REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE 1616 OF 2012

AVIATION AND ALLIED WORKERS UNION….....CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED……..…….....1ST RESPONDENT

MINISTER FOR TRANSPORT…….….....2ND RESPONDENT

MINISTER FOR LABOUR AND HUMAN RESOURCE DEVELOPMENT…3RD RESPONDENT

ATTORNEY GENERAL….....…….……….....4TH RESPONDENT

Before Rika J

Cc. Elizabeth Anyango

Mr. Achiando, instructed by Okweh Achiando & Co. Advocates for the claimant;

Mr. Amoko, Mr. Awele and Mr. Odera instructed by Oraro & Co. Advocates for

The 1st respondent; and,

State Counsel Mr. Fedha for the 2nd, 3rd and 4th respondents.

ISSUE IN DISPUTE: RETRENCHMENT

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Kenya Airways [KQ] seems to have flown into some turbulence. On 1st August 2012, CEO Dr. Titus Naikuni wrote staff notice number 035/2012 addressed to 'all Kenya Airways People.' In this notice the CEO stated that owing to the large increase in the headcount in 2011/ 2012, significant staff annual salary increments, adjustments arising out of the job evaluation grade movements, and costly decisions driven by tough CBA negotiations, employee costs had risen to unsustainable levels. The company Board of Directors had resolved to embark on a restructuring exercise that would result in redundancies, and where applicable, result in outsourcing of labour. The notice advised also, that the Board had approved a

Voluntary Early Retirement [VER] programme, for any employee who wished to leave through this route.

2. On 4th September 2012, some employees received letters from the Head of Human Resources Relationships and Rewards Mr. Tom Shivo, informing them that their positions had been declared redundant, their last day of work being 4th September 2012. Others received letters on the same date, advising that their applications to exit through voluntary early retirement had been approved, and they would receive separation training at the Panari Hotel between 11th September 2012 and 13th September 2012. The Aviation and Allied Workers Union [Kenya] [AAWU], which represents the aviation industry, did not agree with these decisions of KQ. On 12th September 2012, the claimant filed a statement of claim asking the Court to grant the following remedies-:

l Declare that the members of the claimant have suffered unfair and wrongful redundancy;

l Order that the affected employees are reinstated to their former employment and positions without any loss of benefits and /or seniority;

l In the alternative, the employees be paid actual pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned, housing allowance and all accruing allowances;

l Maximum compensation for loss of employment;

l Any other relief the Court may deem fit to grant; and,

l Costs of the suit with interest.

The statement of claim was accompanied by an application for provisional measures, staying the whole process of staff rationalization exercise. Interim Orders issued on 14th September 2012 before Hon. Radido J. Other Orders had issued earlier on, in mid-August 2012, in other separate proceedings instituted and withdrawn by the claimant, on certain technicalities. The application was scheduled for *inter partes* hearing on 5th October 2012. There were several affidavits in support of the claim sworn by M/S Perpetua Mponjiwa the national chairman of AAWU. The claimant also relied on an affidavit sworn by University of Nairobi business lecturer Dr. Martin Khoya Odipo, who prepared a financial analysis of KQ, at the request of AAWU. The Court shelved the hearing of the application for provisional measures, directing the respondents to file their statements of reply to the claim, and hearing of the full claim was scheduled to proceed on an accelerated basis. The 1st respondent filed a statement of reply on 12th October 2012. It also filed replying affidavits and further affidavits sworn by Mr. Tom Shivo, Mr. Dick Murianki the Head of Financial Control and Mr. Charles Kireru, KQ Head of Employee Relations. The 3rd respondent had, through Mr. Benson Okwayo, a Statistical Officer attached to the Central Planning and Monitoring Unit [CPMU] in the Ministry of Labour, filed an affidavit on 28th September 2012, exhibiting a financial audit of the 1st respondent. The other respondents adopted the contents of this affidavit. Hearing of the main claim opened on 29th October 2012. Benson Okwayo gave the evidence for the Ministry of Labour. Martin Khoya Odipo, Anthony Ojee Odiyo and Julius Chacha Mwita testified for the claimant, while Dick Murianki and Tom Shivo testified for the 1st respondent. Hearing concluded on 9th November 2012.

Evidence of the Central Planning and Monitoring Unit [CPMU] Ministry of Labour

3. Benson Okwayo testified that he is employed by the Ministry of Labour as a Statistical Officer. He reports to the Chief Economist in the Ministry. He works under the Central Planning and Monitoring Unit [CPMU], which was formerly known as the Economic Planning Division. CPMU serves as the economic secretariat to the Industrial Court, analyzing CBAs and investigating economic disputes, to assist Judges of the Industrial Court to reach fair decisions. He presented himself in Court with a financial audit of the 1st respondent, pursuant to an order given by the Industrial Court. Through a structured questionnaire, he requested KQ to provide information on the total annual labour force for unionisable, management, and

casual employees for the past 5 years; total annual labour costs for unionisable, management and casual employees for the past 5 years; and annual audited accounts for the years 2007 to 2012.

4. From the answers received, Okwayo reported that in 2007, KQ made a profit of Kshs. 4.098 billion; profit of Kshs. 3.869 billion in 2008; a loss of Kshs. 4.083 in 2009; profit of Kshs. 2.035 billion in 2010; profit of Kshs. 3.538 billion in 2011; and profit of Kshs. 1.66 billion as of 31st March 2012. The analysis showed an overall downward trend of KQ profits between 2007 and 2012. In 2007, KQ had 42 aircraft fully owned and on operating leases, and 23 destinations outside Kenya; 41 aircraft fully owned and on operating leases, and 24 destinations outside Kenya in 2008; 39 aircraft fully owned and on operating leases, and 28 destinations outside Kenya in 2009; 47 aircraft fully owned and on operating leases, and 27 destinations outside Kenya in 2010; 53 aircraft fully owned and on operating leases, and 31 destinations in 2011; and as of 31st March 2012, the aircraft fully owned and on operating leases had gone up to 56, with 34 destinations outside Kenya. Despite the increases in aircraft fleet and outside destinations, the profits dipped between 2010 and 2012.

5. An analysis of the number of employees revealed there were 4,503 employees in 2007; 4,267 in 2008; 4,182 in 2009; 4,122 in 2010; before rising to 4,358 in 2011; and an all high of 4,774 by August 2012. Management staff cost was Kshs. 1.51 billion in 2008/2009; Kshs.1.67 billion in 2009/2010; Kshs. 2.47 billion in 2010/2011; and Kshs. 2.99 billion in 2011/2012. The Unionisable staff cost was Kshs. 6.10 billion; Kshs.7.33 billion; Kshs. 8.66 billion; and Kshs. 10.99 billion over the same respective financial periods. Casual employee cost stood at Kshs. 5.1 million; Kshs. 12.1 million; Kshs. 19.5 million; and Kshs. 13.7 million respectively. 98 employees have opted to exit through the Voluntary Early Retirement programme, while 448 have their positions declared redundant. Most affected in the exit are ground services and flight operations departments. The total number of staff after rationalization is projected at 4,228 employees, around the same level that obtained in 2009/2010. According to Okwayo, the reduction in staff would positively affect the airline's profits, all things remaining constant. Information available to the Ministry of Labour indicates other international players such as Delta Airline, American Airlines, Air France-KLM, Qantas Airline and Gulf Air have implemented similar staff reduction. They have resorted to other strategies such as acquisition of better efficiency aircraft; owning hotels and catering facilities; route network rationalization; and, re-negotiation of CBAs among other measures. Okwayo testified that the office of the Prime Minister of Kenya had called for a financial report of KQ from the Ministry of Labour. Okwayo was part of a team that prepared a wider report on KQ, for the consumption of the government.

6. Questioned by Mr. Achiando, Okwayo stated that he works under the Chief Economist. CPMU is a secretariat serving the Industrial Court. The arrangement was made before the adoption of the new Constitution in 2010. No instructions have been given to CPMU, on its interaction with the new Industrial Court. Okwayo stated he is a statistician, not an economist, but works under the Chief Economist. CPMU has assisted the Industrial Court in economic disputes all through. He did not analyze the profitability ratios; liquidity ratios; efficiency ratios; and investor ratios. The CPMU stated the figures as given by KQ. Productivity measurement is not well established in Kenya. The Productivity Centre is a new Institution. He did not just rehash to the Court figures given by KQ. He did not provide information on the KQ turnover, and did not do a going concern test. In 2009, there was an astronomical loss of Kshs. 4.083 billion. There were several factors contributing to this loss. Among the factors were the wage bill and fuel costs. Wage bill was the number 2 factor. Fuel costs affected the aviation Industry globally. The highest cost under the wage bill, were attributable to the unionisable employees. In 2010, there was a profit of Kshs. 2.035 billion. Wage bill was a major factor in 2010. It is only in 2009 that the 1st respondent made a loss. One can expand and not make profits immediately. The immediate effect of expansion is to bring down the profits. Okwayo did not seek the input of the claimant before making his report. CPMU does not take sides; it is an independent secretariat. The report is not lopsided. Statisticians study economics, finance and accounts to qualify as statisticians by profession. Testifying further in answer to questions from Mr. Amoko, Okwayo stated he has prepared reports for the Industrial Court for about 20 years. He had not made any factual mistakes in his analysis. The costs attributable to unionisable staff in 2011/2012 was Kshs. 10.99 billion. The management cost was Kshs. 2.99 billion. Okwayo reported faithfully. Re-directed by Mr. Fedha, Okwayo testified that the CPMU has not been outlawed under the new Constitution. It has in fact, received a letter from the Chief Registrar to the Judiciary, Mrs. Gladys Boss-

Shollei, to continue serving as the economic secretariat to the Industrial Court. The department is manned by lawyers, economists and statisticians. The report is not a one man report. When audited accounts are required, the CPMU gets these from the employer. If the dispute related to such an issue as house rent allowance, the CPMU would have sought the input of the trade union. The report is to guide the Court, not take sides, concluded Benson Okwayo.

Evidence of the AAWU

7. Martin Khoya Odipo graduated from the University of Nairobi in 1976, with a Bachelor of Commerce degree. He received a Masters degree in Business Administration [MBA], from the same Institution. Odipo has recently obtained a doctorate degree from the University of Dar-es-Salaam, Tanzania. He is also a qualified Chartered Certified Accountant [CCA] United Kingdom, and Certified Public Accountant of Kenya [CPA]. He has 30 years experience in auditing and financial analysis. He has worked for the Catering Levy Trustees as the chief internal auditor. Odipo is the managing director of the Accountant Firm Khoya & Company. Odipo undertook an analysis of the KQ financial statements for the year 2011/2012 as prepared by KQ and audited by Price Water Coopers [PWC]. His analysis followed international financial reporting standards, based on a going concern test; profitability ratios; liquidity ratios; efficiency ratios; and investor ratios. The profitability ratio seems to have declined in the current year, giving the impression that KQ is performing poorly, which is not the case. The liquidity ratio shows a decline also, but this can be attributed to the expenditure incurred by KQ in acquisition of new planes. More labour will be needed to operate the additional fleets. On the efficiency ratio, Odipo observed that the cost has gone up in relation to turnover. The accounts do not have break down on the costs, so that the most effective measure would be the direct labour cost related to employees in the category being retrenched. The employees have generated more money this year than last year. The cost of generating revenue this year was much less than the previous year. The investor ratio gave mixed signals. The first signal depended on the number of shares issued. The second signal indicates that the dividend per share has gone up, which shows that KQ revenue has gone up. The going concern test shows KQ has improved and there is no threat to its finances or existence. Odipo formed the view that retrenchment was without justification. KQ intends to acquire more planes, and therefore needs more employees, particularly, but not limited to, engineers, cabin crew and ground staff. He faulted the report by Okwayo for lacking in ratio analyses. He termed Okwayo's report as copy and paste from the KQ financial statements for the year ended 31st March 2012. CPMU report ignored the contribution of direct operating costs. These costs are controlled by efficient operations. The assumption that profitability will improve after retrenchment is unrealistic. Staff salaries are not the sole reason why there is a dip in KQ profit. Okwayo lumped the staff costs of two different unions together. The Pilots have their Association KALPA, while AAWU stands for the other employees. A demarcation line in staff costs is not shown in CPMU's report. If a distinction was made, it would have been realized that KALPA takes a lion's share in staff wage bill. KALPA was not affected by the retrenchment and the lumping the two cadres of employees, is distortional. The report by the CPMU does not show where the revenue is being applied. There is no clarity on the movement of revenue. Such a revelation would explain where the money is going to, and how this can be arrested without affecting the employees. What the Court was given were just figures. There was a loss of Kshs. 4.083 billion in 2009. Okwayo did not show in his report what caused the dip. Odipo interviewed employees who revealed that KQ purchased jet fuel in advance, to be used for the next 3 years. He undertook a ratio analyses. Ratios themselves may not give the most useful indicator. Productivity of the employees would have been the most informative indicator. Employee efficiency, from his analyses has gone up. If the company is doing badly, it is not because the employees are doing badly. Odipo used the Altman Z-score formula to test KQ as a going concern. Other models are not appropriate for KQ, and would be relevant for other industries such as manufacturing. KQ had improved as a going concern, relying on its data from 2010/2011. It is not in a grey zone. It can sustain itself. There was reduction in profit for the period ending 31st March 2012. This was caused by fuel costs; it had nothing to do with the employees. It was about fuel. There was an increase in the unionisable wage bill by 22% in 2011/2012. Management wage bill rose by 33%. It would not make sense to increase management salaries, with the rate of inflation for the period standing at 16 %. Increment of management salaries was above the rate of inflation. The overall impression made by Odipo of KQ is that its financials are healthy and it is under no immediate threat of deterioration as a result of the wage bill.

8. Cross-examined by Mr. Amoko, Odipo explained that he obtained his Ph. D from the University of Dar-es-Salaam in 2012. He has not uploaded this information in his University of Nairobi profile. He has been a lecturer since 2002, and an auditor from 1976. Auditors cross-check and verify data before reporting. Odipo's report indicated the information was extracted from the financial statements of the 1st respondent. The financial statements of KQ showed dividend per share at Kshs. 1.5 at 31st March 2011, and Kshs. 0.81 as at 31st March 2012. In his investor ratio analysis, Odipo reported the dividend per share as Kshs. 0.81 in 2011 and Kshs. 1.5 in 2012. He interchanged the figures over the 2 years. On efficiency ratios, Odipo mentioned that costs have gone up in relation to turnover, but the statements from KQ do not show a breakdown of direct costs. According to Odipo, direct costs were not captured in the consolidated income statement for the year ended 31st March 2012. He conceded the statement showed direct costs at Kshs. 77.2 billion in 2012 and Kshs. 53.4 billion in 2011. The notes to financial statements at page 97 of the report did not, according to Odipo show a breakdown of direct costs. Paragraph 14 of Odipo's affidavit stated that KQ totally ignored the contribution of direct operating costs and focused exclusively on labour costs. Direct operating costs according to the witness, are easily controlled through the application of efficient operations. The conclusion by KQ that profitability would improve after the redundancy was unrealistic. The KQ statements showed aircraft fuel and oil cost was a direct cost. Forward- buying of fuel is a way of cutting direct costs. If a company predicts financial performance wrongly, it ends up losing. KQ did this in 2009. Price of oil depends on other factors, beyond the control of KQ. KQ has not been hedging. The operating profit account showed fair value [losses / gains] on fuel derivatives. This did not mean that KQ was hedging. Under direct costs in the financial statement were included aircraft landing, handling and navigation. Odipo conceded these costs were defined by governmental controls. He insisted efficient cost utilization could reduce these. KQ could negotiate with the authorities. Landing rights are set by agreement. He agreed that ratios do not give the full picture of the financial health. One has to test if the organization can move further. The financial statements captured the period up to 31st March 2012. Odipo agreed with Mr. Amoko that he would not know what happened after 31st March 2012. He did not see the CEO's letter explaining why it was necessary to have the redundancy. The witness talked to the employees. Employees are his clients. He was concerned about the unusual dip and rise in the profit from 2007 to 2012. An auditor is supposed to consult every source. He talked to the unionisable staff. He did not know about civil aviation regulations on the optimum number for air crew. He would not tell if it was necessary to bring down the numbers working for KQ. The witness wondered why KQ would employ excess numbers in the first place. Newspaper reports claimed executive pay rose by 24% and that of other staff by 33%. Odipo testified further while answering questions by Mr. Fedha that he did not characterize the report by Okwayo as useless. He agreed it showed a trend. Odipo did not see the order of the Court calling for the report. Okwayo should have given more information to the Court. Odipo had not prepared a report touching on such a case as the present one, before. He took his information from the respondent's financial statements. He clarified his evidence, prompted by Mr. Achiando, with the statement that he is a qualified Ph. D holder. Ratios are the correct approach. KQ is in good health. Direct costs did not show the whole picture. As an auditor, Odipo looked at the most likely factors. Efficiency ratio was the most important factor. Okwayo's report did not give a financial analysis. Management received a 24% pay rise.

9. Anthony Ojee Odiyo was employed by the 1st respondent as a flight attendant, on 2nd August 2005. He holds a Bachelor of Education degree and has studied Fine Arts, from the University of Nairobi. He is a member of the AAWU and represents employees at the shop floor level. Odiyo received a letter dated 4th September 2012 from the respondent, approving his voluntary early retirement, and confirming that the respondent had made arrangements for separation training at the Panari Hotel. He received an SMS communication inviting him for a meeting with the respondent. He had not applied to leave employment on voluntary early retirement, and his position had not been selected for redundancy. He had not filled any application forms offering to voluntarily retire early, as required by staff notice number 035/2012 from Naikuni. The recognition agreement between the AAWU and KQ, calls for a negotiated settlement between the parties, on all issues which affect employees covered by the agreement. Odiyo was not consulted. The CBA of 2008/2010 had expired, and the one for 2010/2012 registered with 6 clauses pending agreement. These were the preamble; allowances; redundancy; warnings; foreign contract employees; and the ground operation rules and regulation, clauses. There was no dispute the redundancy clause had not been settled, at the time the redundancy was declared. KQ offered some of its employees

to an outsourcing firm Career Directions Limited. The employees are working for KQ, as employees of this outsourcing firm. Rationalization, according to the staff notice, would be based on individual assessment. No assessment has been carried out to-date. Questioned by Mr. Amoko, Odiyo testified that he received 3 letters on 4th September 2012. 1 was a letter stating that his position had been affected by redundancy; the other referred to approval of his voluntary early retirement. The witness admitted that an employer has the right to declare redundancy under the Kenyan employment law. He was not party to the CBA negotiations. Parties have not met. The union has always been ready to meet the 1st respondent. KQ wanted to dictate who would represent the claimant. AAWU was in agreement who would represent it in the consultations with KQ. Odiyo is not aware of any splits in the union. Bonnie Barasa is the registered general secretary. Zipporah Maina is the acting general secretary. There was no split in the leadership of the claimant. Odiyo did not know if Barasa and Mponjiwa were at one time suspended by AAWU. Re-directed by Mr. Achiando, Odiyo testified that Alvan Mwendar, KQ human resource director kept cancelling negotiation meetings.

10. Julius Chacha Mwita served as the AAWU cabin crew branch chairman. He was employed by KQ as a flight attendant on 2nd July 2007. The affidavit of Tom Shivo sworn 6th November 2012, attached a warning letter issued to Esther Kamuti dated 13th December 2011. The letter was not signed in acknowledgement by the employee. Another letter to show cause why disciplinary action should not be taken dated 2nd June 2009, addressed to Madenge Mudigo, by Angela Nderu the in –flight performance manager, was unsigned. Most of the warning letters issued to employees, had lapsed. Warning letters have a lifespan of 1 year. A letter of summary dismissal issued to Madenge was withdrawn on 17th August 2009. Mwita agreed with Mr. Amoko that an employee's history is read from his file. The past shows a trend. Questioned by Mr. Fedha, Mwita stated that there is a claim against the Ministry of Transport. It issues licences to foreign employees.

Evidence of the KQ

11. Dick Murianki is an accountant by profession. He holds a Bachelor of Commerce Accounting Option from the University of Nairobi, MBA from Moi University and is a Certified Public Accountant-K. He is also a Certified Internal Auditor. He is currently working for KQ as the Head of Financial Control. He has worked for KQ for 11 years. He previously worked with Ernst & Young for about 10 years. He filed an affidavit on 6th November 2012, introducing the unaudited consolidated results of KQ, for the half year ended 30th September 2012. The consolidated income statement covered the period between April and September 2012, compared to the same period last year, April to September 2011. The statement reads as follows-:

Six Months to 30th September 2012, in Kshs. Million	**Six Months to 30th September 2011 in Kshs. Million**
Revenue	
Passenger 43,645	*48,587*
Cargo and Mail 4,913	*4,296*
Handling 773	*919*
Other 501	*1,130*
Total Revenue 49,832	**54,932**
Direct Costs (39,877)	*(39,521)*
Fleet Ownership (5,345)	*(4,934)*

Overheads (10,143)	*(9,458)*	
Total Expenses. (55,365)	**(53,913)**	
Operating loss/profit (5,333)	**(1,019)**	
Operating margin [%] (11.1%)	**(1.9%)**	
Finance Costs (956)	*(682)*	
Finance Income733	*94*	
Other gains and losses (758)	*688*	
Share of results of associate14	*252*	
Realised (loss/ gain) on fuel derivatives (85)	*1,454*	
Fair Value loss on fuel derivatives		
Loss/ Profit before tax (6,589)	**2,825**	
Taxation 1,801	*(791)*	
Loss/ Profit after tax (4,788)	**2,034**	
Net profit margin (%) (9.6%)	**3.7%**	
(Loss) / Earnings per share (Ksh) (4.85)	**4.40**	
Loss / Profit for the period (4,788)	**2,034**	
Other comprehensive loss		
Cash flow hedges (2,041)	*(7,786)*	
Deferred taxation on cash flow hedges 612	2,336	
Share of associate comprehensive income		
Net of tax (131)		
Total Comprehensive loss for the period (6,217)	**(3,557)**	

Murianki explained KQ enters into hedge contracts with financial institutions, to fix the price at which fuel will be bought in the future. Fuel prices are volatile, and the hedging gives KQ a limit of exposure. If the market prices go below the hedge price, KQ pays the difference to the contracted financial institution. If the price shoots above the hedge price, KQ is paid the difference. In 2011, KQ was paid Kshs. 1.45 billion by the financial institutions under the hedge contract. This year, KQ has incurred a loss of Kshs. 85 million. It depends on the floor and the ceiling. Derivates are forward contracts. International Accounting Standard Number 39, demands that the parties to such contracts consider the forward curve, what it says about the contract. If the forward curve says fuel price is likely to go lower, and KQ will pay the financial

Institutions under the hedge contract, the loss must be reflected in the books as a current loss. This is the international standard.

12. KQ has reported a loss of Kshs. 6.5 billion for the period ending 30th September 2012, compared to a profit of Kshs. 2.034 billion for the same period last year. Since there is a loss, the presumption is that the taxman owes KQ a rebate of Kshs. 1,801 billion. This is not money that is paid by KRA to KQ; it is only allowed to offset against future profits. For now, it is a solid Kshs. 6.5 billion out of pocket. The rebate is no more than a book entry. KQ Board made a commentary on these figures. Meant to aid investors, the commentary gives an overview of the very challenging business environment, exemplified by both economic and geopolitical adversities KQ is faced with. KQ explains that for the six months ended 30th September 2012, the global airline industry was impacted adversely by the eurozone crisis and high jet fuel prices. The group realized a revenue turnover of Kshs. 49.8 billion, down from Kshs. 54.9 billion achieved last year. The causal factor in this decline is mainly the weakening demands in the passenger business, as well as sustained pressure on yields. This is the cause of the Kshs. 4.788 billion loss after tax. Revenue Passenger Kilometre [PRK] slipped 3% against 2011 due to depressed uplifts, particularly to European markets. The Available Seat Kilometre [ASK - not to be confused with the Agricultural Society of Kenya], increased by 2.2 % over the prior year. KQ increased capacity, but the uptake plummeted. The people who were actually occupying seats and paying went down. Passenger traffic in Middle East, Asia, and the Orient remains on a positive trajectory. On the domestic front, KQ has realized a 40% growth in passenger traffic on the city of Kisumu route. Traffic to the coast has declined by 0.9% due to the eurozone crisis and security concerns. Cargo volumes registered in 2012 grew by 18.8 % made possible by introduction of B747 freighters between China and Nigeria. Belly capacity improved. Revenue was impacted by additional traffic and stronger exchange rate. The Kshs. strengthened against US $. This had the effect of depressing turnover converted to Kshs. terms by Kshs. 2 billion because large revenues are dollar denominated. Major operating costs have taken a slight reprieve due to the stronger Kshs. Direct operating costs remained largely unaffected compared to the previous year. Fuel costs remained the largest expenditure at 38.7% in 2012, compared to 39.3% for 2011. Overheads at Kshs. 10.1 billion represent 7.2 % increase against prior year. This is largely driven by a 16.8 % growth in employee related costs, totaling Kshs. 7.7 billion. This includes the staff rationalization exercise at Kshs. 826 million. The company has taken stringent cost saving initiatives that have seen non-employee related costs decrease by 15% over the same period. The company issued additional shares rights issue in the AGM of 14th October 2011. This resulted in 1.034 million shares available in the market, and the additional capitalization of Kshs. 14.5 billion. The company has already taken delivery of four E-190 aircraft after the rights issue. The commentary concludes with the information to the investors that IATA predicts global aviation industry will realize net profits of US $ 4.1 billion, down from US $ 8.4 billion in 2011. Prospects for Europe remain bleak. Africa, Asia and the Pacific all show positive trends compared to the previous forecasts, published in June 2012.

13. Murianki gave an outline of the global airline industry statistics, sourced from the IATA. He also provided historical employee head count and costs; average cost per employee; average cost per employee and percentage growth in cost; staff restructuring cost; projected staff savings; process improvement; and, customer journey map. The Kshs. strengthened against the dollar. This depressed KQ turnover by about Kshs. 2 billion. Large portions of revenues are dollar denominated. There is an exchange currency loss. Revenues have come down when expressed in dollars. By retrenching, KQ projects to save Kshs. 1.240 billion in wages and other non- wage allowances. Murianki described these other non-wage costs to include uniforms, staff transport, systems costs and trainings among others. The restructuring is not the firstKQ has carried out. KQ is involved in an entire business model re-look. It is changing processes. High in the mind of KQ is efficiency. The customer journey map is purposed on growing the revenue base. KQ is asking if it has redundant processes. This is the idea behind mapping the customer journey. The affidavit of Charles Kireru, Head of Employee Relations explains what KQ is doing other than declare redundancies. Among these are fuel hedging; in-flight services and employee medical services. Medical expenses have become a high expense, with the increase in fraud. KQ has introduced biometric systems. It has looked at hotel accommodation for staff involved in air travel outside Kenya. Staff and stranded passengers spend a lot of KQ income on hotel accommodation. KQ needs to negotiate with hotels globally. The IT system has been enhanced. Paper tickets have been replaced by e-tickets. Stock holding level has been improved. Suppliers bring supplies. They hold the supplies. KQ only

pays suppliers when KQ uses the supplies. There is in place a component exchange programme. The 1st respondent does not hold aircraft components which it is not using. It exchanges them with other companies. It has cut marketing costs. It has reduced advertisements. Murianki testified that profitability margin went down by 2.58% between 2011 and 2012. It is not proper to deduct ratios. The correct approach would be to divide, rather than subtract the previous year's ratios from the current. The true numbers should be 63% drop in net profit margin; drop of 82% in operating profit margin; a drop of 45% return on capital employed; and, a loss of 52% in return on assets. Purchase of new planes fell under purchase of plant, property and equipment. Airplane purchase cost increased by a mere 2% from Kshs. 3.1 billion to Kshs. 3.2 billion. Odipo ignored borrowings of Kshs. 5.207 million which adversely affected liquidity ratios for the year 2012. The assertion that more planes will demand more employees ignores current profitability challenges. The planes must first be deployed profitably, and it is impossible to opine on employee performance based on financial statements. Direct operating costs cannot be reduced overnight. Fuel costs are dependent on volatile market prices, while navigation and landing charges are fixed by government authorities. AAWU members' wage bill rose from Kshs. 6.09 billion in 2008/ 2009 to Kshs. 10.9 billion in 2011 / 2012. KALPA members' wage bill was Kshs. 2.5 billion in 2008/2009 and Kshs. 3.8 billion in 2011/ 2012. The greater proportion of the increase in the wage bill was borne by the AAWU members.

14. Murianki told the Court that airline business is labour and capital intensive. The company is looking at the full costs. Reliance on turnover alone is misleading. Costs of generating revenue increased. Going concern is not determined by one ratio analysis; there are many factors. Going concern is forward looking, not backward looking. The future cannot entirely be shown by the figures. There are geopolitical factors. Navigational and landing rights are such other factors. Jomo Kenyatta International Airport is expanding, and has for instance raised its landing fees. These are geopolitical factors, which KQ cannot influence. New legislation can wipe out a company. Travel advisories cannot be predicted. In any event, the going concern model was up to 31st March 2012. It could not be predicted that KQ would make the greatest loss since privatization. The company is undertaking fleet expansion. It is a 10 year plan. The plan is based on long term funding. Rights issue could not meet the long term funding requirement. Flight expansion will require more labour, but under a different business model. The witness emphasized that direct operating costs are influenced by other factors, not efficient operations alone. The big dip in the profits in 2009 was explained by Odipo to have been occasioned by imprudent fuel hedging. Murianki stated this was not true. KQ had fixed its price under the hedge contracts at 100-120 dollars per barrel of fuel. Prices collapsed. International accounting standards [IAS 39] required KQ to account for this as a loss. The 1st respondent did not pay any cash to the financial institution. Murianki testified that staff rationalization is based on genuine concerns of KQ. The financial performance is bleak. The exercise is crucial for the survival of KQ as a commercial concern.

15. Answering questions from Mr. Achiando, Murianki further testified that there is no clear cut formula for a going concern. Financial forecasting looks at the future- costs and finances. Murianki is not a fortune teller, but stated he can predict. KQ does not operate in a vacuum. He had heard of the Altman Model which measures the financial health of a business. It is a model that is used only in academic circles. There is no universally accepted model. He did not say management could predict. Restructuring is global in the airline industry. The results for the half year ended 30th September 2012 were not audited. There is no auditor's name or signature in the report. There is no requirement for interim reports to be audited. The accounts are reviewed. Banks would accept the unaudited report. Murianki stated he is not a labour law specialist and does not know if the retrenchment process was discussed between KQ and AAWU. KQ was affected by the airline industry crisis as were other airlines. Murianki did not know how the other airlines went about the problem. He is not in the human resources department and does not know if foreign employees have been recruited. KQ lost Kshs. 4.78 billion for the half year ended September 2012. He gave reasons for this. He would not say if this loss was occasioned by management inefficiencies. The accounts are meant principally for the investors. KQ has a strategic plan for 10 years. The rights issue raised Kshs. 14.7 billion. The issue gave the Government of Kenya the largest shareholding in KQ. Kshs. 4.78 billion loss was in operations. It has no relation to the money raised in the rights issue. The rights issue was aimed at raising capital for fleet expansion. The Kshs. 14.78 billion cannot be applied for any other purpose. There was no raise in executive salaries by 24%. This percentage included a one-off bonus package paid to staff in 2011. Bonus was paid to all employees in 2011 due to

good performance. A publication of KQ called '*Msafiri,*' attached to the affidavit of Perpetua Mponjiwa sworn 21st September 2012 showed KQ achieved an all time high turnover of Kshs. 107.9 billion for the financial year ending 31st March 2012. KQ has lost most of it. Fuel has not come down. Jet fuel is not regulated by the Energy Commission. Profit as of 31st March 2012 was Kshs. 1.66 billion. For the same period in 2011, it was Kshs. 3.53 billion. Accountants are supposed to give honest figures. They look at specific operating period. The interim results ended 30th September 2012 showed KQ overheads at Kshs. 10.1 billion. Staff rationalization cost is given as Kshs. 826 million. In the statement of reply paragraph 34, the 1st respondent gave its staff rationalization cost as Kshs. 837 million. There is a discrepancy, but Murianki clarified that the correct figure is Kshs. 826 million. He also confirmed under questioning by Mr. Fedha that the CPMU report represented documents from KQ. There were no other sources.

16. Re-directed by Mr. Amoko, Murianki stated that the 24% executive pay rise included one –off bonus payment. The witness stressed that his testimony was based on the actual performance. The unaudited report was made in accordance with the Capital Markets Authority regulations. It is released at the investors' briefing. KQ did not cook figures. Such reports are relied on by investors, and monitored by Capital Markets Authorities in the East African Countries. Banks would accept the report to gauge KQ financial health. Financial models are useful to academics. People running companies use practical factors. Management is accountable to investors. The Board approved the accounts. KQ management is not accountable to other airlines. The witness did not know what models these other airlines adopted. Response to crises would be different. Operations are different. He did not knowabout labour regulations in other countries. It is a fact, airlines made losses. Virgin Atlantic cancelled its Nairobi-London route. The notice on staff rationalization explained why it was necessary to restructure. The witness explained to the Court about the factors that KQ could not influence such as jet fuel costs and travel advisories. KQ cancelled flights to Rome because of the eurozone crisis. Flights to London have been cut down. The money raised from the rights issue cannot be applied for other purposes. This is in the CMA regulations. KQ collects in dollars and reports in Kshs. The record high turnover of Kshs. 107.9 billion was achieved at a high cost. KQ made and lost money through fuel hedging. Fuel prices fluctuate to as high as US $ 140 per barrel, to a lowly US $ 38 per barrel. Murianki adheres to the code of ethics issued by the Chartered Institute of Accountants. The figure of Kshs. 837 million in staff rationalization cost was an estimate.

17. Tom Shivo holds a Bachelor of Education degree, Higher Diploma in Human Resources and MBA specializing in Human Resources. He is the Head of Human Resource Relationships and Rewards at KQ. His duties include employee recruitment, performance, reward and compensation. He was involved in the restructuring exercise from the beginning. He looked at the profiles of the affected individuals and computed redundancy payments in collaboration with respective line managers. The exercise was based on a revised strategy, taking costs and efficiency into consideration. Shivo came up with the number of employees to be retained in the revised structures. KQ issued a staff notice number 035/2012 giving reasons for the decision and processes to be taken. Shivo prepared a list of frequently asked questions, and the information was dispersed to the employees. It was explained that owing to the large headcount increase in 2011 / 2012, significant annual salary increments and adjustments arising out of the job evaluation grade movements and attendant salary increases, costly decisions driven by tough CBA negotiations, the employee costs had risen to unsustainable level. There was need for review, to ensure the airline's long term sustainability. The selection mode was communicated to the employees. Roles, not individuals were targeted. The criteria included employee fit in the revised organization structures based on their skills and experience, standard of work performance, displayed work initiative and respective competencies defined for different roles in the organization design. A sample of severance payment computation was attached to the staff notice number 035/2012. AAWU was given a notice dated 1st August 2012. It was copied to the Federation of Kenya Employers, and the AAWU Airport branch secretary. KQ offered training for the affected staff at Panari Hotel and enlisted Psychological Health Services to run the training. 447 unionisable employees were affected by the redundancy, while 98 opted for voluntary early retirement. KQ gave a breakdown of the numbers and the criteria. Once the numbers were identified, the criterion was applied. Revenue assurance support executive and customer relations executive roles were abolished due to duplication. Some roles were consolidated. Cabin crew numbers were high. Shivo examined their performance and productivity. Ground services were the most affected.

Cabin groomers clean the aircraft. KQ had its own groomers, and partly outsourced a number of groomers. It was determined to outsource the entire service. This was the case with loading.

18. Outsourcing is a cost effective model. There was a shift reconfiguration, reducing staff. All customer agents went through online assessment. It was one of the modes used. Information systems saw the elimination of some jobs on the basis of duplication. Revenue management was outsourced. 17 technical persons in the laundry department were affected. On 3rd August 2012, KQ management held a consultative meeting with the AAWU leadership. In the agenda was the subject of labour and restructuring. The issue of the internal conflicts bedeviling AAWU, which officials KQ would engage with, was raised. Amidst these consultations, KQ was served with the Court order issued on 10th August 2012, stopping the process. The affidavit of Perpetua Mponjiwa alleging that employees' performance was good was factually incorrect. The evaluation attached to her affidavit related to a particular flight. It did not reflect performance overall. It did not give details of the employee such as the disciplinary record. 19 flight attendants mentioned by Mponjiwa were selected on the basis of low productivity. M/S Eddah Maria Kendi Marete was grounded from flying for 100 cumulative days over the last 18 months, and had an ad hoc cumulative 25 sickness days over the last 18 months. When an employee is grounded, she cannot fly. The employee would continue to work on ground services. Cabin crew are guaranteed lay over allowance. It is dollar denominated. It is paid whether the employee flies or is grounded. The current rate is US $ 90 for 9 guaranteed nights, coming to US $ 810 per month. Another employee is taken to fly, incurring further expenses. KQ is further hampered by not being able to release employees whose leave is due. Restructuring was carried out fairly. Documents attached to Mponjiwa's affidavit did not show the full picture. The selection was based on objectively verifiable factors. No employee was selected on the ground that she was pregnant, or on the ground of trade union affiliation. If the redundancy clause was not concluded, the parties were free to follow the minimum statutory redundancy procedure under section 40 of the Employment Act 2007. KQ offered employees above the statutory minimum redundancy packages. The half year interim financial results show that it is absolutely necessary to restructure.

19. Grounded means an employee is not available to fly, Shivo explained under cross-examination. One is still an employee of KQ, even though not able to fly. There is no disciplinary action for being grounded. On 3rd September 2012, M/S Eddah Marete was awarded a top seller voucher by KQ of US $ 100. KQ awards for excellence. In the operational roles performance and development report, for the period 2012/2013, Eddah scored 89%. In the previous period 2011/ 2012, this assistant flight purser scored 90%. In 2010/2011 she scored 86%. Shivo explained that performance is different from productivity. No one was penalized for being pregnant. M/S Daisy Wandiri was selected for low productivity. She was grounded for 85 cumulative days, and had ad hoc cumulative 21 days of sickness, over the past 18 months. Shivo did not have specific grounds why she was grounded. Esther Kagure Kamuti was selected for low productivity. In the appraisal of 2011/ 2012, she scored 87%. She had a total of 23 super OTP compliments. OTP means she released the plane on time. M/S Roseline Yuniah Andeka was selected on the ground of performance. She had two warning letters dated 23rd November 2011, and 16th January 2012. She failed to check if all cabin crew had valid flying documents. She too was given commendation by KQ. Commendation was based on specific issues. Performance was based on the employment record. Roseline had two warning letters. M/S Edna Viola Kithuku was employed by KQ as an assistant flight purser upon interview by KQ, on 11th April 2012. She was selected for low productivity, with an ad hoc cumulative sickness of 45 days over the past 18 months.At page 117 of the statement of claim is a letter of Titus Naikuni dated 10th August 2011. Addressed to all KQ people, the letter complained that the CEO had noticed a creeping in of the old bad and unethical habit, of people who are entrusted with handling employee recruitment, manipulating the final outcome. There were individuals who interfered with KQ contractors and consultants in staff recruitment, lamented the CEO. The Human Resources Director is the overall accountable person, explained Shivo. Redundancy process was coordinated through this office. The notice issued on 1st August 2012. Employees were sent home on 4th September 2012, after about 34 days. The claimant was notified. The law only requires the claimant is notified; it does not require consultation. The recognition agreement has a provision for negotiation. Negotiation is done under the CBA. All employees were individually notified. The employees were invited through the official SMS facilities, but this was not the first mode of communication. There were unsettled collective bargaining subjects in the CBA of 2010/ 2012. The agreement was signed on 8th

August 2011. Redundancy clause is outstanding. It was acknowledged by the parties that this was an outstanding issue. The only official from the national office shown to have attended the consultative meetings with KQ management was Bonnie Barasa, the General Secretary AAWU. The test of Last In, First Out [LIFO] was not considered in the process. It is not a requirement under section 40 of the Employment Act 2007. The money raised from the share issue was purely for capital consideration. Kshs. 4.7 billion was lost due to operation costs. KQ did not recruit new employees for the period August to October 2012. KQ would not hesitate to recruit after the redundancy process. New recruitment would be based on the new business model desired by KQ. No foreign cabin crew employees have been recruited. If KQ needs foreigners, it will not hesitate to employ them. It looks at the customer requirements. The Chinese route would be well served by Chinese cabin crew. A firm by the name Career Directions Limited has been providing labour to KQ. This firm was contracted in August 2012. It has absorbed 80 interns who were not employees of KQ. Psychological Counseling Services gave pre and post redundancy counseling. On 13th August 2012, Alban Mwendar, Group Human Resources Director, sent a letter to all KQ people advising that the staff assessment will stand suspended until further notice. Assessment was not completed before the declaration of redundancy, except for the customer service department. On 3rd August 2011, Naikuni wrote to all KQ people, stating *'' at no time in the recent months have management contemplated declaring any redundancies in the company. We are in fact recruiting to match our continued expansion.''* One year later, KQ declared redundancies. Shivo testified that KQ has continued to sponsor the Kenya Rugby team and the Mara marathon. These are long term contractual engagements. The Kenya government is the largest shareholder of KQ at around 29%. KQ remains a private company listed on the NSE.

20. Re-examined by Mr. Chacha Odera, now present for KQ, Shivo explained that when an employee was grounded, there were financial implications for KQ. The voucher given to M/S Marete was in relation to the month of August 2012 only. Productivity is a function of output from the employee vis-à-vis costs of the employee. Performance looks at capabilities over a period of 12 months. The scores do not take into account warnings. 23 OTP compliments given to Esther Kamuti related to 1 flight. In domestic flights, one can get as many as 4 OTPs in a day. M/S Andeka failed to check the travel documents of cabin crew. The immigration authorities can impound aircraft for this default. Edna Kithuku worked in an area where jobs were declared redundant. In any case majority of employees were qualified at the time of redundancy, and unlike the time of her recruitment in April 2012, she was in competition with these employees in August/September 2012. The letter of Naikuni on the ethics of recruitment had nothing to do with redundancy. Redundancy related to many departments. KQ role's was to notify the claimant; it went beyond this and met the claimant. It met the employees and offered counseling. The CBA states that consultation with the claimant is meant to explain the employer's decision, not to negotiate. Section 40 of the Employment Act does not prevent an employer from going ahead with redundancy if the CBA is pending settlement. Counseling is not a requirement under the parties' relationship, but KQ extended this to its employees. It would be difficult to have Kenyans work in foreign jurisdictions. Few can communicate in Chinese. KQ had a continuous assessment of employees and retained different means of communication with the employees.

Final Submissions

21. The principal parties filed their final submissions on 26th November 2012. AAWU argued that the CBA of 2010-2012 has six pending clauses, among them the redundancy clause. In event of disagreement, the CBA provides for the intervention of a negotiating committee. If there is no settlement, and the disagreement persists, it is to be dealt with in accordance with the governing labour laws. KQ failed to follow this procedure. Benefits could not be calculated on the basis of a disputed clause. Declaration of redundancy while the CBA redundancy clause was outstanding smacked of bad faith on the part of the KQ. The 2008/ 2010 CBA had lapsed and its clauses could not be relied upon by the parties after the registration of the succeeding CBA. The claimant was not consulted by KQ. Consultation involves the right to be heard; is part of the right to fair labour practices under Article 41 of the Constitution of Kenya; and a main principle encompassed in the Labour Relations Act 2007. The notice given to staff was on rationalization, a term that is unknown to law, and was from 10th August 2012 to 30th August 2012, a period of less than 30 days. 'Consult' as described in ***Rycroft and Jordan, A Guide***

to South African Labour Law, Second Edition, states at Page 235, ''…..*Consultation does not mean merely affording an opportunity to make a comment on, or express an opinion about a decision already made and which is in the process of being implemented.''*AAWU asked the Court tofind KQ actions were not guided by good faith. ***Dewar, A Guide to Employment Law, Juta [1991] at Page 88****,* explains that good faith suggests some concessions should be made, failing which the employer would be required to give valid reasons for the refusal. The purported consultation with a section of the trade union leadership was a window dressing activity, in which the 1st respondent presented a fait accompli. The selection criteria were faulty. Efficiency rating was not used to determine the fitness or productivity of the retrenched employees. Many employees had good overall appraisals and commendations, from the airline and its passengers. They did not hold superfluous positions. There was no determinate timeframe within which the purported employee evaluation or assessment was carried out. Warning letters issued to employees had lapsed at the time they were used in the selection process. Dismissal letters of employees who had participated in a strike in 2009 were relied upon by KQ. The affected employees were characterized as low on productivity. The strike of 2009 ended in a return-to-work formula, and the summary dismissal letters withdrawn. Selection criteria must be objective. Affected employees are persons with good understanding of modern trends and management systems. Financial constraints experienced by KQ, resulted from poor financial management. Employees cannot be said to be poor performers or low on productivity for the reason that they were grounded, or had been taken ill. Some of the female employees lost employment on the ground that they were pregnant, or for reasons associated with their pregnancy. The company recorded an all time high turnover of Kshs. 107.9 billion in the year ended 31st March 2012. It made a loss of Kshs. 4.7 billion in less than a year. It has purchased Embraer Aircraft, and increased management salary by 24% above the inflation rate.

22. The claimant termed the employment of foreigners by KQ as the height of absurdity. Kenyan employees have been retrenched and replaced with foreign cabin crew. In the KQ Annual Report and Financial Statements for the year ended 31st March 2012, it is revealed that *''plans are underway to increase the number of cabin crew from other markets such as India, Burundi, Rwanda and Ghana.''* Employment of foreigners, while retrenching Kenyan serving in the same positions violates Article 10 of the Constitution. KQ feels it cannot meet the obligations entered into with the claimant on wage increment; instead of engaging the trade union to find solutions, it has engaged Career Directions Limited to employ other staff, to fill the same positions left by the grievants. The Employment Act 2007 and the ILO Covention 158 of 1982 on Termination of Employment, provide that an employee shall not have his contract of employment terminated, unless there is a valid reason. Section 40 of the Employment Act requires employers to take into account the golden principle of 'Last In, First Out' [LIFO], also called 'First In, Last Out' [FILO]. No other alternatives such as employee rotation, triple and quadruple room sharing, leaves without pay or stagnated salaries were considered. Mr. Okweh Achiando asked the Court to find the retrenchment illegal, premature, whimsical and capricious. The claimant asked the Court to grant the remedies as prayed in the statement of claim.

23. KQ submitted that it communicated to the employees, in staff notice number 035/2012 of 1st August 2012, the grim facts which necessitated the exercise. The notice was accompanied by a detailed aide memoire, seeking to address the various issues and giving the contacts of management staff who could be contacted by the employee, for any clarification. A notice was sent to the claimant and the competent authorities, on the same date, giving reasons and the extent of the restructuring exercise. Bona fide officials of the trade union, met with the KQ management on 3rd August 2012. In the follow up of 10th August 2012, the claimant accepted the necessity of the exercise. Interim orders issued by the Court were discharged, and the notice crystallized on 31st August 2012. KQ immediately embarked on the assessment process for purposes of determining who would be affected, other than those who had opted to exit through voluntary early retirement. Section 40 of the Employment Act allows an employer to terminate the contract of an employee by declaring a position redundant. This position has been confirmed by Judge Rawal in ***Lucas O. Ondoya & 43 Others v. Rift Valley Railways Kenya Limited, in H.C.C.C. No. 33 of 2009 [UR] at page 18***where it was held, *'' The employer under the Employment Act No. 11 of 2007 has the right to terminate the services of an employee by declaring him redundant.''* KQ made the decision for economic reasons. CPMU report confirmed that KQ's profitability has been on steady decline for the past five years. This has been occasioned by increase in staff numbers; high jet fuel prices; and

unfavourable currency exchange rates, resulting in sharp increase in operating costs. Cash flow from operating activities has declined, making KQ engage in heavy borrowing. KQ issued a profit warning at the end of 2011/2012. This has come to pass with the interim financial results for the year ended 30th September 2012, showing a comprehensive loss of Kshs. 6.217 billion. IATA has predicted a general decrease of 50% profits in the global aviation industry. The financial figures given by KQ were supported by the trends recorded by IATA, and cannot be said to be 'cooked.' The commentary of the financial report explained the financial downturn of the 1st respondent as brought about by the eurozone crisis; high prices of jet fuel; and travel advisories. These economic and geopolitical factors are beyond the control of KQ. Employee costs have risen to Kshs. 13.4 billion. KQ has taken other measures, explained by the evidence of Murianki, beyond staff reduction, to cut costs. The redundancy clause from 2008-2010 CBA remained a fallback position in the absence of consensus on redundancy in 2010-2012 CBA. In event there was a vacuum in the applicable clause on redundancy under the CBA, the parties were not barred from resorting to section 40 of the Employment Act 2007. The procedure adopted by the 1st respondent was fair and in conformity with the parties' contract and the applicable redundancy law. Requisite notices were issued. KQ proceeded to use fair selection criteria in identifying which employees would be retrenched. The employees were assessed using methods known as Hogan Personality Inventory and Morrisby Aptitude Tests, which are accepted and used worldwide. These tests are of high persuasive value in these proceedings. Selection was based on objective criteria. There was no requirement for KQ, in law or the CBA, to consult. The 1st respondent has a right to terminate, and the right is not subject to any negotiations or consultations. KQ nonetheless engaged the claimant as a sign of good faith. The claimant in the end stymied the consultation process by obtaining *ex parte* orders.

24. The evidence of Odipo equated revenues [inflows] with the cost of generating these revenues [outflows]. Business performance is measured on the basis of profitability. While revenues went up, the costs applied in generating these revenues went up, depleting profitability. KQ urged the Court to uphold the testimony of Dick Murianki on this. The figures given by Odipo are distorted. Productivity could not be measured by simply dividing revenues by the number of employees. It would be misleading to attribute growth, or even decline in revenue, solely to employees. There are no statistics prepared in Kenya on employee productivity. Going concern test as applied by Odipo, ignored secondary factors. Odipo similarly ignored heavy borrowings made by KQ in his liquidity ratios. He testified in breach of most of the provisions of the Code of Ethics for Professional Accountants. KQ did not achieve more number of staff eligible for release, than the required number to be released. LIFO would only have applied as a tie breaker. KQ concluded its submissions with the observation that the employees were retrenched fairly, in a genuine restructuring programme, and were offered generous redundancy packages. The alternative to the decision made by KQ is to allow it to collapse, with severe and economic repercussions beyond the company. Mr. Walter Amoko urged the Court to throw out the entire claim with costs to the 1st respondent.

The Court Finds and Awards-:

25. This dispute raises a number of issues. Broadly, these are whether the retrenchment exercise initiated by KQ on 1st August 2012, and scheduled for completion on 4th September 2012, was justified and based on valid grounds; two, whether the process was carried out fairly and in accordance with the law governing the parties' relationship; and three, to what extent the Court should intervene in the exercise.

26. Sections 2 of both the Employment Act No. 11 of 2007 and the Labour Relations Act No. 14 of 2007, define the term 'redundancy' to mean '' *the loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation, and loss of employment.''* The term 'retrenchment' is not defined in these Acts. Judicial Authorities have defined 'retrenchment' to be '' *discharge of surplus labour or staff by an employer for any reason whatsoever, otherwise than punishment inflicted by way of*

*disciplinary action,'' **[See Malaysia Court of Appeal in the case of William Jacks and Company MSdn. Bhd. v. Balasingam [1997] 3CIJ 235].*** Positions and not employees, become redundant. When theposition becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. 'Restructuring' is similarly, not defined in our law books. Dictionary sources such as *investopedia* describe 'restructuring' to include *''significant modification made to legal, ownership, or operational structures of a company to make it more profitable.''* Although not expressly defined under the Employment Act 2007, 'restructuring' is contemplated by section 45 [2] as a fair termination reason. The provision refers to *operational requirements of the employer.* Companies restructure not necessarily because they are in financial distress, but for such other reasons as mechanization of the modes of production. The terms *redundancy, retrenchment and restructuring* are related, but can be separable. There are other terms used in different jurisdictions, to denote this form of employment termination. These include *downsizing, rightsizing, and de-layering.* Whatever term is used, the decision results in the dissolution of an employment agreement. In Court of Appeal of New Zealand case of ***Brighouse Limited v. Bilderbeck [1994] 2 ERNZ 243 [CA],*** the Court explained in detail that the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

27. The reasons given by employers are open to judicial interpretation. The Court must be satisfied that in all the circumstances of the matter the decision made by the employer was reasonable. Retrenchment becomes a colourable exercise if done for collateral purpose of getting rid of an employee. In ***the Malaysian Court of Appeal No. 28 of 1998 between Shaikh Daud, N.H. Chan, Yaakob Bayer [M] Sdn Bhd v. H.P Ng,*** the Court held that, *''It is our view that merely to show evidence of re-organization in the respondent, is not sufficient. There was evidence before the Court that although sales were reduced, the workload of the respondent remained the same.''* In ***the English case of Chapman v. Goonvean & Rostowrack China Clay Limited [1973] 2 All ER, 1973,*** *Lord Denning M.R.* held that it is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before. In this case the employer terminated the contracts of certain employees on the basis of redundancy, but went ahead to recruit new employees to undertake the same roles. ***The House of Lords in Polkey v. A.E. Dayton Services Limited, 1988 ICR 142 [HL]*** examined the duty of employers to act reasonably in all termination decisions. *Lord Bridge* strongly argued, *'' Thus, in the case of incapacity, the employer will normally not act reasonably, unless he gives the employee fair warning and an opportunity to mend his way, and show that he can do the job; in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly, and then hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns or consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy, and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organization.* In other commonwealth countries, the prerogative of employers to manage their businesses is recognized, but it is agreed that Courts can intervene and determine the reasonableness of the exercise of such prerogative. In the ***New Zealand case of Tupu v. Romano Pizzas Wellington Limited 1995, ERNZ 266,*** *Chief Judge Goddard noted that, ''The law of the land is that every employee has a right not to be dismissed unjustly and no one, no matter how important or how powerful, may take that right away.''* Fairness in all forms of termination is the staple of Industrial Law. In the ***Industrial Court of Kenya Cause Number 231 of 2010 between Kenya Union of Domestic, Hotel, Education, Institutions and Allied Workers [KUDHEIHA] v. Rabai Road Primary School,*** *Justice I.E.K Mukunya* found the employer to have correctly terminated the contract of an employee for economic reasons, but concluded the employer failed on fairness and awarded compensation. Whether a redundancy decision ismade in good faith is a question of fact and degree, depending on the circumstances of the case. So long as the decision is reasonable, and exercised in good faith, the Court is encouraged not to intervene. The Court

however, has a duty to investigate facts and circumstances, and determine if the exercise of the managerial prerogative was reasonable and clothed in good faith.

28. The Government of Kenya retains 29.8 % of KQ shareholding. 26.73 % is held by KLM, while the rest of the shares belong to private investors. The total Kenyan shareholding, government and private Kenyan individual shareholders, stands at 55.24 %. Foreigners have 44.76%. The ownership structure is based on a public-private partnership concept. The company was established as a company fully owned by the Government of Kenya in the aftermath of the break-up of the East African Community in 1977. In 1996, the Government of Kenya gave up 77% of its shares to local and foreign investors, under its privatization programme. The first shareswere floated to the public in March 1996. Dutch airline KLM acquired 26% shares, becoming the largest shareholder of Kenya Airways. In partnership with the KLM and the International Finance Corporation [IFC], KQ restructured its debt and modernized its fleet. KLM remained the largest shareholder until 30th April 2012 when the Government of Kenya acquired additional shares to become the largest shareholder at 29.8%. The IFC, the lending arm of the World Bank was not left behind and purchased a substantial stake of 9.6%, becoming the third largest shareholder of KQ. KLM and IFC have kept a keen eye on the development of KQ from 1996. The IFC is number three largest shareholder, and a financier of KQ expansion. The 1st respondent retains the national carrier designation.

Substantive Justification

29. The report prepared by the Central Planning and Monitoring Unit [CPMU] reflected the financial position of KQ as of 31st March 2012. It was based on the information supplied by KQ. The Court did not find anything prejudicial to the claimant, by Mr. Okwayo not seeking the views of the claimant, before drafting his report for the consumption of the Court. Disputes of this nature call for urgent response, and just as the Court has rushed the parties, and accelerated the proceedings, so too was CPMU rushed to come up with the financial fundamentals of KQ. It is not necessary that proceedings are delayed, as parties prepare, exchange, and critique each others' financial analysis. The CPMU has served as the economic secretariat of the Industrial Court. It has collected data on economic disputes, and assisted the Court in breaking down such data into intelligible evidence. The Court is not bound by the financial reports of the CPMU. The CPMU prepares the reports to aid, not bind the Court. Parties are free to avail to the Court their own financial reports. The duty of the Court is to impartially examine all evidence brought before it, and make a determination, guided by the relevant laws. The position of the CPMU under the new Constitution has not crystallized. It would not serve the principle of judicial independence well, if the economic secretariat of the Industrial Court is to be directed in its work, by the Permanent Secretaries Ministries of Labour or Finance, or the Prime Minister of Kenya, to carry a financial analysis in a matter under the consideration of the Industrial Court. CPMU should shift to the judiciary as an independent economic unit within the Industrial Court. Alternatively, the Judiciary ought to have an economic unit within its research department, assisting the work of the Industrial Court. There is likely to be functional confusion if the Industrial Court continues to share a secretariat with the Executive.

30. The report by CPMU traces back KQ's performance to 2007. It covers the period ending March 2012, while the evidence of Dick Murianki which was gathered midstream the proceedings, captured the most recent financial status of KQ. There are certain aspects of the CPMU report that capture the period up to August 2012. The financial analysis by Odipo covered the period ending 31st March 2012, and did not have the benefit of the current KQ red flags. All reports agree that KQ has made profits over the 5 years analyzed, save for 2009 when a loss of Kshs. 4.083, was reported. Going by the reports, the highest profit after tax was recorded in 2007 at Kshs. 4.098 billion dollars. The highest profit of 2007 was attained with a total staff number of 4,503, the second highest staff number. This staff number given in the CPMU report is contradicted by the number given in the evidence of Murianki. It was not clear to the Court why KQ supplied conflicting statistics. The pattern of giving incorrect figures is evident in the number of employees affected by the retrenchment, and the cost of the retrenchment exercise. The highest number of employees in the CPMU report is given at 4,774 recorded as of August 2012. The headcount recorded as of 30th September 2012 in the evidence of Murianki is 4,834. Even after KQ issued a profit warning at the end of the last financial year, and even as it was issuing redundancy notices, KQ is shown

by its own statistics, to have been bringing in more employees. In 2009 when KQ recorded a loss of Kshs. 4.083 billion, it had the second lowest staff number at 4,182. There are disparities in the number of employees working for KQ between 2007 and 2012, given by Murianki and Okwayo. The only year both witnesses agreed on was 2008 when the number is given as 4,267 employees. In 2007, Murianki gives the staff headcount at 4,154, very different from the figure supplied to Okwayo of 4,503. The highest number of employees given by Murianki is 4,834 presumably by 30th September 2012. Okwayo's figure by August 2012 was 4,774, which would suggest that there were 60 new employees joining KQ between August 2012 and 30th September 2012.

31. There are other factors that influence the profitability of a business beside staff costs, as explained in detail by Odipo and Murianki. High labour costs have featured prominently as a contributing factor to reduced profitability. Historically, additional or reduced number of employees does not seem to have directly influenced KQ profits. Between 2007 and 2009, if the staff number for 2007 is as stated by Okwayo, there was a staff reduction of 320. There was no downsizing or rightsizing shown in the period, and reduction would be through attrition. The profit went down from Kshs. 4.098 billion to minus Kshs. 4.083 between 2007 and 2009. If the staff number for 2007 of 4,154 for 2007 as given by Murianki is the correct figure, there would be a slight increase of 28 employees up to 2009. Between 2009 and 2010, staff reduced by 60 and the profit of Kshs. 2.035 billion was realized. KQ then went on a recruitment spree, taking in 236 new employees in the one year from 2010 to 2011. A profit of Kshs. 3.538 was realized notwithstanding the sharp rise in the number of employees. The biggest number ever employed by KQ was in the year 2011/ 2012 at 416. There was a dip in the profit to Kshs. 1.66 billion reported by 31st March 2012. In the space of about two years from 2010 to 2012, KQ added about 652 employees to its workforce, slightly more than the 546 targeted by the retrenchment and voluntary early retirement exercise subject matter of this dispute. In fact, in its redundancy notices, KQ indicated about 650 employees would be affected by the current staff rationalization programme, an identical number to the one employed between 2010 and 2012. There is no visible correlation between the number of employees and the profit movement. There must be other factors impacting on profitability.

32. The staff salaries and allowances have steadily gone up. The unionisable staff remuneration rose from Kshs. 6.10 billion in the year 2008/2009 to Kshs. 7.33 billion in 2009/2010. This was an increase of Kshs. 1.23 billion. There was a rise in unionisable staff costs by Kshs. 1.33 billion in the following financial year 2010/2011, totaling Kshs. 8.66 billion. In 2011/ 2012, the cost stands at Kshs. 10.99 billion, a rise Kshs. 2.33 billion. Management staff costs rose from Kshs. 1.51 billion in 2008/2009 to Kshs. 1.67 billion in 2009/2010 a rise of Kshs. 0.16 billion. In 2010/2011, this cost went up by Kshs. 0.8 billion adding up to Ksh. 2.47 billion. The last period 2011 /2012 placed management costs at Kshs. 2.99 billion, a climb of Kshs. 0.55 billion. The wage bill of casual employees has gone down from a high of Kshs. 19.5 million in 2010/2011 to Kshs. 13.7 million in 2011/2012. The movement in the wage bill does not entirely match the rise in staff levels. Between the years 2008/2009 and 2009/2010, there was reduction in staff of 122, but an increase in both unionisable and management staff salaries and allowances. There were many new employees who joined between 2010 and 2012, a record 652 in all, which may have contributed to the sharp rise in the wage bill over the period. The number of employees however, is not shown to consistently match the rise in the wage bill. There must be other factors raising the wage bill. It may be. Wage increment through tough CBA negotiation could be one of the factors. The aspect of wage increment, given the common refrain by KQ about tough collective bargaining position adopted by the claimant over the years, should have been explained to the Court in the context of the wage levels. The KQ financial pay structures, how they impacted on the wage bill, between 2007 and 2012 have not been revealed to the Court. There was a newspaper cutting in the statement of claim, stating that KQ raised management salaries by 24% and 33% for other staff in 2011. The increase was said to be due to a one-off bonus package given to all staff. The witnesses who gave evidence could not explain to the Court, what component of these percentages was from the invariable pay structures, and which could be attributed to variable forms of pay. The rise in the wage bill could result from such factors as generous bonus payments every time there is a whiff of a profit in the air; tough collective bargaining concessions resulting in salary adjustments; wayward staff recruitment, reward and recognition structure; or a profligate, management high-fat diet.

33. Murianki gave an analysis of cost per employee and percentage growth in cost. Like in the historical

employee cost and headcount, there was no line drawn between management and unionisable staff cost. The average cost per employee traced back to 2005 until 30th September 2012 is Kshs. 1.23 million in 2005; Kshs. 1.40 million in 2006; Kshs. 1.45 million in 2007; Kshs. 1.66 million in 2008; Kshs. 1.93 million in 2009; Kshs. 2.46 million in 2010; Kshs. 2.57 million in 2011; and Kshs. 2.78 million in 2012. The percentage growth in cost is indicated as 14.15% in 2006; 3.65% in 2007; 14.36% in 2008; 16.23% in 2009; an all time high of 27.41% in 2010; a sharp drop to 4.43% in 2011; and a slight rise to 7.96 % in 2012. While the average cost per employee was Kshs. 1.40 million in 2007 and Kshs. 2.78 million in 2012, the percentage growth in cost was highest in 2010 at 27.4%. It came down to 4.43% in 2011 and 7.96 % in 2012. The average cost per employee has gradually gone up, while the percentage growth in cost has steadied with the high staff headcount of 2011/2012. The analysis of costs per employee and average percentage growth were not reflected in the reports by Okwayo and Odipo. The statistics on average cost per employee were not availed to the two gentlemen by KQ. The Court did not therefore have the benefit of alternative expert views on what these averages and percentages mean in real terms. Murianki's report is much more complete, but his evidence did not explain his methodology in arriving at the figures. He did not include a cost and benefit analysis. Labour is not always looked at as a cost, but is intended to be an investment. The cost per employee would be more objective if shown against revenue per employee. Revenue per employee, though the method of its calculation was disputed by Odipo and Murianki, is the most fundamental of human resources metrics. It would have assisted the Court in more than one way, as it is the primary yardstick for employee productivity, which was a feature in the selection criteria in the retrenchment process. KQ's position was that productivity measures are not entrenched in the Kenyan labour market. It is inappropriate to apportion revenue per employee by dividing total revenues over the number of employees. While the Court agrees with KQ that productivity measures are not common in our labour market, and the Productivity Centre is in its infancy, revenue per employee is accepted globally as basic human resources metric, in employee productivity. It is not objective to give the cost per employee, without giving what ratio of revenue that employee has brought to the company. The figures given to the Court just show what the KQ employee has cost from 2005 to 2012; there is no hint of what the employee has generated. Average cost per employee normally takes into account many factors. Some of the factors include the costs of recruitment, hiring, training of employees; basic salaries; employment taxes; healthcare ; work injury insurance premiums; the physical workplace space; and tools of trade.

34. KQ is expanding. The number of aircraft either owned, or on operating leases grew from 23 in 2007 to 34 in 2012. Destinations outside Kenya increased from 42 to 56 in the same years. KQ has in place a 10 year strategic plan dubbed '*Mawingu,'* [Kiswahili for clouds]. In the year 2011, it had a total of 55 destinations. In 10 years to 2021, KQ plans to have 115 destinations. In 2011, KQ flew to 45 countries and plans to fly to 77 countries by 2021. It has covered 4 continents, and hopes to fly to 6 continents in 2021. It ordered 5 Embraer 190s aircraft in 2010, and placed an additional order of 10 aircraft of the same type in August 2011. 1 Embraer, Brazilian aeronautical product, costs about US $ 32 million. This is about Kshs. 2.5 billion. 15 Embraer 190s will cost about Kshs.37.5 billion. KQ has placed an order for 9 Boeing 787 Dreamliners. A unit of this aircraft costs about US $ 208 million, estimated at Kshs 16.5 billion per unit. 9 of these Boeings are approximated at Kshs. 146.25 billion. KQ records indicate there was a delay in delivery of the Boeings, and KQ contemplated rescission of the contracts with Boeing. However, the dispute has been settled with Boeing making some unspecified reparations to KQ in kind. KQ plans to buy and lease more freighters to expand the cargo capacity. Under KQ Network Map Year 2021, KQ has identified risk areas, issues and response or mitigation to the identified issues. With respect to labour, KQ states it does not have sufficient captains. The response or mitigation suggested is to obtain approval of the government and the trade unions to recruit expatriates. Another issue in the map is the un-availability of skilled local labour. KQ proposes to train more locals at its Pride Centre, but also, intends to bring in expatriates. Another relevant area of concern is the high volatility of fuel costs, which are the largest direct costs. The response or mitigation envisaged is fuel hedging. Labour costs are not identified as a risk under Project Mawingu. KQ flight performance bulletin reveals that KQ has engaged Thai and Ghanaian crew. There are new Thai flight attendants and new flight pursers as part of the project Mawingu. In the KQ Annual Report and Financial Statements for the year ended 31st March 2012, titled '*Taking off for the Future,'* KQ confirms that, '*'plans are underway to increase the number of cabin crew from other markets such as India, Burundi, Ghana, and Rwanda.''* The expansion in the view of the parties will need more investment in labour. There was common ground that more labour will be

required, the only disagreement being in the nature and form of this labour. KQ gave one of the employee selection criteria as '*their fit in the revised organization*.' KQ testified that this additional labour will operate within a new business model. The message from KQ is that restructuring is based on the need to meet the demands of a new business model.

35. The analysis by Odipo agreed with that of Murianki that profitability ratios declined in 2012. Looked at alone, this would give the impression that KQ is in a poor financial position, according to Odipo. Liquidity ratios showed a decline, but in the understanding of Odipo, a lot of expenses have gone to expansion of KQ. Odipo testified that under efficiency ratios, turnover to employees was 21.72 in 2011 and 25.87 in 2012. Turnover to employees' costs was 7.67 in 2011 and 8.04 in 2012. Turnover to direct costs was 1.61 in 2011 and 1.40 in 2012. The figures suggested cost has gone up in relation to turnover. Odipo faulted this saying there was no breakdown on the nature of costs. The Court notes and agrees with the evidence of KQ that there is a breakdown of some of the direct costs in the financial statement for the year ended 31st March 2012. Under the entry direct costs, these were shown to be aircraft fuel and oil; aircraft landing, handling and navigation; aircraft maintenance; passenger services; commissions on sales; aircraft, passenger and cargo insurance; crew route expenses; central reservation system and frequent flyer programme; and others. Odipo concluded employees had generated more revenue to KQ in 2012 than in 2011, and the cost of generating revenue much less in 2012 than in 2011. The investor ratios given by Odipo were in reverse for two comparative periods, and the conclusion that dividend per share went up, meaning more revenue than in 2011 was based on the erroneous interchange of the dividend per share figures. There was nothing in the interpretation of Odipo to persuade the Court that the cost of generating revenue in 2012 was less than in 2011. Odipo's going concern test demonstrated that KQ has improved under this measure, and there is no threat to its existence. The employees improved in their performance; the company is expanding and in need of more staff; and the retrenchment is not justifiable.

KQ stated that going concern test is determined by a multiplicity of factors. The Court agrees that the data relied on by Odipo in doing his going concern test went up to 31st March 2012. There are other factors such as geopolitics and legislation. There was evidence in the affidavit of Charles Kireru, Head of Employee Relations at KQ, to show other cost reduction measures taken by KQ. Fuel volatility has been mitigated through fuel hedging. This is a type of contract entered into between airlines and financiers, where the airlines agree to buy jet fuel and oils at a predetermined price for a specified future time period. In common language, it is a gamble against future prices. If KQ predicts that cost of fuel is going to increase in the future, it enters into a hedging contract to purchase fuel at the current price for months or years ahead of time. If prices double in a year, KQ would be able to purchase the fuel at the previous year's 'locked in' lower rate, resulting in savings. If the price falls below what the airline hedges to buy, it is bound to pay the higher rate than the market price, thereby losing money. In 2012, KQ lost Kshs. 85 million in this gamble, and won a staggering Kshs. 1.45 billion in 2011. Airlines hedge only a certain portion of the fuel requirements, for a specific period with multiple contracts overlapping, as different hedging agreements expire over time. The theory behind airline fuel hedging is to reduce a major source of swings in profits. IAS 39 requires airlines to observe the forward curve in fuel prices, and reflect anticipated future losses, as current losses. In 2008, the global economy was picking. KQ had hedged jet fuel at US $ 100-120 per barrel. The bubble burst in August 2008. When the prices collapsed, IAS 39 required KQ reports to account for this as a loss. By the end of March 2010, the price of fuel had picked at around US $ 80 per barrel. The airline did not pay any cash to the financial institution, and the allegation by the employees that the dip in the profits in 2009 were occasioned by KQ hedging and purchasing jet fuel the same year, had no foundation. This evidence suggested that fuel hedging plays a major role in swings in profits. Figures as stated by Murianki, do not give the full picture. KQ is renegotiating with hotels globally to reduce on staff and stranded passengers hotel costs. The airline is fighting medical frauds. It has introduced biometric system for air travelers. These are among other measures taken to cut on costs. The Court agrees with KQ that these are measures taken in reducing operational costs. The measures have not been taken specifically because KQ is facing financial difficulties. Fuel hedging has been going on over the years. The CEO assured in August 2011 that restructuring is a normal exercise, which KQ has continued to do within the company to suit business changes posed by the environment. The other cost reduction measures listed by Murianki are not extraordinary measures, taken in response to a new situation that has arisen. They are measures that are taken on any average day, as part of good management practices. In establishing whether there is a

genuine redundancy situation, a company does not have to show that it is faced with the threat of collapse. Going concern is aimed at demonstrating the viability of the business in the foreseeable future. The concept does not imply or guarantee that the business is profitable and will remain so in the future. The concept assumes the business will remain in existence long enough for all assets to be fully utilized. Employers acquire assets on the assumption that in the fullness of time, these assets will generate income. This is the same reason why businesses recruit employees. In the period ending 30th September 2012, KQ invested Kshs. 6.4 billion in purchase of property, plant and equipment, compared to an investment of Kshs. 1.5 billion in 2011. The Altman Z Score is a measure, mainly used in academic circles, to predict if a business will go into bankruptcy in the next two years. The test for redundancy does not have to go to the depth of examining the survival prospects of a business. Where the employer has alleged that retrenchment is aimed at securing its future, the implication is that its future is in doubt, and the going concern test, properly carried out, and Altman Z Score formula become relevant, in showing that there is no immediate threat of business closure. The Court differs with Murianki in his evidence that this approach from the claimant, was of academic value. A going concern test, based on the period ending 31st March 2012 is not entirely irrelevant, and assists in the objective assessment of the hidden value of KQ. A company that has registered consistent profits in the past 7 years, the highest turnover in its history of Kshs. 107.9 for the year ended 31st March 2012, which also reports the biggest financial loss in its history six months later, deserves the attention of more than one financial analyst.

36. The evidence of Murianki that KQ management is only accountable to KQ investors, and that how other airlines such as British Airways responded to industry wide crisis could not inform the decision of KQ, was not wholly persuasive. KQ gave information to CPMU that other airlines, faced with similar problems as KQ, have recently retrenched their employees, or taken other cost reduction measures. American Airlines, Delta, Air France-KLM, Qantas, and Gulf Air were given as examples of airlines that have taken drastic business decisions, as taken by KQ in restructuring. Unfortunately, parties did not give sufficient evidence on the position of these airlines. Information available in the website of Gulf Air suggests that it is correct the airline has proposed retrenchment of some of its employees. The decision is the subject of consultation involving the Management, Trade Union, Parliament and the Central Authorities in Bahrain. Besides, Gulf Air is reducing its fleet. Qantas retrenched some of its engineers and redeployed them. Delta not only invested in the fuel refinery, but also offered its employees voluntary early retirement, with a healthcare cover in retirement. These are airlines that recognize there is a problem, have allowed consultations and have the support of strong social security systems, and also the support of the governments. KQ should be more circumspect in giving these comparisons. The industry is highly internationalized. Labour regulatory regimes across the borders have only minor variations. There are certain immutable international standards, mainly through the international legislative work of the International Labour Organization. KQ gave data from the International Air Transport Association [IATA] on the industry statistics for 2012/2013. The IATA annual report supports the view that air transport industry is fragile. Fuel now accounts for 30 % of the average operating costs, compared to 13% a decade ago. Airlines are vulnerable to economic cycles. The immediate challenge is how to keep revenues ahead of costs. IATA expects average collective profits for 2012 to be razor thin. KQ adopted the report of IATA which predicts that while prospects for Europe remain bleak, Africa, Asia and the Pacific show positive trends compared to the previous forecasts published in June 2012. It would be unrealistic to argue that with all the information in the domestic as well as the international aviation market, KQ has not encountered a downturn in its financial performance from early 2012. The question that would follow is whether the right response was made by KQ, to a problem explained by IATA to be rooted in economic cycles?

37. The IATA report expects that airlines will make collective profits for the year 2012, even with such global financial turbulence that has recently faced the industry. Profits will be razor thin, but there is no suggestion in the report that any airline is faced with bankruptcy in the immediate future. The other notable thing about the IATA report that should have been highlighted by the parties is the role of aviation to national and global economies. Many airlines remain wholly owned by governments: some are private-public partnerships; while others are public or private. Whatever the model, IATA encourages governments to become more involved in the industry. Air travel is a strategic concern of every government. IATA advocates sustainable development. This is an important advocacy, which is endorsed under article 10 of the Kenyan Constitution. Defined in ***the Brundtland Commission Report on 'Our***

Common Future' [Oxford Press 27th April 1987], sustainable development means,''*development that meets the needs of the present, without compromising the ability of the future generations to meet their own.''* Sustainable development as advocated by IATA means a balance between social, environmental and economic objectives. The Kenyan Government should be more involved in KQ, because this is a strategic industry, and Kenya's sustainable development cannot be left to the World Bank and its lending arm. Fair labour practices should matter to governments as much as carbon emissions and corporate greed and corruption. The Global Compact, an international effort between the UN and leading Multinational enterprises, has laid down a ten point agenda, for the social legitimacy of businesses. This agenda comprises the four core international labour standards, anti-corruption, human rights and the environment. The Global Compact enjoys universal consensus, based on the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption. These instruments and principles are receivable in Kenya through Article 2[5] and [6] of the Constitution of Kenya. IATA urges governments not to underrate the benefits of aviation enabled connectivity. Job creation is a priority of all governments. Aviation contributes directly by employing people, and indirectly, by facilitating the global workforce, as a means of labour mobility. Global tourism and business rely on air transport. There can be no access to international markets without air transport. IATA says that air transport's contribution to the global GDP is greater than that of the world's pharmaceutical and automotive industries. It compares well with the GDP of Switzerland. There are people who think such a strategic function should not be left entirely to the private sector. The problem with private-public partnership business model is that it allows for a divergence of shareholding, and multiple decision making centres of power.

38. The Prime Minister of Kenya took a bold move and asked the KQ management to stay its course of action, pending further consultations. The Court appreciates that KQ is not a state owned company. It is listed in the Capital Markets in Nairobi, Dar and Kampala. The Government of Kenya however, remains the largest shareholder. KQ is a strategic, rather than purely commercial enterprise. It is a state designated company, carrying the name and the flag of Kenya. It is not clear why the reasonable approach of the office of the Prime Minister of Kenya, was downplayed by KQ top hierarchy. There is material to show the matter was also brought to the attention of Parliament, but it is not known to the Court whether KQ submitted itself to any dialogue from any quarters. Not every problem in the society should engage the intervention of the Court. Parties must learn the importance of social dialogue. There was a call by the largest shareholder for further consultation, but KQ went on with the retrenchment process. Shivo trivialized the issue, testifying that there is no obligation to consult. The Court got the impression that the decision makers at KQ, were not ready to consult. Consultation in any redundancy process as reviewed in the next paragraphs is cardinal in a redundancy process. The Court did not understand the rush to proceed with the process, why the reasonable request by the Prime Minister of Kenya for suspension of the process, was rejected. There was need for more consultations. KQ is not just another employer; it retains a national carrier designation. The Government of Kenya is the largest shareholder. Majority shareholding is in the name of the Kenyan People and the Kenyan Government. A national carrier is a locally registered air or maritime transport company in a given State, which enjoys preferential rights and privileges accorded by the government for international operations. A national carrier may be state owned, state-run, private-public owned, but State-designated. KQ is therefore, not just a run-of-the mill employer that should be left to conduct its business as it wishes. The Government and Judicial Authorities have an obligation to ensure it is a business that meets its economic, strategic as well as social responsibilities. In the context of Article 10 of the Constitution of Kenya, this flagship carries very weighty responsibility. Businesses must be conducted in a manner that meets the demands of the Constitution. Article 10 carries the national values and principles of governance. It is a law that is addressed to ***all persons.*** It states,

''The national values and principles of governance in this Article bind all State organs, State Officers, Public Officers and all Persons whenever any of them—

a] Applies or interprets the Constitution;

b] Enacts, applies or interprets any law; or,

c] Makes or implements public policy decisions.

Among the national values and principles of governance are *patriotism, participation of the people, good governance, integrity, transparency, accountability and sustainable development.*

In applying or interpreting the Labour Laws, KQ was bound to observe these principles. The Court is bound to observe the principles in applying and interpreting the law. Security of employment is a core value of the Employment Act 2007. This is the reason why sections 41, 43 and 45, place such onerous duty on employers in justifying employment decisions. This security has now been anchored in the Constitution, by availing to all persons, the right to fair labour practices. It will not be possible for certain parties in the employment relationship to make certain decisions capriciously and unilaterally, without taking into account the changed constitutional framework. Article 2 of the Constitution makes general rules of international law part of the law of Kenya. Any treaty or convention ratified by Kenya forms part of the law of Kenya. Article 23 of the Universal Declaration of Human Rights states that,

a] Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

b] Everyone without discrimination has the right to equal pay for equal work.

c] Everyone who works has the right to just and favourable remuneration, ensuring for himself and his family the existence worthy of human dignity, and supplemented if necessary, by other means of social protection.

d] Everyone has the right to form and join trade unions for the protection of his interest.

This law secures the right of work. All persons have the right to work. They have the right of protection against unemployment. The protections given under Article 41 of the Constitution, and in the Employment Act 2007, are given strong endorsement under Article 23 of the UNDHR. The right to work is part of our law

39. KQ testified it has adopted a new business model, under project Mawingu. It needs to do so within the parameters drawn by the new Constitution. A Kenyan company that retrenches Kenyans, and recruits Thais, Indians, Rwandese, Burundians, and Ghanaians, is not involved in a development that meets *the needs of the present without compromising the ability of future generations to meet their own*. Shivo denied that KQ has employed any foreigner, but argued the advantages of employing Chinese cabin crew. In the KQ Flight Operations Performance Bulletin, it is made clear there are new Thai flight attendants and Flight pursers. The Bulletin also suggests the presence of Ghanaian crew. The Annual Report and Financial Report is explicit. Naikuni states that KQ has in the past months, recruited 220 cabin crew, to meet the demands of a growing fleet. Out the 220, 16 are of Thai origin. This is the message of the CEO to the shareholders. Shivo testified there are no foreign employees. Why would KQ send its Head of Human Resource Relations to come here and tell the Court a blatant falsehood? What reason will the shareholders have to believe what the KQ management tells them? The expatriates are not just Pilots, but include flight pursers. In the KQ Network Map Year 2021, KQ states it would seek the approval of the Government and the Trade Unions before engaging the services of foreign nationals. In this dispute, KQ does not feel it has any obligation to consult anyone. It is not clear whether it has sought and obtained the approval of the Government, AAWU and KALPA before exporting Kenyan jobs. The justification in employment of foreign nationals from the KQ Annual Report is to embrace diverse cultures. This may well be a noble intention in the context of international business; it cannot be done at the expense of Kenyans. There is need to have the consensus of the social partners. KQ cannot be allowed to expand in the mode it has chosen. Article 10 does not allow this. The entire Constitution of Kenya is demanding that business models are founded on the principles laid down in the Constitution. The old Constitutional framework saw the growth of businesses that depleted the environment, businesses that failed to meet the aspiration of Kenyans seeking productive and decent work, and businesses that were economically inefficient. A new Constitution has been adopted, which puts people, fairness and the planet, at the core of development. It is for businesses to adapt or perish. Employment and social inclusion are integral to the

new order. In 1944, the International Labour Organization adopted the Declaration of Philadelphia. It was declared that *labour is not a commodity.* KQ must understand that Labour is not a commodity.Economic development is not taken for its own sake, but is meant to improve the lives of human beings. Human beings cannot be equated to jet fuel, because labour is not a commodity. This principle is well discussed by Justice Paul Kosgei ***in Industrial Court of Kenya Cause Number 143 of 2007, Kenya Union of Commercial Food and Allied Workers Union [KUCFAW] v. British American Tobacco Limited,*** where the Judge said,'' *Labour is not a commodity. Whereas it is one of the factors of production, labour is unique and distinct from other factors of production. It is composed of living human beings who have feelings and special needs….. Other factors of production cannot take cognizance of the conditions of work as they are non-living.''* The International Labour Organization has over the years, developed International Labour Standards, which help employers and governments to avoid the temptation of lowering labour standards. Without these standards employers and governments would be tempted to lower labour standards to attract investors. Cheap labour is perceived to give host states comparative advantage in the international market. This results in a race to the bottom, where countries lower labour standards to have minimal labour regulatory burdens, and the largest volume of foreign direct investments. KQ has looked to Thai, Indian and Ghanaian cabin crew probably because they are cheap, and these countries are way ahead in the race to the bottom. The much touted project Mawingu embraces and encourages the theory of the race to the bottom. Locally, KQ has turned to Career Directions, a labour outsourcing firm, to avoid the regulatory burdens that have been imposed by what Naikuni has characterized as tough collective bargaining outcomes. Outsourcing of labour is contrary to the principles of fair labour practices, sustainable development, and engenders the race to the bottom. It intends to avoid regular employment relationships, employees' social security and is a vehicle for the lowering of international labour standards. In the context of the air transport industry, outsourcing compromises air safety and security. IATA places high premium on safety and security. Experience on the job is invaluable. KQ has invested in the training of its employees to ensure the safety and security of its systems. Part of the training, as in any workplace, is on-the-job. It does not make sense, to outsource, replacing knowledge and experience in safety and security, with outsourced greenhorns. When employers and governments lower labour standards, particularly by encouraging outsourcing, they encourage the spread of low wage, low skill and high employee turnover. This prevents such countries from developing a stable and skilled labour. It is unrealistic to argue that because American Airlines has retrenched its employees to cut costs, KQ retrenchment is just okay. The American worker has a strong social security system to fall back to. Kenya does not have any unemployment insurance. The social security system is weak. Implementation of knee-jerk retrenchment decisions, denies young Kenyans social protection. If as reported by IATA, air transport is vulnerable to economic cycles, should KQ rush to declare redundancies every time these cycles depress its profitability? Should one lower labour standards to meet the challenges of economic cycles? The Court was not convinced by the 1st respondent that, it in all the circumstance of the matter, acted reasonably. KQ cannot be said to have acted reasonably particularly given that at the end of 2011, the CEO addressed all the KQ people telling them that, ''*at no time in the recent months have management contemplated declaring redundancies in the company. We are in fact recruiting to match our continued expansion. I would like to reassure staff there is no redundancy.''* When such reassurance is given to employees by their CEO, they come to believe that they have a security of tenure, take housing mortgages, car loans and make other long term commitments. The words of a CEO are bankable. It is not reasonable to go back to the same employees with termination letters 12 months down the line, persuading them that a genuine redundancy situation has arisen in which there are no alternatives to retrenchment, and that they must exit at no fault of their own. What becomes of the employees' long term commitments? Good faith in the employment relationship demands that neither party should directly or indirectly deceive the other. Deception is not consistent with the principle of sustainable development. The CEO also revealed at the end of 2011 that the old and bad unethical habits of people who are entrusted with the handling of recruitment processes [shortlisting, interviewing etc] manipulating outcomes, has returned. Corruption in staff recruitment has the effect of creating a bloated and inefficient workforce. Anti-corruption is part of the 4 pillars of the Global Compact.

Procedural Fairness

40. Procedural fairness in a retrenchment exercise is as important as the substantive justification. How

an employer treats its employees really matters to those who exit, and even those who remain. Fair procedure involves notification to employee, their trade union and the government of the intended redundancy. The initial notification is intended to alert the parties to the situation. It is not the same thing as a notice of termination of employment. No decision has been made, and the employer is simply inviting the social partners to discuss a possible redundancy situation. The second phase involves consultation. The Court was surprised to hear KQ witness Shivo who is in charge of human resources at KQ, testify that there was no obligation to consult, but that KQ nonetheless consulted AAWU. Consultation, before and during the retrenchment exercise, is mandatory. Employees are consulted individually and through their trade union. They must be given reasonable opportunity to consider the proposal from the employer. Employees must be given time to respond to the proposal and their response given proper consideration by the employer. It is not a decision that is initially communicated by the employer, but a proposal that ushers in constructive social dialogue. ***Rycroft and Jordan, 'A Guide to South African Labour Law,' Second Edition,*** emphasizes that consultation is not about the employer affording the employee an opportunity, to make a comment about a decision already made by the employer. It is at the consultation stage that proposals of other stakeholders must be likewise considered. There are no quick fixes in a retrenchment exercise. KQ should have engaged with the Government, and in particular office of the Prime Minister, at this stage. Alternatives to the retrenchment decision should be ventilated at the consultative stage. ***In Industrial Court of Kenya Cause Number 390 of 2010, David Omutelema v. Thomas De La Rue,*** this Court stated, *''Consultations must be held with an open mind. The employee must be encouraged to express his views individually and through his trade union. All feedback from all stakeholders merit careful consideration before a decision is made. The notice of termination comes only after all other processes have been exhausted, and a decision made.''* Shivo took a very narrow view of what the term 'labour law' stands for. Labour law is a body of laws, administrative rulings and precedents which address the legal rights and restrictions on working people and their organizations [see Wikipedia]. It mediates many aspects of the relationship between trade unions, employers and employees. This definition is the reason why Labour Statutes are said to only place the minimum employment standards. To assess an employment relationship, the Court is required to look beyond what is contained in a contract of employment. Consultation is fundamental to the retrenchment exercise and is a universally accepted principle of retrenchment law. Article 10 of the Constitution names democracy and participation of the people, as one of our national values and principles of governance. Consultation represents democracy and participation of the people in corporate governance. It should be understood as a building block of business and workplace democracy. Whenever employers apply or interpret the Employment Act, the Labour Relations Act, the Companies Act and other everyday Acts of Parliament, they must allow the participation of the people- shareholders, employees, their organizations and other stakeholders. In the case of ***Mugford vs. Midland Bank, UK Employment Appeal Tribunal [EAT], APP NO. 760 of 1996 IRLR 208, [1997***], it was held that, *''If the employer has not consulted with either the trade union or the employee, the dismissal will normally be unfair, unless the tribunal decides that consultation would have been a futile exercise*.'' This decision also established that collective consultation is not sufficient. Collective consultation does not mean that employers can avoid individual consultation. Employees must be consulted individually, informed they are at a risk of redundancy and allowed the chance to challenge the process and highlight the flaws in it. At the consultation, selection criteria must be discussed with the employee and the trade union. A fair selection criteria includes the preparation and adoption of an objective selection criteria; weighting each criterion; consultation with the affected employees regarding the criteria; advising employees how the criteria will be applied; fairly applying the criteria; inviting comments from employees on the results; and communicating the outcome of the selection criteria. Objectivity is central to the selection criteria. Last in, First Out [LIFO] is one such objective criterion. An employer should avoid subjective criteria. Performance and attitude, where there are no measures of performance or attitude the employer can rely on, are very subjective criteria. Suspected misconduct which has been addressed by the employer is not a proper criterion. Objectivity is important because the process is about positions, not people. Consideration of disciplinary issues which have not been dealt with, the presence of valid warnings in the employee's file and documented performance are objective selection criteria. Consideration of skills is an objective criterion. Last in, First Out [LIFO] is a mandatory requirement under the Kenyan Law. Section 40 refers to consideration of seniority in time, which is basically about LIFO. Although Shivo appeared to downplay the importance of LIFO, it is part of the Kenyan law and parties cannot contract out of the requirement. It is not mandatory in certain jurisdictions with strong legislation against age discrimination. In Kenya there is no prohibition

against this affirmative discrimination. Senior employees are deemed to be loyal and knowledgeable. In the air industry, where security and safety are fundamental issues, seniority must be a key aspect in the selection criteria. LIFO remains a very objective selection criterion and is considered in some jurisdictions as the golden rule of procedural retrenchment law. A valid retrenchment exercise can be reversed on the sole ground that LIFO was not observed. ILO Convention No. 158 on Termination of Employment [1982] and Termination of Employment Recommendation No. 166 [1982] acknowledge that employers can terminate employment for reasons of economic, technological, structural or similar nature. These instruments of international labour standards require that employers notify and engage the trade unions and the competent authorities in consultation, where the employer is contemplating retrenchment. Once the selection process is finalized, the employer should notify affected employees. At every turn there is a duty to act in good faith.

41. KQ announced its decision to restructure in staff notice number 035/2012. It did not communicate its intention, but a decision, telling all Kenya Airways people that *''the company will immediately embark on a restructuring exercise that will result in staff redundancies and where applicable, outsourcing of labour''* The same day, KQ issued a redundancy notice to AAWU, saying it had become necessary to declare redundancies, and where necessary, engage outsourced labour. The notice was copied to the AAWU Airport Branch and to F.K.E. The notice stated the selection criteria would be based on employee skills and experience, standard of work performance, work initiative and respective competencies. Staff Notice number 035/2012 also informed employees the restructuring exercise had a Voluntary Early Retirement component. Those interested were asked to make their applications beginning the same day up to 12th August 2012. The impression the Court made of these notices is that they were lacking in good faith. KQ was communicating a decision, not inviting the trade union, the employees and the government for honest social dialogue. Naikuni advised the employees that KQ had already engaged Career Directions Limited with effect from 1st August 2012 to provide and manage outsourced personnel. A series of decisions were communicated by KQ. There was communication dated 3rd February 2012 to cabin crew to from Nicholas Korir, In Flight Performance Manager, showing KQ was involved in crew internship on board. 151 interns were taken in by KQ. These are the employees of Career Directions, basically performing the roles performed by the employees who have been selected for retrenchment. At the end of 2011, Naikuni advised the employees that KQ was not intending to retrench. It was recruiting more employees to meet the demands of fleet expansion. In February 2012, interns emerged on Board KQ. The June 2012 Flight Operations Performance Bulletin, reports the recruitment of Thai flight attendants and pursers. It mentions presence of the Ghanaian crew. The Annual Report corroborates the Bulletin and goes further to give specific numbers, and the plan to bring in more expatriates. All these new forms of KQ workmen joined early in the year, after Naikuni assured there would be no retrenchment. The notice to the trade union, employees and F.K.E was therefore not clothed in good faith, but was communicating a decision, rather than an invitation to the social partners, for dialogue. A redundancy notification should not be communicating a fait accompli; it is intended to invite the employee, his representative and the competent authorities to explore the alternatives to retrenchment, and if inevitable, form some consensus on how the social impact of the decision can be mitigated. The notice by KQ was issued as a formality, to satisfy the law, but completely shorn of good faith. This Court in the case ***Omutelema v. De la Rue*** observed that, *'' The entire process must be marked by good faith. Good faith is implied at every turn in the process''* KQ appears to have determined sometime ago that it would have its labour outsourced and managed by Career Directions for no other reason, other than to escape what Naikuni has termed as tough collective bargaining positions. Reorganized labour to fit the new business model has come in two forms- outsourced and non-Kenyan.

42. After the notice, there were no good faith and genuine consultations with the Ministry of Labour, the AAWU and the individual employees. KQ management rode roughshod over everyone. The Office of the Prime Minister asked for suspension of the decision, but KQ went ahead with the exercise. Parliament was called to intervene by the employees as shown in their Petition, but KQ remained intransigent. In consultation, parties explore alternatives to retrenchment. There is no evidence on record that KQ ever considered alternatives to retrenchment. It is true that KQ held meetings with AAWU on 3rd August 2012 and 10th August 2012. The meetings were however held with only one national official of AAWU, its General Secretary Bonnie Barasa. Other National Officials such as Perpetua Mponjiwa who is the National Chairman, and Zipporah Maina who is the Assistant General Secretary and acting General

Secretary did not participate. KQ had officially been advised by AAWU, of AAWU National Executive Committee resolution relating to changes at the AAWU. Mr. Alban Mwendar went ahead and held meetings with one National Official, and several other officials described as Branch representatives. The good faith element, given the representatives of AAWU that KQ opted to consult, was absent. The KQ Management complained to the AAWU representatives, that it would have been in accordance with best practices to consult before the process commenced, but that KQ was hindered from doing this because of the factional fights in the trade union. It was not sure which faction to engage. Barasa's group countered that KQ Management was involved in the AAWU leadership feud. AAWU wished to know if KQ had considered alternatives to retrenchment, or had already made a decision. In the meeting of 10th August 2012, no National Official was present. Barasa was represented by a Mr. Abkula whose designation is not shown in the minutes. The notable minute related to the selection criteria that would be adopted in the exercise. KQ assured that assessment would be done by an independent third party. This two day engagement with a few Branch operatives, and one disputed National Official was KQ's idea of consultation. It was suggested that KQ has been involved in the trade union internal conflicts, an allegation that if true, would place the current Management of KQ, in very bad light, particularly in the context of the timing and execution of the retrenchment exercise. There are employers who on occasion feel that tough trade union negotiations result in too many concessions to labour. Outsourcing and fueling of internal trade union conflicts are some of the methods adopted by such employers in trade union busting. The intention is to reduce trade union power. The Court however, has no reason to hold that KQ is involved in the internal conflicts at AAWU. The meetings of 3rd and 10th August 2012 cannot be seen as meeting the requirement of good faith consultation.

43. The selection method was communicated by Naikuni in the notice of 1st August 2012. The test on experience was obviously not adhered to because as testified by Shivo, LIFO did not regulate the parties' relationship. Naikuni told the employees their experience would be a factor, but the method ultimately used did not consider the period of time the employees had spent working. Work experience is a statutory selection criterion, and no employer can avoid LIFO. The criteria communicated by Naikuni were refined into four categories by KQ Human Resources Managers. These were abolishment of office or roles; performance and assessments; productivity and roster changes; and skills fit for the future organization. Assessment was to be carried out by an independent third party, but on 13th August 2012, Alban Mwendar wrote to all Kenya Airways People, advising that assessments had been suspended. A few employees had been assessed but the majority employees were not. They were selected without any assessment. In its closing submissions KQ states that the redundancy notices crystallized on 31st August 2012. This is not so, because from 10th August 2012, there have been successive Orders of the Court stopping the exercise. When the parties appeared before this Court at the outset of the proceedings, they came to argue *inter partes*, the injunction already in place. Amazingly, in paragraph 1.13 of its submissions, KQ says that it immediately upon the crystallization of the notices on 31st August 2012, embarked on the assessment of employees for purposes of determining those who would be affected, other than those who opted for VER. Already employees had long been given their termination notices and invited for what was described as post retrenchment psychological counseling and training. 31st was a Friday, and 4th September 2012 the following Tuesday. What kind of assessment took place over the weekend in between? KQ boldly submitted that the assessments were psychometric tests, known in the world of human resources as Hogan Business Reasoning Inventory and Morrisby Aptitude Tests. These tests assess employees' ability to solve problems and make business related decisions. They test cognitive ability designed to predict real world performance. Candidates' results are scored by comparing their performance with results of others who have the same assessments. KQ did not show when or how it carried out these tests in the days between 31st August 2012 and 4th September 2012, when it had already asked the employees to leave. The initial assessment exercise was suspended on 13th August 2012. No assessment results were availed to the Court. The people who were being tested in absentia for ability to solve problems and make business related decisions were persons whose qualities KQ had sufficiently recorded.

44. Among the employees affected by the retrenchment was Assistant Flight Purser, Eddah Maria Marete. She was employed by KQ on 3rd April 2006. She had been feted with an award of top seller

voucher for the month of August 2012. In the evaluation period 2012/2013, she was given a rating of 89% in an appraisal that followed clearly defined performance indicators. In 2011/2012 year, she scored 90%, and 86% in the 2010/2011. In all the evaluations, she was described by her supervisor as hardworking, driven and great team player. She was repeatedly paid productivity allowance sometime in 2011. She has received numerous commendations from KQ passengers over the years. She was selected by KQ for retrenchment on low productivity. Esther K. Kamuti a Flight Purser was selected because of low productivity. She has worked from May 2000. In 2011/ 2012 evaluation, she scored 87%. She has received commendation from passengers. She received 25 Super OTP Compliments from KQ, on different flights, on diverse dates. OTP means On Time Performance, and is integral to flight operations. Its objective is to encourage cabin crew to have flights depart and arrive on time. Ruth Kioko, a flight purser was selected on the basis of '*displayed work initiative and abolishment/ reduction of headcount structure.*' It is not exactly clear what this wordy criterion was. She had however received commendation from passengers on various flights. There was no objective assessment of initiative, and her employment record had a compliment given to her by KQ for operating different flights at short notice. Her initiative averted flight delays. She was complimented for demonstrating willingness to improve the overall perception of KQ services. The further affidavit of Shivo attached a letter addressed to Ruth, asking her to show cause, why disciplinary action should not be taken against her for gross misconduct. KQ complained that she had attended a press conference at the 680 Hotel in Nairobi where one of the speakers disparaged the management and business policies of KQ. Ruth responded on 29th September 2011, explaining that the press conference was organized by AAWU, and was hosted by the trade union officials who included Ruth. Any concerns and clarifications, she replied, should have been sought from AAWU. Disciplinary record is not given as the selection criterion applied to Ruth. Instead, KQ gave the criteria as *'displayed work initiative, abolishment/ reduction of headcount structure.*' In the view of the Court, this employee was selected on account of her trade union activities and affiliation. Her retrenchment was a colourable exercise. Martin Amolo Oyoto, a flight attendant, was retrenched on the basis of performance and another criterion referred to as 'integrity.' He was alleged to have a disciplinary case with a warning letter dated 15th July 2011, and other previous similar cases 'showing trend of integrity and negative attitude to work.' In the appraisal of 2012/2013, his rating was 84% and 75% the previous period. His supervisor commented that Oyoto is very focused and works with a minimum of supervision. Like most of the affected employees he had a chain of passenger commendations. Most of the warnings issued to him had no validity at the time of termination, and the letters to show cause had been answered and matters rested. Madenge Mudigo, a flight attendant, was selected on the basis of performance. His appraisal for 2012 /2013 awarded him a score of 88%. He stated in the appraisal that his immediate ambition was to become an assistant flight purser. He went on to attend a job interview for the position and was appointed with effect from 13th August 2012. He did not have the opportunity to serve in this role, because KQ issued the redundancy notice on 1st August 2012. KQ stated in selecting him that his disciplinary cases were relatively high. This is the same employee who had sat a job interview and been promoted by KQ. The disciplinary case referred to related to an allegation that he had failed to check whether emergency equipment was working before flight. He was asked to show cause, replied and KQ closed the case on 21st April 2012, before promoting him. It would not make sense at all that selection was justified on a disciplinary issue that was closed, after which the employee had been promoted. Viola Cherotich Rono's case is much similar to Mudigo's. She was selected on the grounds of performance and low productivity. She was a flight attendant, and scored 74% in the evaluation of 2012/2013. She dreamt of becoming an assistant flight purser, and sat an interview for the position. She was successful and was fatefully appointed to the position with effect from 13th August 2012. KQ referred to a letter to show cause dated 26th May 2012 and a first warning letter written to Viola on 31st May 2012. There was no follow up disciplinary action. She had been promoted to take the position of assistant flight purser effective from 13th August 2012.

It is not possible to state the case for each employee, but the trend is the same: high performance evaluation scores over more than one year period; many commendations from passengers and KQ management for work well done; promotions by KQ; and latter day allegations by KQ of disciplinary infractions in spent cases. The performance mode of selection was a sham. It cannot stand the test of procedural fairness in any judicial forum. Other high sounding criteria such as skills fit for future organization were not made manifest to the Court by Shivo in his evidence. It was not shown to the Court

what these skills were, how they were absent from the selected employees, or even why the future organization or business structure that is KQ, does not require the skills possessed by the selected employees. How did the interns who are serving as KQ flight attendants and pursers, and their Thai counterparts, acquire skills fit for project Mawingu, which skills have escaped the selected employees? It does not make any sense to this Court. It is not possible also, that an Airline which is involved in massive expansion is reducing or abolishing offices such as those of flight attendants, senior flight attendants and pursers. The CEO has confirmed the airline has employed hundreds of new cabin crew, 16 of them from Thailand. One cannot have more and larger aircraft, additional flight destinations and reduced cabin crew. Naikuni told the truth on 3rd August 2011 when he assured that KQ is recruiting more employees to match the expansion. He told the truth in the Annual Report. In this Court there were many untruths originating from KQ management. Shivo laboured to distinguish performance from productivity, arguing that even with the good performance appraisals and commendations, the employees were still low on productivity. It was not lost on the Court that KQ testified elsewhere that it is not possible to measure employee productivity, and productivity measurements are uncommon in Kenya. Can an employee perform highly year after year, and be low on productivity? The Court thinks this is a matter of commonsense; it is not possible that high performers in any organization, assessed over a period of three years in succession, end up producing lowly for the employer, unless there is something inherently wrong with the appraisal system. There were no objective productivity measurement lines drawn by KQ. Whereas performance appraisals spread over three years, had scores on identified performance indicators, productivity did not have any scores. Shivo just stated that so and so had an ad hoc cumulative sickness days and was prevented from flying over the past 18 months. Selection criterion is not a matter of a manager's opinion about the employee. Grounded employees continued to work in ground services, and it cannot in all honesty, be argued that they were not generating revenue while grounded.

45. There were allegations that female employees were grounded and therefore deemed un-productive on the basis of pregnancy. No evidence was led by the claimant to support this assertion. The Court notes however, that low productivity on the basis of cumulative sickness related almost exclusively, at least in the samples given to the Court, to female employees. This can be explained on the ground that most of the flight attendants and pursers are probably of this gender. In their Petition to Parliament the employees of KQ alleged that female employees who had given birth in the past two years were targeted. There was no evidence led by the claimant to support this allegation. Maternity documents of Caroline Moraa Mauti were attached to the claimant's statement, but were not supported by witness testimony. The Court is concerned that the number of female employees selected on the basis of low productivity, relating to cumulative sickness, was markedly high. The productivity measure was not fair or objective, and is totally rejected by this Court. The Court finds that the selection method was impracticable, capricious, unacceptable, unreasonable and unfair. It was not objective and most glaringly, no assessment of the individual employees was ever made. The myriad flaws in the selection criteria arose because KQ, in its rush, failed to prepare and adopt an objective selection method. There was no consultation with the employees regarding the criteria, just a decision communicated by KQ to the claimant.

46. Anthony Ojee Odiyo was employed in 2005 as a flight attendant. He is a trade union representative. He was selected for retrenchment and also, received a letter from KQ, approving his application for early retirement. Amazingly this employee told the Court he had not applied for Voluntary Early Retirement, but KQ went ahead and approved his early retirement. There was nothing in the cross-examination of the witness by Mr. Amoko to suggest that Odiyo was an untruthful witness. No records were brought by the employer on his retrenchment selection process, or showing his application for VER and the acceptance. The evidence by Shivo did not disprove the evidence of Odiyo, that he was selected for retrenchment, and also confirmed for Voluntary Early Retirement. KQ appears to have made a decision that Odiyo, Ruth and Mwita, all trade Union Officials must go. There is a strong anti-union sentiment discernible in the conduct of KQ Mandarins. Naikuni complains persistently about tough CBA negotiations. In one newspaper clip, he is quoted as saying of the retrenchment exercise '*that the chickens have come home to roost,'* lampooning the sanctity of existing CBA obligations, and justifying KQ's retrenchment decision on employee costs. The claimant stated that employees involved in a past strike were victimized in the exercise. The attitude of KQ Management, and the obviously flawed selection of trade union officials in the exercise, makes this assertion by the claimant credible. The two processes, retrenchment and voluntary early retirement were revealed were colourable exercises.

Conclusion and Remedies

47. KQ is faced with a cyclic economic downturn, not a downfall, and is expanding under project Mawingu. Not every cyclic financial report of loss should be read as valid reason to justify retrenchment. Many companies make cyclic losses and do not rush to retrench. The Court would not have exercised its mind judiciously, if it concluded that simply because an employer has come to Court with evidence of record financial loss, its decision to mass-terminate the contracts of its employees, is substantively justifiable. There is evidence that KQ has experienced a downturn and is re-organizing. As stated in the Malaysian decision of ***Shaik Daud,*** *to show evidence of re-organization is not sufficient.* The Court must investigate all facts and circumstances of the matter. KQ is increasing its workload, and needs more employees as stated by its CEO. It is expanding its fleet and destinations. It argues that it has adopted a new business model, in which certain employees cannot fit. It does not explain what this new business model, in which selected employees cannot fit, is. KQ has recruited Thais, Ghanaians and plans to have more expatriates, even as Kenyans are told they must leave. This is not nationalist fervour, but hard evidence from KQ corporate records. Interns, trained under the employees selected for retrenchment, and employed through an outsourcing firm Career Directions, have taken over the same roles of flight attendants and pursers. There is no justification that roles have been collapsed or merged; expansion naturally demands an increase in the roles. The financials, while demonstrating a cyclic loss in profits caused by certain global factors, do not show that KQ is in any danger of total collapse. There is a downturn, but no suggestion of a downfall. Its largest shareholder is the Government of Kenya, which through the Office of the Prime Minister, called for further consultations, a call that was ignored by the KQ Management. Data from IATA, while confirming that airlines encountered challenges brought about by volatile jet fuel costs, also confirmed the ability of the industry to weather the storm, and make razor thin profits in the coming years. KQ made a record turnover of Kshs. 107.9 billion as of 31st March 2012. The airline sustained profitability as of 31st March 2012, despite the cyclic economic challenges. It cannot be that every time there is a cyclic loss made by KQ, employees have to be sacrificed. KQ has other underlying problems, such as corruption in its recruitment practices. There are fundamental factors KQ Management has ignored in its project Mawingu, chiefly the existence of Article 10 of the Constitution of Kenya. The 1st respondent cannot be a national carrier, and recruit Thais, Ghanaians and other Nationals, while retrenching Kenyans. Labour, as announced by the ILO in 1944 is not a commodity. Cost of jet fuel cannot be equated to the cost in labour. A new business model must be rooted on the principles of Article 10 of the Constitution, and meet international standards as set by the ILO and the UN Global Compact. Fair procedure, reasonableness and consultation were thrown out of the window. Alternatives were not considered, and even when the Government of Kenya requested for dialogue, KQ was impervious to such entreaties. The current KQ restructuring process, through retrenchment, redundancy and VER is a cheap and ornamental falsehood, which can only be described in the words of Oscar Wilde, as the *silliness of the empty pageant:* [***Oscar Wilde, The Picture of Dorian Gray, Lippincott's Monthly Magazine, 1890].*** What remedies are, available to the grievants?

48. The claimant asked the Court to declare that its members suffered unfair and wrongful redundancy. The Court is persuaded the exercise amounted to unfair termination of employment. The claimant asked for an order of re-instatement of its members, without the loss of seniority, benefits and privileges. An order for re-instatement is not easily made and requires more thought. The employees asked for the alternative orders of maximum 12 months' salary compensation or payment of actual pecuniary loss suffered, from the date of retrenchment. They prayed for any other suitable remedy and costs of the dispute.

49. An unfair redundancy process results in an unfair termination. Under section 43 and 45 of the Employment Act 2007, the employer must establish valid reason or reasons for termination, and demonstrate that it followed fair procedure. Fairness in all forms of employment termination is the staple of Industrial Law. There is no doubt in the mind of the Court that the reason or reasons advanced by the 1st respondent in the mass retrenchment are objectively, not valid reasons. KQ is merely using a financial downturn to justify its replacement of unionized employees with outsourced and foreign workers. It is a company that is expanding and as stated by its CEO, requires more, not fewer employees. The procedure was fundamentally flawed, and the claimant is entitled to the remedies sought.

50. The Claimant primarily prays for the reinstatement of its members. In the alternative, it seeks for a compensatory Award. Section 12 [3] of the Industrial Court Act No. 20 of 2011, grants the Court the jurisdiction to grant an Award of compensation in any circumstances contemplated under this Act or any other written law. It enables the Court to order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law. Section 49 as read together with section 50 of the Employment Act 2007, allows the Court to redress summary dismissal or the unjustified termination of a contract of an employee by compensation, reinstatement or re-engagement. In determining what should be the suitable remedy, the Court is guided by any, or all, of the following principles-

l the wishes of the employee;

l the circumstances in which the termination took place, including extent, if any, to which the employee caused or contributed to the termination;

l the practicability of recommending reinstatement or re-engagement;

l the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

l the employee's length of service with the employer;

l reasonable expectation of the employee as to the length of time for which his employment with the employer might have continued, but for termination;

l the opportunities available to the employee for securing comparable or suitable employment with another employer;

l the value of severance payable by law;

l the right to press for claims or any unpaid wages, expenses or other claims owing to the employee;

l any expenses reasonably incurred by the employee as a consequence of the termination;

l any conduct of the employee which to any extent caused or contributed to the termination;

l any failure by the employee to reasonably mitigate any losses attributable to the unjustified termination; and,

l any compensation, including *ex gratia* payment, paid by the employer and received by the employee.

Compensation is money paid to the employee whose contract of employment has been unfairly terminated, a payment made by the employer to make amends, in economic reparation. Reinstatement refers to the restoration of such an employee to the previous position on the same terms and conditions of employment. Normally, the employee does not lose benefits, seniority and privileges that would have accrued to him, if he had been in continuous service. The employee is restored and treated as though he never left employment. Re-engagement refers to a remedy where the employee goes back to work, but in a different capacity.

51. There is no hierarchy in these remedies. In some jurisdictions, reinstatement is considered a primary remedy. It is considered ahead of compensation. In South Africa, the Labour Relations Act creates reinstatement as a primary remedy. The South African Constitutional Court in ***Equity Aviation [PTY] LTD v. CCMA, and Others, CCT 88/07,*** explained that reinstatement is a primary remedy under South African Law. This is the case today in Germany and Sweden. Until recently, reinstatement was given primary consideration in New Zealand. The Employment Authority in New Zealand could order for interim reinstatement, allowing a dismissed employee to go on working until there was a final decision on

the validity of the employer's decision. This law has changed and reinstatement is considered equally alongside other remedies. In Kenya, the law does not place the remedies in any hierarchical structure. The Court is allowed to look at the facts and the circumstances of each case, guided by any, or all, of the principles under section 49 of the Employment Act 2007, and section 12 [3] of the Industrial Court Act 2011.

52. The wishes of the employees as expressed by their trade union, is to be reinstated by KQ. Compensation and other prayers are made in the alternative. The circumstances of termination have adequately been captured in the preceding paragraphs, and because retrenchment is considered a no-fault employment termination, there is no consideration that the employee could have contributed to termination. The practicability of granting reinstatement must be given greater thought, as the employer has argued that some of the positions previously held by the affected employees no longer exist. The principle relating to the potential of the employee to find alternative and comparable employment is a relevant consideration, given certain unique qualities of the aviation industry. Other principles under the Employment Act 2007 do not have much bearing on the dispute. The employees wish to be reinstated. Termination was effective from 4th September 2012, which is three months ago. The Industrial Court Act 2011 makes the remedy of reinstatement unavailable if three years have lapsed from the date of termination. Three months have passed, and the remedy of reinstatement has not been placed beyond the reach of the employees. Under the repealed Trade Disputes Act Cap 234 and Part 3 of the Labour Institutions Act No. 12 of 2007, the remedy of reinstatement was not affected by the passage of time. It was not unusual to have employees dismissed in excess of 10 years back, reinstated. The amendment introducing the three year limit was meant to encourage practicable reinstatement, as it was felt ordering parties to re-establish a workable employment relationship many years after separation, was not achievable. The limit is therefore related to the principle of practicability, captured under the Employment Act 2007. Long separation is deemed to affect mutual trust and confidence. Employees and employers change. Employment places and the means of production in particular change. This is more so in the hi-tech aviation industry.

53. The main aspect of practicability in a retrenchment, redundancy and restructuring situation relates to the fact that old jobs may have been redesigned, or phased out altogether. In issue is a mass termination exercise. 447 unionisable employees were affected by the redundancy. 98 were mentioned to have left through voluntary early retirement. In total 545 unionisable employees were affected. It cannot be said with certainty, as borne out by the evidence of Anthony Odiyo whether there were genuine applicants, for voluntary early retirement. Practicability is a question about the employer being able to carry out the order. In this dispute the Court has found that the entire process was driven by bad faith. No jobs have been redesigned or collapsed as a result of genuine restructuring. The basis for terminating Ruth Kioko's contract was stated to be '*displayed work initiative, and abolishment/ reduction of headcount on structure*.' She was a flight purser. The role of flight purser has not been abolished. KQ has been recruiting more flight operators through Career Directions. Its expanding its fleet and it would not make sense to diminish or abolish roles. The real reason why KQ 'restructured' the role, as seen elsewhere was to get rid of an employee who was involved in trade union activities. It was a colourable exercise. Other roles became 'unavailable' to the grievants to allow for outsourcing. The decision to outsource for reasons given in this Award, was not driven by valid commercial reasons, and is simply a way of weakening trade union power. The roles are there, but have simply been shifted to a different and informal labour manager. KQ did not demonstrate that any of the roles have been diminished or abolished for sound commercial reasons; it has just set on journey of juggling positions, renaming them and hiding others behind outsourcing. Abolishment of office cannot be a practical hurdle in this case, particularly given requirement for additional labour to handle the expansion programme, the clear evidence that KQ is recruiting more employees with the involvement of third parties, and the assurance by the CEO late 2011, that KQ only intended to recruit more staff. Furthermore, it is a mere three months from the date the claimant's members were asked not to report on duty. The Court has considered that the majority of KQ employees are not likely to fit elsewhere in the Kenyan job market. KQ is the main indigenous air transport company in Kenya. It is not likely that other world players are out there looking for Kenyan air transport employees. The Court does not see comparable jobs in the market, for the high number of flight operations and ground services employees, affected by the KQ decision. How many job adverts, outside the aviation industry, are likely to require a job applicant to have experience with KQ as a flight purser?

What are the prospects for these employees other than seek career re-direction? The Court put a stop to the whole restructuring, first through the initial Industrial Court Cause Number 1360 of 2012 on 10th August 2010. This was affirmed in the subsequent Orders, the last which issued of 14th September 2012. KQ should not have gone ahead with the process, stopping salaries and locking out employees, even after the Court froze the entire process. In the view of the Court, the employees ought to have gone on working, earn their salaries, once the restructuring exercise was stopped by the Court. Notice of termination could not take effect. This Court does not accept a fait accompli. The roles were preserved with the freezing of the exercise by the Court, so that there would be no difficulty in the employees resuming their duties. The Court has considered the alternative prayer of compensation. This is not an appropriate remedy. KQ has already offered generous redundancy and VER packages. The Court did not think that the non-completion of the negotiation of the redundancy clause in the current CBA prejudiced the claimant, or prevented KQ from invoking the redundancy decision. The parties could make reference to the previous CBA redundancy clause, or section 40 of the Employment Act 2007, and adopt which of the two presented employees with superior terms of exit. Terms and conditions of employment are designed to be in continuity. There are no gaps that would be of such nature, as to tie the hands of the parties in the realization of the rights and obligations created over time. Collective bargaining subjects that are pending do not require that the parties cannot move forward. There were two legitimate ways in moving forward: adopt the redundancy clause of the outgoing CBA or fall back on the Act. It is a principal collective bargaining subject, an essential term in the contract of employment and cannot be deemed to be in a state of suspension at any one time. The employer was free to proceed with the redundancy process, relying on the previous redundancy clause, or the Act, whichever conferred superior benefits on the employee. Compensation is a mere monetary remedy, which aims at mitigating economic loss. The violations by KQ involve more than mere economic loss to individual employees; it is about corporate insensibility and disregard for certain constitutional ethos. This is about ensuring that development meets the needs of the present, without compromising the ability of the future generations to meet their own. IT IS HEREBY ORDERED-:

[a] The restructuring, redundancy, and retrenchment processes, carried out by the 1st respondent between 1st August 2012 and 4th September 2012, were substantively without justification, and procedurally wrong, amounting to unfair termination of employment;

[b] All the affected 447 unionisable employees are hereby reinstated to their roles at KQ, held as of 30th August 2012, without loss of seniority, continuity, benefits and priviliges;

[c] All employees shall be paid their back-salaries and allowances from the month of September 2012;

[d] All the reinstated employees are directed to report to work tomorrow at 8.00 a.m.;

[e] Costs of the claim Awarded to the claimant to be paid by the 1st Respondent; and,

[f] 2nd, 3rd and 4th Respondents to cater for their own costs.

Dated and delivered at Nairobi this 3rd day of December 2012

James Rika

Judge