment with effect from 9<sup>th</sup> November 2016.**

**Upon clearing with the Company including undergoing an exit medical check-up with KQ clinic and signing all the necessary discharges, you will be paid the following entitlements less any amount that you may owe the Company:-**

- 1. Salary and all applicable allowances up to and including 9<sup>th</sup> November 2016.**
- 2. Three months' salary in lieu of notice.**
- 3. Accrued leave as of 9<sup>th</sup> November 2016.**
- 4. Provident Fund Contributions in accordance with the prevailing Provident Fund Rules.**

**Less:**

**Any amount that you may owe the company.**

**Kindly sign the attached duplicate copy of this letter to signify your understanding and receipt and return it to the undersigned.**

**Yours faithfully,**

**Signed**

**Egla Too**

**Ag. Head of HR Relationship.....”**

57. From this letter, the 2<sup>nd</sup> Claimant was indicated to have breached Clause 16(a) and (b) of his contract of employment on conflict of interest and confidentiality. It was stated that it was a misconduct in terms of Clause 7.12.1(b) of the Company's Human Resource Policies Manual.

58. I have looked at appointment letter of the Claimant dated 8/10/2001. I note that Clause 16(a) & (b) are not part of this contract. The Clause that deals with conflict of interest is a Clause that is not numbered but it forbids the Claimant from engaging in any other business or

receiving any reward, commission or profit by virtue of his office.

59. Prior to this termination, the Claimant had been served with a suspension letter (page 289 of Claimant's documents) which indicated that the 2<sup>nd</sup> Claimant had been suspended for the reason that he had not declared a business he was engaged in contrary to the Code of Business Conduct and Ethics form. The suspension letter stated as follows:-

**"Our Ref:DE/00C1974/PF**

**24th May 2016**

**Lumutu, Mr. Aloice Odhiambo**

**Through Technical Director**

**Dear Aloice**

**Ref: Suspension from duty**

**As communicated to staff in the past, Kenya Airways contracted forensic auditors to conduct a forensic audit on company activities.**

**As part of that audit, it has come to our attention that you are a director of a certain company that conducts similar business as Kenya Airways with regards to Aircraft Engineering Maintenance Activities which in itself is a conflict of interest.**

**Our records have revealed that you did not declare the business in question on the Code of Business Conduct and Ethics form that you completed on the 22<sup>nd</sup> April 2015. This business has been mentioned in the forensic audit and as such we would like to investigate further to ensure that Kenya Airways is not negatively impacted by this conflict of interest.**

**In view of the above, this is to advise that you have been suspended from duty with effect from 24th May 2016 in accordance with the HR Manual 17.2.1 (b) (ii) for a period of 60 days to allow for further investigations in the above stated matter. You will be on full salary during the suspension period.**

**You will be required to avail yourself as may be advised by your Manager. Kindly ensure to leave your current postal/residential address, email and telephone number with your Manager.**

**Yours faithfully,**

**Signed**

**Martyn Haines**

**Technical Director....."**

60. Through a letter dated 21.7.2016, the 2<sup>nd</sup> Claimant's suspension was lifted and he was asked to report to work on 22<sup>nd</sup> July 2016. The lifting of the suspension was not conditional or subject to any investigations.

61. On the same day suspension was lifted, the 2<sup>nd</sup> Claimant was also issued with a show cause letter which indicated that a forensic Audit had been carried out and which disclosed the following:-

**1) "That he operated and/or worked for a private business – Henpen Aviation Consulting Services (Henpen) without disclosing and seeking prior permission.**

**2) That Henpen Aviation Consulting Services provided services to other Airlines.**

**3) He operated another business called Buseka Investment Limited without disclosing or seeking prior permission.**

62. He was asked to show cause why disciplinary action should not be taken against him for the breach of Clause 1.1 of Code of Business Ethics (CBCE).

63. He responded to the show cause denying any knowledge or dealing with Henpen Aviation Services. He also asked to be furnished with a list of Directors or his appointment details.

64. As to Buseka, he indicated that it was a merry go round kind of arrangement with family members established in 2008.

65. There is no indication that the Respondent replied to the letter but instead invited the 2<sup>nd</sup> Claimant to a Panel hearing vide a letter dated

9.8.2016 (page 113) where the hearing was stated to have proceeded on 11.7.2016 which was a date earlier than 9.8.2016, the date of the letter of invite but the hearing proceeded on 11.8.2016. The Respondent had also indicated that they could not furnish the Claimant with the investigation file or report.

66. The 2<sup>nd</sup> Claimant was able to establish that he was neither a Director or an employee of Henpen Aviation Consulting Services which fact was confirmed by the RW1 and 1<sup>st</sup> Claimant in their evidence in Court.

67. This was confirmed by records from the Registrar of Companies dated 26<sup>th</sup> May 2016 which showed that the Directors are Penina Atieno Odhiambo and Henry Obinyo Owino.

68. There was no evidence that the 2<sup>nd</sup> Claimant worked for the said Company either.

69. As for the issue of Buseka Limited, the Panel hearing was able to exonerate the 2<sup>nd</sup> Claimant and found that there was no conflict of interest in the said Company from the 2<sup>nd</sup> Claimant and the Respondent.

70. In view of this analysis, it is my finding that there was no valid reasons to terminate the services of the 2<sup>nd</sup> Claimant.

71. As for the 1<sup>st</sup> Claimant, he was terminated vide a letter dated 7<sup>th</sup> November 2016 which letter stated as follows:-

***“STAFF CONFIDENTIAL***

***DI/0007616/PF***

***7th November, 2016***

***Through Head of Supply Chain***

***Obonyo, Mr. Henry Owino***

***SN:0007616***

***Dear Henry,***

**RE: Termination of Contract**

***We refer to the show cause letter under reference DA/0007616/006 dated 21<sup>st</sup> July 2016, your response thereto under reference DA/0007616/026-SC dated 25<sup>th</sup> July 2016 and to the subsequent panel hearing in the matter held on 25<sup>th</sup> August 2016.***

***We wish to advise you that after considering all the facts and evidence in the matter, including evidence adduced during the panel hearing, the charge as leveled against you in the show cause letter have been confirmed. It has been established that you:-***

- Failed to maintain and/or preserve the confidentiality of the tender process as required by clauses 3.3, 5.6.7 and 5.9.2 of the Company's Procurement Policies Manual (PPM).***
- Breached Clause 18 (Conflict of Interest Policy) of the PPM.***
- Breached the conflict of interest and confidentiality clause 18 (a & b) in your contract of employment.***

***Your conduct as stated in the show cause letter amounts to misconduct in accordance with the provisions of Clause 7.12.1 (b) of the Company's Human Resources Policies Manual.***

***Consequently, Management has decided to terminate your contract of employment with effect from 9<sup>th</sup> November 2016.***

***Upon clearing with the Company including undergoing an exit medical check-up with KQ clinic and signing all the necessary discharges, you will be paid the following entitlements less any amount that you may owe the Company:-***

***1. Salary and all applicable allowances up to and***

***including 7<sup>th</sup> November 2016.***

***2. Three months' salary in lieu of notice.***

3. *Accrued leave as of 7<sup>th</sup> November 2016.*

4. *Provident Fund Contributions in accordance with the prevailing Provident Fund Rules.*

*Less:*

*Any amount that you may owe the company.*

*Kindly sign the attached duplicate copy of this letter to signify your understanding and receipt and return it to the undersigned.*

*Yours faithfully,*

*Signed*

*Egla Too*

*Ag. Head of HR Relationship Management .....*”

72. From this letter, the 1<sup>st</sup> Claimant is said to have failed to preserve or maintain confidentiality in the tender process as required by Clause 3.3, 5.6.7 and 5.9.2 of the Companies Procurement Policies Manual and that breached Clause 18 (Conflict of Interest Policy) of the Procurement Policies Manual (PPM) and also breached conflict of interest and Confidentiality Clause 18 (a & b) in his contract of employment.

73. Before this termination, the 1<sup>st</sup> Claimant had been suspended vide a letter dated 24.5.2016 which letter stated as follows:-

*“Our Ref: DA/0007616/019*

*24<sup>th</sup> May 2016*

*Obonyo, Mr. Henry Owino*

*S/N 0007616*

*Through Aq. Finance Director*

*Dear Henry,*

*Ref: Suspension from Duty.*

*As communicated to staff in the past, Kenya Airways contracted forensic auditors to conduct a forensic audit on company activities.*

*As part of that audit, it has come to our attention that you are a director of a certain, company that conducts similar business as Kenya Airways with regards to Aircraft Engineering Maintenance Activities which in itself is a conflict of interest.*

*Our records have revealed that you did not declare the business in question on the Code of Business Conduct and Ethics form that you completed on the 20<sup>th</sup> March 2015. This business has been mentioned in the forensic audit and as such we would like to investigate further to ensure that Kenya Airways is not negatively impacted by this conflict of interest.*

*In view of the above, this is to advise that you have been suspended from duty with effect from 24<sup>th</sup> May 2016 in accordance with the HR Manual 17.2.1 (b) (ii) for a period of 60 days to allow for further investigations in the above stated matter. You will be on full salary during the suspension period.*

*You will be required to avail yourself as may be advised by your Manager. Kindly ensure to leave your current postal/residential address, email and telephone number with your Manager.*

*Yours faithfully,*

*Signed*

*Dick Murianki*

*Ag. Finance Director .....*”

74. He was thereafter recalled from suspension vide a letter dated 21.7.2016 without any condition. But on the same day was served with a show cause letter expecting him to answer to certain findings. The show cause letter referred to a forensic Audit following investigations done by Deloitte and which disclosed that:-

**“DA/0007616/026**

**21<sup>st</sup> July 2016**

**Obonyo, Mr. Henry Owino**

**S/N 0007616**

**Dear Henry,**

**RE: SHOW CAUSE LETTER**

**As you are aware, the Board commissioned Deloitte to conduct a Forensic Audit of KQ Operations. Based on their investigations, the Forensic Auditors provided information which has disclosed that:-**

**a) You operated a private business - Henpen Aviation Consulting Services (“Henpen”)- without disclosing and seeking prior permission.**

*(Appendix 1).*

**b) Henpen Aviation Consulting Services provided services to other airlines. *(Appendix 2 and 3).***

**c) Recruited and/or encouraged employees of KQ to work for Henpen including Alloice Lumutu Odhiambo. *(Appendix 2 and 3).***

**d) You also operated another business- Buseka Investments Limited- without disclosing and/or seeking prior permission. *(Appendix 4, 5 and 6).***

**e) You actively solicited business from an existing KQ supplier using Henpen as its local agent in return to a commission of 5%. *(Appendix 7).***

**f) In addition you encouraged the said supplier to inflate its quoted prices so that equally share the enhance price. *(Appendix 7).***

**g) Undermined competitive process by disclosing to Lufthansa the details of other bidders tender prices. *(Appendix 8).***

**h) Received payment in the form of 5% commission from Lufthansa for ordered goods and services.**

*(Appendix 9).*

*In light of the foregoing, you are hereby required to show cause why disciplinary action should not be taken against your for:-*

**i) Using your authority for personal gain contrary to Clause 3.2 of the Purchasing Procedures Manual (“PPM”) *(Appendix 10)***

**ii) Failure to maintain and/or preserve the confidentiality of the tender process as required by clauses 3.3, 5.6.7 and 5.9.2 of the PPM. *(Appendix 10, 11 &12)***

**iii) Breach of Clause 18 of the PPM, Clause .1 of the Code of Business Conduct and Ethics (“CBCE”) as well as your contract of employment on conflict of interest. *(Appendix 13 & 15)***

**iv) Breach of Clause.1 of the Code of Business Conduct and Ethics (“CBCE”), clause 17 of the PPM and your contract of employment on personal investments. *(Appendix 14 & 15)***

**Your written and signed response should reach the undersigned within two days of receipt of this letter. Should you fail to respond to the letter within this time frame without permission from the undersigned or other acceptable justification, appropriate action in accordance with the Staff Rules and Regulations and the Labour Laws will be taken.**

**Enclosed are copies of the 15 appendices as enumerated in**

**the above paragraphs.**

*Your faithfully,*

*Signed*

*Chris Oanda*

*Head of Supply Chain .....*”

75. The 1<sup>st</sup> Claimant responded to the show cause letter vide his letter dated 27<sup>th</sup> July 2016. In relation to Henpen, he admitted he was a director of Henpen Aviation Consulting Services (Henpen) but qualified this by stating that the Company was formed way back in 2008 and this was before he signed the Code of Ethics in 2014.

76. He also indicated that the Company was currently dormant and its last activity was in September 2008. He also indicated that it was a Consultancy Company which is acceptable as per Section 1.1.2 of the KQ Code of Business Conduct and Ethics which states as follows:-

***“Sometimes our employees desire to take additional part-time jobs or do other work after hours, such as consulting or other fee earning services. This kind of work does not in and of itself violate our code. However the second job must be strictly separated from your job with us and must not interfere with your ability to devote the time and effort needed to fulfil your duties to us as our employee”.***

77. He also indicated that Henpen is a family business and does not require approval of the Group Human Resources Director as per Section 1.1.3 of the KQ Code of Business Conduct and Ethics which states as follows:-

***“The Group Human Resources Director approval is not required for:-***

***– services as an officer or director of a charitable or other non-profit institution or trade organization, or for service as an officer and director of a family owned business unless the business is a customer (travel agents, general sales agents etc) Supplier or Competitor of the company in which case approval of the Group Human Resource Director is required...”***

78. In answer to the accusation that Henpen provides services to other Airlines, the 1<sup>st</sup> Claimant indicated that the document the Respondent relied upon was a mere proposal dated 2008 which was never executed. He denied recruiting employees of the Respondent to work for Henpen.

79. As for operating another business called Buseka Investments Limited, he indicated it was a family business, which had nothing in conflict with the Respondent.

80. There was an accusation that he solicited for business from the Respondent’s Suppliers using Henpen which he denied and indicated that there was no proof of this as the letter relied on was from one Victor Onyango who he indicated he did not know and that it was not on Henpen letter head nor did it bear Henpen address.

81. The 1<sup>st</sup> Claimant still denied other accusations of encouraging suppliers to inflate its quoted prices as to share in the profits.

82. Concerning disclosing information to Lufthansa, he denied it. He denied also receiving commission from Lufthansa airlines.

83. The 1<sup>st</sup> Claimant thereafter was invited for a Panel hearing vide a letter dated 9<sup>th</sup> August 2016. He was asked to appear on 12<sup>th</sup> July 2016 which would have been a typographic error.

84. During the hearing, he questioned why there was no report from the forensic audit which was the whole purpose of the investigation. He also indicated that the letter inviting him for the Panel hearing did not indicate what charges he would be facing.

85. At the end of the Panel hearing, the Panel was unable to conclusively prove that a transaction happened to violate the Code of Conduct nor that KQ suffered financial loss as a result of the 1<sup>st</sup> Claimant’s actions nor that when KQ paid Lufthansa for services offered the 1<sup>st</sup> Claimant received a 50% commission.

86. The Panel however found him culpable of clear breach of company policies and procedures, as he had not declared the stated conflict of interest and personal investments.

87. From these Panel hearings and from the analysis of the show cause letter and the responses unto the Panel hearings and findings, it is apparent that the 1<sup>st</sup> Claimant was exonerated of many charges leveled against him save for that of being in breach of company policies and procedures as he had not declared the stated conflict of interest and personal investments.

88. However, the termination letter goes ahead to state that he failed to maintain and preserve the confidentiality of the tender process as required by Clauses 3.3, 5.6.7 and 5.9.2 of the Companies Procurement Polices. This is a charge which the Panel had already determined that there was no conclusive proof on.

89. The 1<sup>st</sup> Claimant had also declared that Henpen was formed in 2008 and last traded in 2008 and that he could not have declared its

existence then as there was no requirement to do so.

90. From the analysis of these findings, it is my view that the Respondent did not conclusively prove the allegation levelled against the 1<sup>st</sup> Claimant and this is even in their own conclusion in the Panel hearings.

91. What is left glaring is that the forensic report that the Respondent based their decision to subject the Claimants to a disciplinary process was never produced in Court.

92. Infact this report was never supplied to the Claimants as the Claimants were subjected to the disciplinary process but the report was supplied to the Respondent after the termination of the Claimants.

93. In view of the above position, it is my finding that there were no valid reason to warrant termination of both Claimants.

#### **Due process**

94. As concern due process, the Claimants were actually taken through a disciplinary hearing. However, the Claimants have submitted that crucial information was not availed to the Claimants i.e. the forensic audit. It was even established that the forensic audit report was actually submitted to the Respondent in December 2016 after the Claimants' termination.

95. The Claimants also submitted that the Respondent violated their own Human Resource Manual Clause 17.2.2(a) and (f) which indicates who should issue a show cause letter. The 1<sup>st</sup> Claimant submitted that his show cause letter was issued by the Technical Director (Mr. Haynes) when the Manual indicated that it should be issued by the Controlling Manager of the staff in consultation with the Human Resources Department.

96. The 1<sup>st</sup> Claimant submitted that the Technical Director was a very senior officer involved in the appeal process and so should not have issued the show cause letter.

97. In relation to the Disciplinary Panel, both Claimants have submitted that the composition of the Panel was flawed as the persons who sat in the initial Panel also sat in the Appeal Panel e.g. the Human Resources Director.

98. It is also submitted by the 2<sup>nd</sup> Claimant that the Respondent's Human Resources Manual Cause 17.2.3(b) indicates the composition of the Panel to hear the case will include the Controlling Manager of the concerned staff, a staff in management position from any other division to act as Chairman and staff in management position for Human Resources Department.

99. He contends that his Controlling Manager (Mr. Yongo) did not participate in the panel hearing and instead the Technical Director (Mr. Haynes) did attend as the main prosecutor.

100. The 1<sup>st</sup> Claimant on the other hand submitted that the disciplinary process was unfair, illegal and did not adhere to natural justice principles as it was a process with a pre-determined outcome as he did not have access to the forensic audit report and that the expected timelines were not followed.

101. The Respondent insisted that the process they followed was fair.

102. Section 4(3) of Fair Administrative Action Act (FAAA) states as follows:-

**3. "Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-**

- a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- b) an opportunity to be heard and to make representations in that regard;**
- c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- d) a statement of reasons pursuant to Section 6;**
- e) notice of the right to legal representation, where applicable;**
- f) notice of the right to cross-examine or where applicable; or**
- g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

103. In the Claimants' case, the provisions of Section 4(3) (a) and (g) was not adhered to. The panel composition in respect of the 2<sup>nd</sup> Claimant was also not proper as envisaged under Section 7(2)(a) of the Fair Administrative Action Act. In view of these findings, I return a verdict that the Claimants were not accorded a fair disciplinary hearing.

104. Under Section 45 (2) of employment Act states:-

(2) *“A termination of employment by an employer is unfair if the employer fails to prove:*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason:-*

*(i) related to the employee’s conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure”.*

105. In view of the fact that the Claimants were terminated without valid reasons and without following the proper disciplinary process, I find that their termination was unfair and unjustified.

### **Remedies**

106. The Claimants sought various remedies the main one being reinstatement. The Respondent has opposed the prayer for reinstatement terming it improper on the ground that these positions are no longer in existence due to restructuring.

107. The Claimants sought reinstatement due to the fact that their work is very specialized and they are unable to get any other jobs after the termination.

108. 1<sup>st</sup> Claimant indicated that he is unable to get another job of equivalent value. He however did not demonstrate this fact.

109. The 2<sup>nd</sup> Claimant on his part indicated that he worked in a very specialized field. He produced evidence that he has been seeking jobs and has been turned down due to the termination. He pointed out that on 19.7.2017, he had been offered a job by Jambojet Limited, a subsidiary of the Respondent but this job offer was rescinded after the prospective employer established that he had been terminated by the Respondent.

110. He also pointed out that he received another employment with Salamain on 31.7.2019 (page 777 to 780) of his documents and did all formalities but the contract was also withdrawn for the reason of termination of employment by the Respondent.

111. He pointed out that he is a trained specialist on aircraft types operated only by the Respondent in Kenya and therefore he is unable to secure any employment elsewhere.

112. I do agree with the submissions of the 2<sup>nd</sup> Claimant that his job is highly specialized and he can only work on particular aircrafts. He has proved that his attempt to serve alternative employment from 2 different employers has been futile after it was established that he had been terminated by the Respondent.

113. In view of his age at 43 and in view of the specialized nature of his field, I find that the only remedy that would put the 2<sup>nd</sup> Claimant in the best position is reinstatement which I proceed to award.

114. I therefore order that the 2<sup>nd</sup> Claimant be reinstated without any loss of salary and benefits with effect from the time of termination and to continue in the Respondent’s employment until retirement age or for any other good cause.

115. I also award the 2<sup>nd</sup> Claimant compensation for the unfair and unjustified termination equivalent to 10 months’ salary = 10 x 587,789= 5,877,890/= less statutory deductions.

116. As for the 1<sup>st</sup> Claimant he did not establish that he is unable to secure an alternative job given the nature of his job which I find he can serve. However given the unfair and unjustified termination, I award the 1<sup>st</sup> Claimant compensation equivalent to 10 months’ salary which = 10 x 347,128= 3,471,280/= less statutory deductions.

117. I also award costs to the Claimants.

118. The Respondent will pay interest on the decretal amount with effect from the date of this judgement.

Dated and delivered in open Court this 9<sup>th</sup> day of October, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kaluma for 1<sup>st</sup> Claimant – Present

2<sup>nd</sup> Claimant – Present

Odaka holding brief Kiche for Respondent – Present