



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.430 of 2016

ALEX WAINAINA MBUGUA.....CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – unfair termination and reinstatement

Claim

1. The claimant filed the Memorandum claim herein and also an Amended Memorandum of Claim.
2. The claimant is an adult male and the respondent is a limited liability company.
3. By letter dated 25th June, 2008 the claimant was offered employment by the respondent as the Group Finance Director (GFD) at a gross salary of Kshs.1,800,000.00 per month. Previously the claimant had been employed in South Africa as Chief Financial Officer – Africa for Anglo Gold Ashanti from where the respondent implored him to come back home and assist the respondent airline with his extensive experience in finance. The claimant was also offered that the respondent needed to recruit a Kenyan national as Group Finance Director with the potential to take over as Managing Director of the company within a framework of 5 years when the incumbent was expected to retire.
4. The claim is also that the claimant worked for the respondent diligently and within the course of his work his performance was appraised by his reporting manager and by the board's staff committee. The claimant consistently met and exceeded expectations and on many occasions his experience was found outstanding.
5. Due to the claimant's exceptional performance, in September, 2012 the respondent paid \$100,000 to sponsor him for training in Harvard Business School as a preparation for his potential appointment as the next Chief Executive Officer for the company. The claimant was the first ever beneficiary of such training by the respondent since 1948. The claimant became the longest serving Group Finance Director and Kenyan Board member of the respondent Board of Directors. The claimant also managed to keep the respondent company afloat despite significant revenue shortfalls of \$1 billion during the years ended 31 March, 2015.
6. Notable achievements by the claimant to keep the respondent company afloat include raising \$175 million during the rights issue and restructuring of the financing of the Dreamliner with a loan finance facility of \$1.9 billion priced below 50 basis points. This financing deal won a global award as the respondent airline finance deal of the year in 2012. The claimant had numerous costs saving initiatives

with the result of over \$280 million reduction in costs. He raised \$250 million in short term unsecured facilities from the local market without a balance sheet to work with and considering the respondent was technically insolvent with a balance sheet that had a negative equity.

7. On 24th June, 2014 the Chairman of the respondent Board of Directors implored upon the claimant not to resign from his position after he missed being appointed the CEO of the respondent. It was emphasised to the claimant that he was an invaluable member of the board and management and commended for keeping the company afloat despite the challenge in revenue challenges.

8. During the course of the claimant's employment by the respondent, he was subjected to annual and quarterly performance appraisals and his performance found satisfactory. The last such appraisal was in October, 2015 with a rating of having met expectations for the period of review.

9. The claimant's reports are to the board Audit Committee which meets at least 6 times a year and which committee has the duty to go through the detailed reports by the internal and external auditors. This committee has never raised concern with the claimant's performance. All external audit reports have been unqualified with a note that proper books of account have been kept.

10. The claim is also that on 11th January, 2016 the claimant was scheduled to attend the normal performance appraisal meeting in the CEO office at 8.00am which was rescheduled severally until 3.00pm when the claimant was called in where he found the respondent's Board of Directors Chairman, Mr Dennis Awori with the CEO, Mr Mbuvi Ngunze. The claimant was surprised as the chairman is never involved in performance review meetings of any employee of the respondent. In terms of the claimant's contract he was to report to the Group Managing Director and CEO. He was always reviewed by his line manager and CEO. At this instance the chairman demanded for the claimant to resign from his position failure to which he would be taken through a performance hearing to ensure his employment was terminated. No reason was given for this abrupt action requiring the claimant to resign.

11. The claim is also that the claimant declined to resign from his position on the grounds that he had not done anything wrong to warrant such action. The chairman then proceeded to issue him with a letter dated 11th January, 2016 which letter was summoning him to a meeting for the following day, 12th January, 2016 at 7.30am at Serena Hotel. These events followed immediately the claimant refused to tender his resignation. The meeting scheduled for a performance appraisal then ended with the suspension of the claimant and was denied access to his office.

12. The claimant's case is that his suspension on 11th January, 2016 had no basis noting his performance had been rated as having met expectations and the alleged poor performance had no justification or arrived at in accordance with his terms of the contract. Such suspension is regulated under the respondent's Human Resources Policy that a staff may only be suspended from employment to allow for investigations and preparation of the report and suspension only in cases where the employee has;

- a) Committed a serious offence warranting investigations or
- b) Is likely to interfere with investigations, evidence or witnesses or
- c) Where severe disciplinary action is likely to be taken against the staff if the offence is proved after a panel hearing.

13. The alleged poor performance of the claimant did not warrant a suspension from work. There was no board assessment of the claimant for it to make a finding that he was of poor performance as stated in the letter of 11th January, 2016. This can only be for the reason of bad faith on the part of the respondent Board of Directors, Chairman.

14. Upon the claimant being served with notice of 11th January, 2016 he pleaded for time to prepare for the meeting that had been scheduled for the next day and also requested for documents crucial for his

preparations at the performance appraisal meeting. On 13th the CEO replied to the claimant's request with a small fraction of requested for documents and notifying him the meeting had been rescheduled to 18th January, 2016.

15. On 15th January, 2016 the claimant responded and noted that the documents issued to him by the respondent were not sufficient to enable him prepare for the scheduled meeting and would therefore not be able to attend. The claimant also requested for a full board hearing so as to address his grievances as provided for under the section 24.1 of his employment contract. The claimant had the right in his contract to escalate any disciplinary matter against him to a full board.

16. The respondent failed to address matters addressed by the claimant in his letter of response on 15th January, 2016, the board proceeded to meet on 18th January, 2016 and decision was taken to terminate the claimant's employment vide letter dated 19th January, 2016.

17. On 22nd January, 2016 the claimant made an appeal against the decision terminating his employment but there has been no response. The claimant's concerns were that his suspension on account of poor performance was done without a review; he has asked for documents which were not supplied yet had been denied access to his office; by calling the claimant to a disciplinary hearing under section 41 of the Employment Act, 2007 was to flout the provisions of clauses 17 of the respondent's disciplinary Handling Procedures Policy and which required that performance be first addressed between the employee and his supervisor at an informal level and then escalated to the formal level with a show cause leading to a panel hearing the case. What the respondent opted to do was to the disadvantage of the claimant.

18. The decision to send the claimant on suspension and then terminate his employment was in breach of clause 16 of the contract of employment. The claimant was not given a chance to improve on his alleged poor performance. The documents issued to the claimant to prepare for his defence were not as requested. A performance review meeting scheduled for 18th January, 2016 was changed and it became a disciplinary hearing and the respondent ignored its HR policy on disciplinary handling procedures. The claimant was not heard on his appeal. And the termination of employment did not comply with the provisions of section 41 of the Employment Act, 2007 or article 41 of the constitution, 2010.

19. The claim is also that before the claimant joined the respondent employment he was working abroad and he left his employment as an act of patriotism to serve his country at great sacrifice and by taking a pay cut and leaving his family abroad. The claimant has diligently served the respondent for 8 years and due to his good performance has won various awards. Despite outstanding work, the claimant has been treated unfairly by the respondent in the decision to terminate his employment. Such decision is in bad faith, malicious and done to frustrate his source of livelihood. This is geared to humiliate the claimant so as to put him into suffering by denting his stellar career as a Finance person both locally and internationally. The claimant cannot secure a similar position anywhere locally or internationally considering the reason given by the respondent for his termination.

20. The claimant is seeking reinstatement with all attendant benefits.

21. The claim for reinstatement is premised on facts that the claimant was working on on-going projects key to his work performance particularly the forensic audit to which he had information not addressed by the auditors; the turnaround plan for which he had negotiated with the team to make it a success; strategic investor of which the claimant had identified so as to inject long term capital finance for the turnaround plan; short term facilities of over Kshs. 20 million negotiated by the claimant over which the claimant had developed personal relationships; and the overdue creditors in excess of Kshs.13 billion the claimant had managed to keep as key suppliers.

22. The claimant is also seeking in the alternative other remedies. These are based on claims that according to the directors and statutory information in the respondent's Annual Reports for the year ending 31st March, 2016 the claimant was removed from the Board of Directors in May, 2016 which is in

contempt of court orders of 18th march, 2016. As a result, the claimant, spouse and children lost privileges and entitlements in accordance with Travel Rules for the respondent director's policy, 2006. Despite the order not to advertise or recruit for the position of Group Finance Director, the respondent has made the appointment and created a position called Project Finance Manager with responsibilities similar to those held by the claimant. The respondent should be punished for contempt of court.

23. Prior to joining the respondent the claimant was resident in South Africa and the incentive to join was motivated by the travel policy. The claimant was assured of privileged travel South Africa to see his family twice a month. The respondent did cover the shipment expenses of his personal effects from Johannesburg to Nairobi which was a negotiated term of contract. From the travel policy, a retired director who had served up to a period of 10 years or less is eligible to travel benefits on the airline for the years of service. A retired director following service of over 10 years had additional benefits. The claimant has been denied the benefits of his years of service on the respondent board and noting he had 2 years left to the 10 year mark, had he been allowed to continue in service, the benefits due would have accrued to him.

24. By December, 2015 the claimant's gross salary was Kshs.2,950,132.56 and was also entitled to a provident fund contribution of Kshs.295,013.26 a 10% of his gross pay all being Kshs.3,245,145.12 per month. Since his termination on 19th January, 2016 the respondent has refused to pay the claimant the earned salary up to the last work day. Such pay is due with interest; the leave earned and not taken for 15 days at Kshs.1, 662,572.56; 3 months' notice pay; Certificate of Service and penalty due for non-issuance of the same; exemplary damages for mental and psychological harm; general damages for violation of the rights due under article 41 of the constitution and denial of the right of dignity; and comes nation for unfair termination of employment.

25. The prayers by the claimant are;

(a) A declaration that the claimant's dismissal from the respondent's employment was unprocedural, unfair and unlawful and unconstitutional.

(b) A permanent injunction do issue reinstatement and stopping the respondent from headhunting, advertising, recruiting a new Group Finance Director to replace the claimant based on the reasons contained in the letter dated 19th January, 2016.

(c) (c) An order does issue reinstating the claimant as the respondent's Group Finance Director forthwith without loss of any salary and benefits thereof.

(d) In the alternative... the claimant prays for remedies for wrongful dismissal and unfair termination as follows;

a. Damages equivalent to 12 months' salary

b. 3 months' pay in lieu of notice

c. Unpaid salary for 19 days worked in January

d. Untaken leave days

e. Air travel tickets as per the policy dated 16.5.2006

f. Refund of tickets of the claimant, spouse and children incurred since termination amounting to USD 3,461.00 and Kshs.95,337.00

g. Exemplary and punitive damages

h. An order that the respondent is guilty of contempt of court orders issue don 5th May 2016 by removing the claimant as Board Member

i. Compensation for constitutional rights violation to be assessed

j. Certificate of Service

k. A fine of Kshs.100, 000 against the respondent for failing to comply with mandatory provision of section 51(3) of the Employment Act, 2007.

l. Interests on (b), (c) and (d) above

(e) Costs of this suit.

(e) Any other relief that the court may deem appropriate to grant.

26. The claimant also testified in support of his claim.

Defence

27. The respondent in response and Amended statement of Response states that over the last 4 years or so has suffered a severe downturn in its performance and its present financial status is a matter of public notoriety. For the 2014/2015 financial year the respondent recorded a pre-tax loss of Kshs.29.7 billion against Kshs.4.8 billion loss during the 2013-2014 financial years. Such performance has been the subject of grave public concern and has attracted the attention of the National Assembly as the government is a major shareholder in the respondent.

28. The defence is also that by letter dated 25th June, 2008 the respondent offered the claimant employment as Group Finance Director and his work performance was appraised by his reporting manager and the Board's staff committee. The Board of Directors would also mandate a committee to appraise the claimant's performance in accordance with article 111 of the Articles of Association.

29. The claimant did not consistently meet or exceed expectations and specifically the performance appraisal summary from 2008 to 2015 show he had 13 key performance areas which needed improvement. Such ratings meant the claimant's work did not meet the standards of performance as required of his position. Upon conducting periodic appraisal on the claimant on 29th May, 2014 it was noted that the claimant needed to ensure timely delivery on his actions.

30. During the performance appraisal on the claimant for the period of July to September, 2015 the claimant failed to meet agreed standards in the areas of the establishment of the financial service to manage credit sales and in the attainment maturity in the respondent's Way Centre of Excellence in Technical Supply Chain.

31. The respondent is enjoined under clause 6 of the HR policy to support continuous training and development of its staff in areas directly related to their roles and business needs. To assist the claimant in improving job performance, the respondent sponsored him for training at Harvard Business School in September to October, 2012.

32. On 11th January, 2016 the claimant was scheduled to attend a normal performance appraisal. Due to the alarming financial performance facing the respondent in came into sharp focus on the capacity of the senior management team and this led to the need to re-evaluate their respective individual competencies and ability to implement a turnaround plan and thus the need to have their performance reviewed. For these reasons, the respondent Board at the meeting held on 8th January, 2016 determined that it would evaluate all top manager including the Group Finance Director and CEO. The Board mandated the HR Committee to review these officers and make recommendations and decisions fit as a result of the

evaluation.

33. The defence is also that the CEO, the Group Finance Director and Mac Falckenberg were requested to leave the meeting on the board on 8th January, 2016 during discussions regarding the report by the committee on the performance of senior management team. The Board thus delegated to the committee to evaluate the performance of the claimant. The CEO and Group Finance Director being members of the respondent board of directors are also subject to the Articles of Association. The chairman of the board was mandated to explain to the claimant on the appraisal process and therefore on 11th January, 2016 he attended the claimant's performance review. The claimant was then issued with a letter requiring him to attend performance review meeting on 12th January, 2016. Following this decision, the board found it necessary to preclude the claimant from accessing to his office, respondent premises and other resources since he had access to very sensitive information and contacts including the respondent's bankers, suppliers and business associates.

34. The hearing on 12th January, 2016 was a performance evaluation process contemplated under Chapter 5 of the HR policy and undertaken by the board noting the extra ordinary circumstances and extreme financial pressure the respondent was under. The claimant was also notified that his performance review would be undertaken in accordance with section 41 of the Employment Act, 2007.

35. The claimant asked for more time to prepare for his performance hearing and he was given documents and hearing rescheduled to 18th January, 2016. Some of the documents the claimant had requested for, the Seabury report and the Senate reports were in his possession. The claimant then failed to attend at the hearing. Such refusal to attend was found to constitute lack of performance and a decision was taken to terminate his employment with immediate effect.

36. Under the contract of employment, the respondent had the right to remedy non-performance of work by the claimant with termination of the same. The respondent in terminating the claimant's employment relied on the performance review contemplated under chapter 5 of the Manual and not a disciplinary hearing as under chapter 17.

37. There were justifiable grounds leading to termination of employment. Under the contract of employment the respondent could terminate employment by giving 3 months' notice or payment in lieu thereof. In the letter of 19th January, 2016 the claimant was informed of 3 months' salary payment. Under clause 83(h) of the respondent Articles of Association the claimant as Group Finance Director would vacate office if his appointment was terminated by the board and therefore the remedies sought are not due.

38. The claimant's employment as the respondent's Group Finance Director did not in any way involves the use of specialised skill which can only be employed in the respondent's service. The claimant is in a position to secure alternative job in a similar position as held with the respondent. His continued employment as Group Finance Director is untenable as the major shareholders being the government of Kenya and Koninklijke Luchtvaart Maatschppij NV "KLM" have lost confidence with the claimant.

39. The defence is also that the position of Group Finance Director is critical to the performance of the respondent and the same is a fiduciary position requiring the trust and confidence of the board and the shareholders in the abilities, competence and integrity of the individual holding the position. The respondent has lost trust and confidence in the claimant and an order for reinstatement would not be practical in the circumstances. The claimant has not demonstrated the exceptional circumstances for the grant of the order for specific performance in respect of the contract of employment. Damages would be an adequate remedy to the claimant in the circumstances.

40. In further defence, the respondent's case is that the orders of the court on 18th March, 2016 restrained the respondent from headhunting, advertising, carrying out interviews, recruiting and employing Group Finance Director to replace the claimant but the respondent was not stopped from removing the claimant from its board of directors. The respondent is not in contempt of the issued court orders. The role of

Project Financial Manager is specific and is limited to oversight of the on-going financial and pre-occupational restructuring for a period of up to 12 months.

41. The Travel Rules for Directors defines what privilege travel constitute and there were set conditions. These privileges are due to the directors and the claimant has no right to seek for rebated tickets from the respondent.

42. All contributions for provident fund to the benefit of the claimant were paid to the Provident Fund and did not constitute part of the claimant's gross remuneration. The salary had not been increased as claimed to be at Kshs.2, 950,132.56. Upon termination of employment, the claimant was required to undertake his own clearance so as to be paid terminal dues and he has failed to do so.

43. The leave days due are at 4.59 only.

44. Notice pay claimed at 3 months' pay is admitted.

45. The court has no jurisdiction to determine the criminal liability of the respondent in terms of section 51(3) of the Employment Act, 2007. Any fine found due from the respondent is due to the state and not to the claimant.

46. The claimant was accorded ample opportunity to present his case which he declined and refused to use. The remedies sought are not due and should be dismissed as the termination of employment was justified on account of insubordination.

47. In evidence, the respondent called two witnesses Thomas Omondi Achola the Director, Strategy and Performance Management for the respondent and Dennis Awori, formerly the Chairman, respondent Board of Directors.

48. Mr Achola in his evidence gave emphasis to the budgeting process and testified that it is driven by the networks. Within the respondent business, budgeting starts with the Group Finance Director as the custodian and sponsor of the whole process. All departments must give their numbers for costing; all directors are involved while the Group Finance Director has to oversee the entire process that has to end with a presentation to the board of directors.

49. The respondent implemented project Mawingo as a growth plan noting where business was going looking at trends. A change or closure faced the respondent. The project overseer was the Group Finance Director. The project ended up being a failure. Projections were that in 2013/2013 there would be new routes and only Delhi was opened. Several reasons in the market were not properly thought through particularly competition and the number of passengers. The Senate in its report following investigations established that Project Mawingo was a failure due to poor management. The revenue falls were significant. The respondent had to downsize its fleet of aircrafts. Other aircrafts had to be subleased to other airlines.

50. The witness also testified that he did not supervise the claimant in his work. That in his assessment, the claimant was of poor performance due to the rights issue and based on the statements made by the claimant. The facts of revenue lead to this assessment. From the records, the claimant had done his duties save for the oversight in procurement which had to be agreed with his supervisor. The claimant had his performance reviewed and targets agreed with his supervisor and as a board member, this should have been approved.

51. The witness did not know the reason why the claimant was terminated from his employment with the respondent save for the reasons state in the letter filed in court.

52. Ambassador Awori testified that as the chairman of the respondent board, this is a public listed company and its largest shareholder is the Government of Kenya with a 29.8% then KLM with a 26.73% stake. The rest is shared by private persons. In the last 4 years the respondent has suffered a severe

downturn in its performance with year 2014-2015 recording a pre-tax loss of Kshs.29.7 billion against a Kshs.4.8 billion loss in the years 2013-2014.

53. The claimant was the Group Finance Director with the roles set out in his contract of employment subject to amendment from time to time by the group managing director and the board. His duties covered finance, reporting, systems, treasury management and tax planning, commercial decision making, strategic planning, investment and acquisitions and staff development. The claimant as the Group Finance Director also sat in the respondent board.

54. The alarming financial performance of the company brought into sharp focus the capacity of the senior management team of the respondent and this led to the need to re-evaluate their respective competencies and ability to implement a turnaround plan and it was therefore imperative that their performance be reviewed on the basis of new parameters.

55. The respondent board on 8th January, 2016 determined it necessary to have a performance evaluation of all top management including the Group Chief Executive officer and the Group Finance Director. The board mandated the Human resources committee to undertake the review and made such recommendations as it saw fit as a result of the evaluation. Such delegation is authorised by article 111 of the Articles of Association of the company.

56. The witness also testified that he was mandated by the board to inform the claimant of the decision made to evaluate his performance and issue him with a letter inviting him to the committee given the responsibility. A meeting was thus held on 11th January, 2016 for this purpose.

57. Ambassador Awori also testified that following the decision to commence evaluations with the Group Finance Director, it became necessary to preclude him from having access to the respondent offices, facilities and other resources for the reason that an individual in the position of the claimant had access to very sensitive information and contacts including the company's bankers, suppliers and business associates. The denial of access was temporary as the committee had intended to hold the review on the following day, the 12th January, 2016.

Determination

In this determination, I take into account the pleadings, the evidence and the written submissions with list of cases by both parties. The issues that arise for determination are;

Whether there is a case of unfair or fair termination of employment;

Whether the orders of 18th March, 2016 have been violated; and

Whether the remedies sought are available.

58. On whether there is a case of unfair or fair termination of employment, the reasons given by the respondent for terminating the employment contract for the claimant is set out in the letter dated 19th January, 2016. The respondent case is that the claimant was found lacking in the performance of his duties and thus a decision to terminate his employment.

59. The Court of Appeal in **CMC Aviation Limited versus Mohammed Noor [2015] eKLR** in addressing the question of whether there was fair or unfair termination of employment on the grounds of performance held that;

... Unfair termination involves breach of statutory law. Where there is a 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 that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an

employee without notice or without the right amount of notice contrary to the employment contract. Section 49 of the Act sets out the remedies for both wrongful dismissal and unfair termination.

60. Section 41 of the Employment Act, 2007 with regard to an employee's work performance provides that before an employer can terminate employment on the ground of poor performance, a notice must issue to the employee explaining to the reason for which the employer is considering termination of employment. In my view, once such notice has issued, the notice must also invite the employee to attend together with another employee of his choice and be ready to make representations or explanations as to why he should be retained and not be terminated on the stated grounds of poor performance.

... before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

61. Although a senior employee is indeed expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets.

62. In this regard, the respondent had its Human Resource Policy Manual and at Clause 7.12 on termination, an employee can be terminated on the grounds of poor performance. To arrive at such a ground, I take it the procedures adopted in the periodic reviews and assessments of each employee were to address the question of work performance.

63. At Clause 17 of the HR Policy Manual the respondent made provision for disciplinary handling procedures. Under clause 17.2 a formal procedure for addressing cases of an employee failing to improve in conduct or work performance after being taken through the informal procedures by the manager. Under clause 17.2.1 the policy provides that;

Preparation of a report

(a) The report may be from KQ Security, Safety office, internal audit, the controlling Manager or any other report deemed acceptable by the Company on a certain conduct of the Staff.

(b) An employee may be suspended from employment to allow for investigations and preparation of the report. Suspensions will be issued only where an employee:

i. Is suspected of having committed a serious offence warranting investigations or

ii. Is likely to interfere with investigations, evidence or witness(es) or

iii. Where severe disciplinary action is likely to be taken against the staff if the offence is proved after a pale hearing

64. From the above intervention and commencement of a formal procedure, once investigations are commenced, the HR policy provides for the issuance of a show cause letter to the employee based on the investigations if such reveal an offence has been committed. Such a show cause should lay down the offence committed and give a timeline for a response and where the manager considers such a response and finds no further cause of action required the employee should be informed. Where the response is not satisfactory, then the employee must be invited to a disciplinary hearing. The HR policy has set out clear safeguards for the panel, hearing procedures, submissions by the employee and the process after the hearing and the right of appeal.

65. From my analysis of the HR policy, I find the respondent has the remedy for poor performance. The

first step is to hold a meeting (an informal hearing) with the employee. Explain where the employee is falling short, what standard is not being met, discuss the matter fully to see if the reason for the poor performance can be established. Time is allocated for review. Only then does the formal hearing process begin. Even with it, a dismissal or termination process has to follow several steps.

66. This is what the court captured in **Agnes Yahuma Digo versus PJ Petroleum Equipment Limited Industrial Cause Number 2049 of 2011** held that;

a. The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time.

b. An employer, who fails to manage the performance of their staff, lacks moral authority to tell the staff that they have underperformed.

67. The above judgement was given emphasis in the case of **Jane Samba Mukala versus Ol Tukai Lodge Limited Industrial cause number 823 of 2010** where the court held that;

a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just stay that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

68. It is common ground that the claimant was appointed at the respondent's Group Finance Director vide employment contract dated 25th June, 2008 and employment commencing on 14th July, 2008. By virtue of this appointment, the claimant also became part of the respondent Board of Directors. On the one hand the employment relationship was therefore regulated under the employment contract and on the other the Articles of Association of the company with the linkage being the employment relationship - Articles of Association 83(h) and 115(d).

69. In the above context, on 19th January, 2016 the claimant was issued with a letter terminating his employment with the respondent. The letter read in part;

TERMINATION OF EMPLOYMENT

We refer to our previous discussions with regard to your employment with Kenya airways and our letters dated 11th and 13th January 2016.

Following your request for more time to prepare for your performance review as indicated on your email dated 11th January 2016, addressed to the Board Chairman and the Group Managing

Director & CEO, we regret to note that you failed to attend the duly constituted Board HR Committee meeting that was re-scheduled for 18th January 2016 at the Nairobi Serena Hotel. Further you failed to give the committee adequate explanation for your non-attendance despite your earlier request to an adjournment.

... your failure to present yourself amounts to insubordination for which the company would be entitled to take disciplinary action against you.

Notwithstanding your failure to attend the HR Committee, the Committee has nonetheless given consideration to the matters alleged to constitute lack of performance on your part and has arrived at the decision that such allegations are well founded. The HR Committee has therefore determined that your employment as Group Finance Director should be terminated with immediate effect.

70. My reading of this communication to the claimant by his employer was in acknowledgement that, on 11th and 13th January, 2016 there had been communication with regard to his work and was thus required to attend the meeting rescheduled to 18th January, 2016. At the meeting of 18th January, 2016 the HR Committee proceeded on to deliberate, the non-attendance of the claimant was put into perspective and found to be an act of insubordination but the committee did not dwell on this aspect, rather it addressed itself to the work performance of the claimant. The committee found that;

... matters alleged to constitute lack of performance on your part and have arrived at the decision that such allegations are well founded. The HR Committee has therefore determined that your reemployment as Group Finance Director be determined with immediate effect.

71. What then were the allegations against the claimant that were found well founded by the HR Committee?

72. Both parties agree there was a meeting held on the morning of 11th January, 2016 between the chairman, the CEO and the claimant was called to attend. The chairman issued to the claimant with the letter of equal date. The letter states as follows;

PERFORMANCE

I refer to today's discussions on the above subject.

As you are aware the Board has been concerned about the declining business performance of the airline over the last three (3) years. To this end the Board of Directors has been compelled by the prevailing circumstances to review the status and or performance of key members of the senior management.

You have been identified as such a key member of the senior management of the Company whose performance has been found to be wanting. The Board has therefore mandated the Human Resource Committee look into/or determine this matter in accordance with section 41 of the Employment Act.

You are hereby invited to a formal hearing tomorrow, 12 January 2016 at 7.30am at Serena hotel. You are at liberty to bring along a colleague to accompany you to the deliberations. ...

Due to the sensitivity of your position, effective immediately and during this entire process you will not be allowed access to your office or have access to company email.

73. Section 41 of the Employment Act, 2007 provides that;

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make

74. Noting the last part of the notice to the claimant required that he vacates his office immediately and that he would not have access to his office or company email and the hearing for his performance was the next day, his immediate reaction and response is therefore not far-fetched. The claimant replied on the same date as follows;

Dear Mbuvi/Dennis, our meeting earlier refers.

Firstly, kindly scan and email me the letter that you gave me earlier as I inadvertently left it in the office.

Secondly, I will not be able to make [to] the meeting tomorrow as I need time to prepare adequately in order to allow for a meaningful conversation. In that regard, kindly provide me with the following:

1. List of areas where I have not performed indicating how I contributed to the poor performance of the company;

2. As my email has been blocked, please send me:

1. A copy of ALL my previous performance appraisals;

2. A copy of current and previous board assessments

3. A copy of my letter of employment as I have no access to my personal file in the office.

Upon receipt of this information, I will require a few days to prepare. I appreciate this is a sensitive matter and believe it is referable that we conclude it in an amicable manner.

75. The context of the law and facts prevailing thus set out, by the respondent inviting the claimant for a formal hearing with regard to his work performance, I take it that it was at the scheduled meeting where the respondent was going to address the first part of section 41(1) of the Employment Act, 2007 by laying out the grounds of the claimant's poor performance and the reason for which the respondent as the employer was considering termination of his employment. I also take it at this time and point, the intention of the respondent and based on addressing the poor performing business and was keen to know the reasons leading to the same and the role of its senior management staff which included the claimant.

76. The claimant's request for more time and access to various documents was therefore reasonable. This was done at 9:11pm on 11th January, 2016 and on 12th January, 2016 at 12:07 pm, Ngunze Mbuvi replied to the claimant as follows;

Dear Alex,

The Staff Committee of the Board has given due consideration to your request as detailed in your email below.

We will make arrangements to deliver the relevant information to you later today. We will deliver this to your residence, unless otherwise advised.

In the meantime, the Staff Committee has scheduled your performance review for Monday, 18th January 2016 at 7.00am, at a venue to be advised in due course.

... further, if you need access to any other personal document – do let us know in advance as well.

The request to adjourn the performance hearing was thus granted. The respondent also agreed to send *relevant information* to the claimant's residence. And offer to fro access *any other personal document* was made.

77. At 2:18pm, on equal date, the claimant replied and appreciated the respondent response and I take it, the requirement to share requested for information. the claimants concerns with regard to attending the performance hearing would thus be addressed.

78. The claimant went further to request for more documents and preferably *in soft copy* and which included;

- 1. HR Policy manual;*
- 2. Seabury report on RM and KLM JV;*
- 3. Final McKinsey turnaround report that was presented to the board;*
- 4. Commercial department organogram for the last three years;*
- 5. Senate report;*
- 6. Low fare analysis for London, Mumbai, DXB and AMS that I presented to the CS Finance and Transport.*
- 7. Copy of email correspondence between myself and the former Chairman complaining about my treatment by Pieter Elbers during the board meeting that I believe was in July last year*

Once I receive these documents, I will be in a position to advice you how much time I will require to prepare for the hearing. ...

79. On 13th January, 2016 and in response to the claimant, the respondent through the Group Managing Director, Mbuvi Ngunze replied as follows;

REFORMANCE REVIEW

I enclose the following documents for your attention:

- a) Copies of the performance appraisals*
- b) A copy of the letter of employment*
- c) Schedule of performance review by the board HR Committee*
- d) Board evaluation reports*
- e) HR Policy manual (relevant section)*
- f) Commercial Department organogram*

g) Letter from KQ Chairman dated 11th January 2016 With respect to the last paragraph of your email dated 12th January 2016, the Board has reiterated that the date scheduled for Monday, 18th January 2016 at 7.30am will not be postponed and you as an employee must avail yourself if you wish to present a position. you must appreciate that upon your request the Board already gave you the indulgence for a later date. ...

80. The context to the above communications between the claimant and his employer from 8th January, 2016 to the letter of termination on 19th January, 2016 is given by the chairman, Ambassador Awori. His evidence under oath on 16th May, 2017 was that;

... on 11th January, 2016 I recall we had a long discussion with the claimant. He did not express surprise at the meeting. I recall the claimant did not feel

his performance was wanting... save for the letter dated 11th January, 2016 I had no other letter to issue to the claimant at our meeting. The assertion by the claimant that I had a letter asking him to resign is not correct. However, given the dire position the respondent was and the claimant being key position it was in his best interest to resign rather than go through the evaluation. This was my only advice to him.

I did advice as a manager noting the circumstances. Also cognisant of protecting the image of the respondent and the claimant's own reputation. This was a separate piece of advice that I offered to the claimant to resign I considered this to be prudent in the circumstances due to the huge loss the respondent had suffered and the precarious situation. The claimant held a key position and I felt it prudent for him to consider my advice other than go through the evaluation and what may follow.

The board in keeping with best practice in corporate governance did an annual self-evaluation which included an evaluation of individual directors and under the respondent's own regulations. The ultimate evaluation for management as annual review ...

81. The chairman, board of directors had advised the claimant to resign from his position. the rationale was to help serve the best interests of the respondent and the claimant. What then was the purpose of the invitation to review the claimant's work performance? Would he receive fair hearing noting the advice from the chairman?

82. What followed, the claimant was not given all the information, documents, and reports he had requested for. in a letter dated 15th January, 2016 the claimant addresses these matters at length. He concludes his letter to the respondent as follows;

... kindly clarify if the meeting you have called for is a Performance Appraisal or Disciplinary Action.

... you have physically barred me from coming to my office and have also failed to provide me the documentation is would ordinarily require for a Performance Appraisal. It is not clear how i am required to demonstrate my performance over three years without access to the information I have requested.

Right to a hearing by the board

KQ has a well laid down procedure for Performance Appraisals and for Disciplinary Hearings. As demonstrated above, you have not complied with these requirements in summoning me. ... under the circumstances, I wish to respectfully decline your instruction for me to appear before the HR Committee on Monday 18th January, 2016 at Serena Hotel as indicated ... if indeed my performance is lacking as alluded to in the Chairman's letter, I believe that as the CEO and in your capacity as my controlling manager, you have ample guideline(s) on how to address my alleged poor performance. ...

Given the gravity of the matters stated herein and my request for a full board hearing, I have elected to copy all board members for their situational awareness.

82. The respondent having addressed itself on the failure by the claimant not to attend at the performance hearing and having made a decision thereon, I find no basis as to how the claimant's performance was reviewed and a decision taken that *lack of performance on your part and has arrived at the decision that such allegations are well founded*. To the contrary and without any material setting out which allegations faced the claimant and how it was found such were well founded, the respondent committee lay no basis at all.

83. The employer has the prerogative to appraise an employee periodically to ensure that the employee is undertaking his duties as required. Such appraisal, the method, tool or persons or officers to undertake the same are also the prerogative of the employer. Further, it is for the employer to determine the best paced person or officer(s) in its establishment to undertake any assessment, appraisal or as may be required so as to address the performance of an employee.

84. It is therefore not correct for the claimant to assert that the Board of Directors of the respondent had no capacity to assess or appraise his work performance. To remove the role of performance appraisal from such a body would deny the employer the inherent role of ensuring each of its employees was well apprised or assess as required. Where the claimant was issued with notice requiring him to attend at a board committee so as to be assessed in his performance, such attendance was not upon his choice. His duty was to present him at the officer or officers and or person appointed or identified by his employer to assess his work performance. The challenge to the rationale behind such assessment and or appraisal and its outcome would be challenged at a different level. Failure to attend as directed by an employer is a gross matter that warrants sanction.

85. It follows therefore that where an employer fails to have regard to material facts, the proceedings leading to termination of employment cannot in principle be said to be fair because the claimant is alleged to be of poor performance. In undertaking a summary action without setting out what performance was reviewed, what support systems and or mechanisms were put in place to support an alleged poor performer or lacking in performance employee, such action prevented the aggrieved party and the claimant from having his case fully and fairly determined. This constitutes a gross irregularity in the conduct of the hearing proceedings as contemplated in section 41 of the Employment Act, 2007. the ensuing decision falls to be set aside not because the result is wrong but because the respondent has committed a gross irregularity in the conduct of the hearing proceedings. Where the claimant was taken through the benefit of the internal mechanisms in addressing alleged poor performance, such brought to his attention in good time and before he was called for the formal hearing with the notice that it would be used or would lead to his employment being terminated, then the motions of the law can be said would apply. In this case by the respondent citing the provisions of section 41 of the Employment Act, 2007 in the invitation to the claimant to attend at the hearing, such does not remove the burden of undertaking the requisite procedures to address poor performance with regard to the claimant's employment within procedural and substantive justice requirements.

86. The procedures for handling poor performance are completely different from the procedures for handling misconduct. Performance is all about how the employee does the job. The quality. Misconduct is all about behaviour or conduct of the employee on the job in relation to company rules, policies and procedures.

87. Where The employee cannot meet standards of quality and quantity when those standards have never been communicated to him/her, and likewise the employee cannot perform if no training has been given. If the required standards have never been communicated to the employee, and you have never taken steps to ensure proper training, a case of poor performance must fail.

88. In addressing the question of poor performance and employee misconduct the court in **Gold Fields Mining South Africa (PTY) Limited (Kloof Gold Mine) versus Commissioner for Conciliation, Labour Appeals Court, South Africa, Johannesburg, JA 2 of 2012** the court quoted Professor B.

Jordaan in his article “Poor Work Performance (Incapacity) vs Misconduct” as follows;

Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer’s standards. In this case the problem lies with the employee’s “aptitude?: although willing to do what is required, s/he is unable to because of some factor linked to the employee that s/he has little or no control over.

A dismissal for misconduct is based on the employees fault i.e. intentional or negligent noncompliance to company rules or standards. A degree of blameworthiness is therefore ascribed to the employee. In respect of misconduct, the employer must prove that the employee contravened a rule, was aware of or could reasonably be aware of the rule, that the rule was valid and there was consistency in the application of the rule (substantive fairness). The employer is required to give the employee an opportunity respond to the allegations (procedural fairness). This may take the form of a disciplinary hearing or an interview for lesser transgressions.

...

In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee’s inability to do so and not due to factors that are outside the employee’s control

89. In this case, where the respondent was faced with poor financial performance for the last 4 years and a decision was taken to evaluate the performance of the claimant as one of the top managers context must be given to the provisions of section 43 of the Employment Act, 2007;

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45

90. It is trite, The burden of proof in employment termination cases rests on the employer. Where the claimant is stated to be of poor performance, the grounds being that he failed in the performance of his duties, then as set out in **Jane Mkala case**, cited above, it does not stop at the allegations but effort must be shown and demonstrated as to how such poor performance was identified and addressed. Where the claimant remained of good performance since his employment in 2008 to October, 2015 he cannot have so suddenly and quickly changed without the notice of his controlling supervisor and CEO and Board to a point that on 8th January, 2016 the board found the sudden urgency to invite him to an otherwise disciplinary hearing and leading to his contract termination. See **Abdi Halake Garamboda versus Fidelity Security Services Limited [2015] eKLR**.

91. In addressing what work performance what connote poor performance within the employment relationship, the court in **Kenya petroleum oil workers union v Kenya petroleum refineries Ltd [2013] eKLR** held as follows;

It is necessary for the Court to very briefly discuss what poor performance within the employment relationship connotes. This is because it is very easy to discern what a poor performance in a drama play is but not in the workplace. Many employers confuse poor performance with negligence, incapacity or misconduct.

Poor performance does not relate to an employee's behaviour in the work place. Behaviour is addressed under misconduct in employment disciplinary process while poor performance examines whether the job which an employee is expected to perform is performed properly (ability).

Performance is therefore gauged on the basis of sufficient job output, acceptable quality, compliance with employer operating procedures, sufficient employee effort and ability to perform the job at the expected level.

92. Where the provisions of section 41 of the Employment Act, 2007 are to be put into good perspective, the law gives each party, the employer and employee the mechanism to address poor work performance. Inform the employee of his poor work and allow the employee to address the same. Poor work performance does not happen in a day, it must have a basis for its assessment. The performance appraisals over the various quarters should have given the respondent a good basis to work with in addressing the alleged poor performance of the claimant. All else put into account and noting the evidence of Mr Achola, I take it to be correct that all the employees of the respondent would address their department work and converge for financials under the claimant. To do so then the claimant required material from all departments to ensure an overall oversight. To allege the claimant then failed in his duties, the cascading effect must then be traced from the departments. The claimant cannot be sacrificed at the altar of all other departments. The claimant was supervised by none other than the board and the Group Chief Executive Officer.

93. The respondent had the benefit of its HR Policy and I find no reasonable basis of ignoring the internal disciplinary procedures set out under section 17 of the employment contract and escalating the matter to the board with summary action.

94. Paragraph 34 and 54 of the respondent's *Statement of Response* it is averred that;

[34]... the decision having been made to commence the evaluation with the Group Finance Director, it became necessary to preclude him [claimant] from having access to the respondent's offices, facilities and other resources since the claimant had access to very sensitive information and contacts including the respondent's bankers, suppliers and business associates. ...

54 ... the hearing leading to the termination of the claimant's employment was a performance review under chapter 5 of the manual and not disciplinary hearing under chapter 17 of the manual.

...

95. As the respondent asserts, the invitation to the claimant vide letter dated 11th January, 2016 to attend a performance appraisal meeting on 12th January, 2016 was to review his performance. If this is so, the respondent has a review performance system in place which ordinarily for the position of the claimant was undertaken by senior managers and the board. The work record is that this had just been conducted in October, 2015. Even where the respondent had the prerogative to directly have the climate reviewed in his work performance by the board members, the denial of access to his office, facilities and physical removal from his workplace has no rationale unless the process was undertaken and meant to arrive at a sole conclusion. Termination of employment.

96. As quoted above, the defence that the claimant was handling sensitive information and contacts and such information was required for purposes of his responses, the denial of access then set the stage for the claimant to fail in addressing allegations against him. The physical removal from office on itself created a perception that the respondent had already arrived at a sanction against the claimant. The offer by the Chairman and Ambassador Awori to the claimant to resign from his employment with the respondent placed the claimant at a disadvantage in subsequent summons by the respondent. Had this been an ordinary performance appraisal, the board had the right to ensure such assessment was undertaken with a view to identify the challenges facing the claimant with a view to improve. To use work performance as a reason to deny workplace access and then apply it as a reason for termination of employment without giving the claimant a fair chance to argue his case is an unfair labour practice.

97. The process and motions of section 41 of the Employment Act, 2007 are not meant to be mechanical. Far from it! The employee who is of poor performance should be given a fair and reasonable chance to address their work performance with a view to improve. The citation of section 41 of the Act while inviting the claimant to the meeting with the Board Committee ought to have been with a view to remedy his poor performance if any and not run the provisions of the law to support an already eschewed process. The mere reliance on the applicable law does not in itself remove the requirement for the employer to ensure fairness and justice to the employee as otherwise, the entire process is a sham. In this case, what happened to the claimant can only be defined as an unfair labour practice against him.

98. The advice to the claimant to resign from his position having failed to yield fruit, I find the process initiated to address alleged poor performance was shrouded in unfairness, was not undertaken in good faith or meant to address any alleged misconduct and thus failed the provisions of section 45 of the Employment Act, 2007. The resulting termination of the claimant from his employment with the respondent was procedurally and substantively unfair.

99. I do find and hold that the dismissal of the Claimant was not in accordance with justice and equity and therefore unfair. The remedies sought shall be addressed hereunder.

100. The claimant is seeking reinstatement. The basis for urging the court for reinstatement is that he left his well paying position in South Africa with Anglo Gold as an exercise of his patriotism to work for the respondent, national carrier at a lower salary. Due to his age, the nature of the market and his career, he is not likely to secure new employment with similar terms and conditions as with the respondent. That the claimant was working on critical reports and audits of the respondent and he is the only one with sufficient knowledge and skill to see the process through.

101. The respondent in submissions has challenged the remedy of reinstatement on the grounds that the claim for reinstatement is made on the basis that the claimant held a senior position and due to the publicity associated with his termination of employment is not able to secure a similar job locally and internationally and that he is willing to continue his contribution to the respondent's turnaround programme but in assessing the claimant's work performance, he scored the lowest among the directors. The scoring performance indicator for the claimant was second lowest. This is an indicator he did not understand the financial position of the respondent. Since the claimant left the respondent there is an increase of fleet from 36 to 45 in 53 routes from the previous 52 where 89,000 passengers were carried for the half year period ending 30th September, 2016 compared to previous half. There are cost improvements with a leaner and efficient airline compared to what the claimant stated he had achieved.

102. The respondent also submitted that under section 12(3) (vii) of the Labour Relations Act, This should be the Employment and Labour Relations Court Act, 2011 at section 12(3)(vii) the court has jurisdiction to issue orders of reinstatement. The jurisdiction to order for reinstatement as a remedy should be read together with section 49(3) of the Employment Act, 2007 and where account should be taken as to the circumstances in which termination took place and including any contribution of the employee; the practicability of such reinstatement; and the common law principle that an order for specific performance in a contract of service should be in very exceptional circumstances. The opportunities available to the employee for securing comparable or suitable employment and the failure by the employee to mitigate his losses.

103. Termination of employment was on 19th January, 2016 within the timelines set out under section 12(3) of the Employment and Labour Relations Court Act, 2011. Section 49 provides for remedies where summary dismissal or termination of a contract of an employee is unjustified.

Where ... an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to

a) Reinstatement of the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

b) Re-engage the employee in a work comparable to that in which the employee was employed prior to the dismissal, or other reasonably suitable work at the same wage.”

104. The Court of Appeal in **Kenya Airways Limited versus Allied and Aviation Workers Union Kenya & 3 others, Civil Appeal No.46 of 2013** held that;

As to whether or not an order for reinstatement should be granted is part of the adversarial process of litigation, and the parties should have been accorded an opportunity to address the court on the issue. It is apparent from the pleadings that though reinstatement was not pleaded it was prayed by the 1st respondent. No evidence was tendered by the parties on the practicability or otherwise of such an award.

105. In this case, the remedy of reinstatement is primary and specifically pleaded by the claimant. He testified in-depth in this regard. To allow a reinstatement would redress the procedural and substantive unfairness of his case.

106. Additionally, reinstatement is the primary remedy under section 49(3) of the Employment Act, 2007 and involves placing an employee back in employment as if the dismissal had never occurred. If the exceptions to the remedy of reinstatement do not apply as set out under section 49(4), the court only has discretion with regard to the extent to which reinstatement should be made retrospective. See **Mediterranean Textile Mills (Pty) Ltd versus SACTWU and Others [2012] 2 BLLR 142 (LAC)** and in **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR** the court held that;

... The Court is cognisant of the claimant long service with the respondent, has been diligent and faithful and that this is one exceptional case to order specific performance. this follows an enquiry as to the precedent conditions applicable in a case where reinstatement is sought, section 49(4) of the Employment Act. The claimant has a legitimate expectation of a reinstatement. Termination was on 29th June 2013 a time within the three (3) years rule when reinstatement can be considered.

...

107. I therefore find no justifiable reason to deny the claimant the primary remedy of reinstatement. Such shall redress all the unfairness against him being taking him back to the position he ought to have maintained as at 19th January, 2016. To order otherwise would not appropriately address the unfairness against him as to quantify the damage caused in monetary terms would leave the respondent in more damage than in ordering a reinstatement.

108. The claims therefore made for payment of tickets for travel by self; family and partner go with the reinstatement. The material losses with regard to the claimant being part of the Board of Directors of the respondent is also dealt with his reinstatement back to employment with loss of any benefits, allowances and chance to earn bonuses and allowances due to him as the Group Finance Director and by that virtue being a member of the respondent board of Directors.

109. The orders of the court on the preservation of the claimants position as held before his termination of employment having remained in force and the respondent confirmation that this has not been interfered with, the return of the claimant back to his position will only benefit the respondent largely due to the claimant's vast knowledge in his area of work and internal knowledge of the respondent systems and operations gained over the last 8 years holding the same position without any incident of indiscipline.

110. The reinstatement of the claimant as the Group Finance Director is practical and by such position he becomes a member of the respondent Board of Directors. Such I find to be practical and a matter previously gone into by the respondent in 2008 when the claimant was initially appointed to join the respondent company. The views expressed by shareholders particular letter by KLM dated 28th April, 2016 and letter dated 1st April, 2016 by the Government of Kenya on the standing of the claimant must be taken into account that they are made while this matter was on-going, there were interim orders of the court and fundamentally, this court is the only primary forum for the parties to address employment and

labour relations and with it the court has the jurisdiction to order for reinstatement. Such is constitutional in terms of violation of the right to fair labour practice and lawful where there is a finding of unfairness in the termination of employment. This court should not shy away for ordering a reinstatement in the clearest of cases such as for the claimant.

111. In quoting the case of **United States International University versus Eric Rading Outa, Civil Appeal No.146 of 2013** the respondent assert that even where the court found there was no notice and the internal disciplinary procedures were ignored, the court did set aside the order for reinstatement. These facts are different herein. There has been preservation of the position held by the claimant since January, 2016. With that secured, it is only fair and just that the same be filled by the claimant as the natural occupant.

112. The Claimant was emphatic that he is seeking a reinstatement. I find he is within the required time period the court is required to put into account for the grant of the remedy of a reinstatement. Taking into account the defence made this should not diminish the claimant's right to enjoy his rights at work. I will however make an alternative remedy.

Accordingly, **Judgement is hereby entered for the Claimant against the Respondent in the following terms;**

- a) A declaration that the termination of employment was unfair;**
- b) The Claimant is hereby reinstated back to his position as Group Finance Director without loss of benefits and any lawful entitlement(s) to be paid within 30 days; and**
- c) The Claimant shall report back to work on 8th November, 2017 at 8.30 hours to the chief officer for allocation of duties; and**
- d) Costs of the suit**

In the alternative to the above;

- a) The Respondent shall pay the Claimant salaries due for 3 years;**
- b) Compensation amounting to 12 months' salary at the last gross salary due on 19th January 2016;**
- c) Costs of the suit.**

Orders accordingly.

Delivered in open court at Nairobi this 7th day of November, 2017.

M MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor: Court Assistants

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