



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 350 of 2002

KENYA AIRWAYS CORPORATION LTD APPELLANT

AND

- 1. TOBIAS OGANYA AUMA**
- 2. AARON MUISYO MWAILU**
- 3. JOHN OTIENO OWILI**
- 4. WALTER OJWANG' AWICH**
- 5. FIDELIS NTHUNTHI**
- 6. HENRY MUNENE KARUBIU) *suing on their behalf and on behalf of*
the ex-employees of Kenya Airways Corporation Ltd..... RESPONDENTS**

**(Appeal from the judgment and decree of the High Court of Kenya at Nairobi
(Mbogholi Msagha, J) dated 23rd February, 2001**

in

H.C.C.C. No. 4434 of 1992)

JUDGMENT OF THE COURT

This is an appeal from a decision of the High Court of Kenya at Nairobi (Mbogholi Msagha, J), given on 23rd February, 2001 in which the learned Judge held that the redundancy affecting the respondents was illegal; and consequently, ordered the appellant to pay the

respondents, in addition to what had already been paid to them on being declared redundant, compensation equivalent to what they would have been paid if they had remained in the employment of the appellant until they reached retirement age. The amount was to be discounted by one third to take into account the vicissitudes of life.

The relevant facts of the case giving rise to this appeal are as follows:- The appellant, **Kenya Airways Corporation Limited** (Kenya Airways), in its heyday and before it ceased operation, had employed the respondents amongst other personnel.

In or about early 1990, the appellant experienced serious cash flow problems and was constantly unable to pay both its staff and creditors on time and to manage its day to day airline operations. That, consequently, led to a heavy accumulation of outstanding debts both in Kenya and overseas. An audit of the appellant's operations revealed that the main contributory factor to the loss-making problem was overstaffing level which then stood at about 4,000 with an aircraft fleet strength of only eleven. The investigation, also, revealed that most of the staff were inherited from the defunct East African Airways the majority of whom, the appellant felt, were only conversant with conservative and traditional systems of management. They were not adaptable to modern revolutionary developments in management systems, technology and work methods applicable to the airline industry.

The appellant felt that the case of overstaffing had stifled revenue generation efforts which was evident when the revenue it generated was compared with other airlines. For example, whereas Kenya Airways employed about 4,000 employees and generated Ksh.3.2 billion in 1989, Air Mauritius employing 1,500 members of staff, generated the equivalent of Ksh.3.7 billion. Ethiopian Airlines, with 3,300 employees generated the equivalent of Ksh.4.8 billion. The audit report further showed that the overstaffing situation had contributed to the:

- **Low level of productivity,**

and

- **Excess staff costs running to Ksh.420 million per year.**

The appellant felt that it was not in a position to bear the burden any longer. It therefore decided to take the following remedial measures in order to save the industry and to create a more commercially viable airline:

1. To negotiate a re-scheduling of the existing loan arrangements.

2. To reduce the current aircraft fleet.

3. To cut the current staff strength by about a half to 1,800 by terminating the services of up to about 2,000 employees by 1990.

By a letter dated 24th April, 1990, the appellant notified the respondents' Union – Transport and Allied Workers Union (TAWU) - that it intended to cut back a sizeable number of its members. The appellant intimated that the criteria it would employ in the exercise, in order to ensure fair-play, was that it would consider individual performance; commitment to the employer, and previous work history. The appellant then issued letters of termination to the respondents and others. However, the respondents felt that the decision to declare them redundant and the whole exercise thereto was not carried out according to law and it sued.

In their plaint first filed in the superior court in August, 1992 and subsequently twice amended to rest with the further amended plaint filed on 7th October, 1997, the six named respondents stated that they were “ *suing on their behalf and on behalf of 960 ex-employees of Kenya Airways*”. They averred that:

“5. On or about the 15th day of May 1990 the Defendant wrongfully and in violation of the provisions dealing with redundancy under the Regulations of Wages and Conditions of Employment Act, Cap. 229 and without any proper notice, proceeded and purportedly declared the said Plaintiffs redundant.

6. The Plaintiffs' claim against the Defendant is for the honourable court to direct the Defendant, in terminating the employment of the Plaintiffs on account of redundancy to comply with the provisions of the Employment Act, the Regulations of Wages and Conditions of Employment Act and the orders made thereunder, and the normal express or implied terms of Agreement for employment in terms of:

(i) Full redundancy payment.

(ii) Notice of termination 36 months.

(iii) Severance pay at the rate of 15 days for each completed year of service.

(iv) The observance of “last in first out” principles.

(v) Cash remuneration for accumulated leave and over time allowance taking into account wrong computation and payment to include all allowances.

(vi) Refund of all deductions except statutory deductions.

(vii) Rebated travel tickets.

(viii) Payments of the deposits retained in the Provident Fund reserve.

(ix) All payments to include all allowances.

(x) Loss of service upto the age of 55 years.

6.A. By reason of the matters aforesaid the Plaintiffs have been deprived of the benefits they would otherwise have earned and have thereby suffered loss and damage.

PARTICULARS OF DAMAGES

- (a) Loss of service Kshs.2,365,026,217**
- (b) Notice payments (36 months) Ksh.200,559,440**
- (c) Severance pay Ksh. 15,529,946**
- (d) Difference on leave not paid Ksh. 4,334,026**
- (e) Provident fund reserve - Ksh. 10,000,000**

- Total Ksh. 2,595,449,629**

6.B. Further by reason of the matters aforesaid the Plaintiffs have been deprived of career advancement and have thereby suffered loss and damage.”

The appellant duly filed a defence, which it later amended, the gist of which was to deny in *toto* the averments as contained in the plaint and the Further Amended Plaint. The appellant averred, firstly; that the respondents had no right in law to file a representative suit on behalf of all the unidentified staff affected by the redundancies due to the undetermined nature of contractual obligations between them and the appellant; Secondly, that the redundancies were carried out in accordance with the terms of service of the respondents and the appellant under the regulations of the airline, thirdly and finally, that in declaring the respondents redundant, the appellant had fully complied with the provisions of the Employment Act, the Regulation of Wages and Conditions of Employment Act as regards payment and other benefits attached to each respondent, and that the respondents have suffered no damage. In particular, the appellant averred that the claim for loss of service and 36 months’ pay in lieu of notice were without legal basis.

The appellant further averred that the respondents were not owed any money by the appellant on account of the Provident Fund and that any claim thereto ought to be against the Trustees of the Fund.

On 12th September, 1994 Shields, J. made an order authorizing the six named respondents in the suit to file suit on their own behalf and on behalf of 923 ex-employees of the appellant. Subsequently, the hearing of the main suit commenced, but, three years or so after the order by Shields, J., the appellant moved the court to have the said order reviewed.

The record shows that the reasons upon which the application was grounded were that (a) each employee had a separate contract of employment and that all employees did not have the same interest (b) the persons named as plaintiffs or claimants did not seek reliefs that were beneficial to all; and; (c) that the mere existence of an alleged common wrong was an insufficient ground for making the order since each person allegedly suffered an individual wrong, being redundancy, under the terms of his contract and no other.

In dismissing the application, the superior court said:

“It is true that each of the plaintiffs on record and those joined following the order now being challenged had different contracts of employment with the defendant. However, their reliefs set out in the pleadings are the same save that at the end of the day it will be a question of quantum. And so, the defendant has to show what prejudice if any, it shall suffer by having that order in place. This has not been shown”

It is apparent from the record that an attempt to prefer an appeal against the said ruling came to nought when the appeal was struck out on a technicality and there was no further challenge.

The proper trial began in February, 1996 and the respondents rested their case on 17th June, 1999 after five of them had testified on behalf of all the claimants. The appellant closed its case on 29th August, 2000. During the course of the trial, both parties made myriad applications resulting in the learned Judge making several rulings and orders. In a reserved judgment delivered on 23rd February, 2001, the learned Judge held that the basic reason for declaring the respondents redundant was financial constraints and over-employment of which the respondents were not responsible and did not, in fact, contribute towards it. He found that there existed a state of mismanagement in the affairs of the appellant at the time. The learned Judge concluded:

“I find that the redundancy was not only misplaced but illegal. There is no other way to describe any action that does not comply with the law. In view of the foregoing, I find that the plaintiffs have suffered loss and damage”

The learned Judge also held that as the loss of service was involuntary, the respondents should be adequately compensated for the period they would have worked had all things been equal. He thought that, where the provisions of law are inadequate and/or Collective Bargaining Agreements are wanting, and therefore likely to result in injustice, the courts should be in a position to fill the void. He concluded:

“In view of the foregoing, I find that each of the plaintiffs herein shall be paid, in addition to what has already been paid by the defendant, compensation equivalent to the remainder of his or her term of service with the defendant based on the retirement age. The said compensation shall be based on the net monthly salary as at the month of May, 1990 when the purported redundancy was effected excluding any allowances. Further, the said payment shall be discounted by one third ($\frac{1}{3}$) to account for unforeseen eventualities of life.

The said payments shall be computed and paid out within 15 days of extraction of the decree herein.

The plaintiff shall be paid interest at court rates on the said sums from the date of filing the amended plaint, that is, 7th October, 1997 until payment in full. They shall also have the costs of this suit.”

There are sixteen grounds of appeal of which grounds 2, 3 and 4 relate to the learned Judge’s alleged misdirection as to the law relating to the court’s jurisdiction in a representative action. In a forceful submission, Mr. Fraser, who appeared for the appellant before us contended that:

a) Whether or not the named respondents were entitled to sue on behalf of all persons declared redundant was an issue before the court and it was wrong for the learned Judge to find that his ruling of 8th December, 1997 on an interlocutory application disposed of the issue. He should have found that the six named respondents were not entitled to sue on behalf of all persons declared redundant and only they were entitled to make any claims for compensation.

b) That the learned Judge should have held that in a representative action he could only make a monetary award to the six named respondents. The jurisdiction of the court as regards the persons on whose behalf the case was brought was limited to a declaration, and

c) That an award of damages is a personal relief which can only be granted to a named plaintiff who proves his individual case. There is no jurisdiction to award damages to a class or to persons in a representative action who are not named as plaintiffs.

Mr. Fraser averred that the persons sought to be represented had separate contracts and did not possess the same interest; and moreover, the persons named as claimants did not seek reliefs that were beneficial to all. He contended that in the circumstances of this case, it could not be said that the respondents constituted persons who have the same interest in the suit within the meaning of *Order 1 rule 8* of the Civil Procedure Rules. He submitted that each person claiming damages must prove his case individually and that it was wrong in law to allow the six named respondents to prove damages on behalf of over 960 other claimants. To buttress his submission, he referred us to the decision in *Duke of Bedford v Ellis [1901] 70 L.J. Ch.* at page 105 which we will have an opportunity to refer to later in this judgment.

Mr. Fraser, also, referred us to various authoritative decisions, both local and English, which show that suits founded on individual contract or in tort cannot be brought in a representative suit.

Dr. Khaminwa, for the respondents, submitted in reply to these submissions, that the issue as to whether the respondents had a right in law to file a representative action due to the undetermined nature of the contractual obligations between them and the appellant had been conclusively dealt with by the learned Judge. He submitted that this issue ought not to be resurrected here since the appellant had had sufficient notice and no prejudice can be said to have been occasioned by it. Moreover, he argued, the learned Judge, Mbogholi Msagha, J. cannot now be faulted since the appellant did not prefer any appeal against the order of Shields, J.

Dr. Khaminwa further contended that the trial Judge correctly adopted a liberal approach towards the scope of the representative action under *Order 1 rule 8*, since the particular circumstances of the case demanded so.

It is trite law that *Order 1 rule 8* is an exception to the general rule that all persons interested in a suit ought to be made parties thereto. The object of the rule is to facilitate the

decision of questions in which a large body of persons are interested, without recourse to the ordinary procedure – see *Afzalumnissa v Fayazuddin* AIR 1931 ALL 610. In cases where the common right or interest of a large community or members of an association or large sections is involved, there will obviously be insuperable practical difficulty in the institution of suits under the ordinary procedure, where each individual has to maintain an action by a separate suit. Thus, to avoid numerous suits being filed for decision of a common question, **Order 1 rule 8** has come to be enacted – see *Mulla*: The Code of Civil Procedure, 16th Edn. P. 1519.

Order 1 rule 8 reads as follows:-

“8(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

(2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”

The synopsis of the above rule therefore is that the conditions necessary to bring a suit within the rule are: - (i) numerous persons; (ii) same interest; (iii) authority or permission of the court; and (iv) notice of suit. Thus, a representative suit is one which is filed by one or more persons or parties under this rule on behalf of themselves and others having the same interest. It is also clear that there is no requirement that a person seeking to institute a suit in a representative capacity must establish that he had obtained the sanction of the persons interested on whose behalf the suit is proposed to be instituted.

In *Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others* – Civil Appeal No. 57 of 2002 (unreported) this Court upheld the decision of Ringera J. (as he then was) when he held:

“The claim in the present suit sounds in tort contrary to the opinion of the plaintiffs’ counsel. Breach of statutory duty of care is to my mind a claim in tort essentially, so is the claim in negligence and fraud. Of the cases cited, the one which in this context is most pertinent is PRUDENTIAL ASSURANCE CO. LTD. VS. NEWMAN

INDUSTRIES LTD & OTHERS [1979] 3 ALL ER 507. As seen earlier the same case is authority for the proposition that a representative action could lie in tort even though the members of the class have separate causes of action provided care was taken to ensure that the action did not confer on any member of the class a right he could not have claimed in a separate action or bar a defence which the defendant could have raised in such separate action. The case also held that because of that reason a plaintiff in his representative capacity would normally be able to obtain only declaratory relief.”

And

“The authorities I have so far analysed seem to suggest that the words “same interest” do not mean one joint cause of action and relief. A representative action can lie in either contract or tort where numerous persons claim either in one cause of action jointly or in separate causes of actions severally.”

And further, that:

“The key words in these opinions are “significant common interest” and “community of interest”. For my part, I agree with the Australian High Court that the rule being a facilitative one must be given a broad interpretation which will secure its purposes, of enabling several parties to come to justice in one action rather than in separate actions. With that in mind I think it is logical and appropriate that parties who have a community of interest in the determination of the substantial questions of law or fact in the suit qualify as persons with the same interest in the suit. In the instant matter there can be no question that the named plaintiffs and the represented persons have a community of interest in the determination of the issues of whether or not the defendants owed them any duty of care under the statute or common law or whether they deceived them in the preparation of the scheme of arrangement and whether or not the losses they have allegedly suffered are consequential upon any breach of such duty or deception. They are in my opinion persons with the same interest in the suit. It may very well be that that is the kind of interest the defendants’ counsel called motive. If it was it does not matter.”

In the matter before us, we would also agree with the learned Judge, and Dr. Khaminwa, that the plurality of the parties, though varying from time to time, was not a barrier to them suing as a class. It is common ground that some respondents had been reinstated and

promoted, others had died and some had abandoned their claims. Some were seeking damages and others were not. As will be recalled, this was the main reason which prompted Mr. Fraser to argue that it could not be said in all the circumstances that all the respondents had the same interest in the same suit.

It is also not in dispute that the respondents were all employees of the appellant. They alleged they were unlawfully declared redundant and were denied their rightful terminal dues. Their numbers and names were not difficult to catalogue.

The question then that arises is whether the respondents' representative action was excluded since the relief claimed was damages and because there existed separate and individual contracts with the appellant.

In CARNIE & ANOTHER V. ESSANDA FINANCE CORPORATION LTD. [1957] 127 ALR 76, the High Court of Australia discussed a rule substantially identical to our **Order 1 rule 8(1)**. Mason C.J., Dean and Dawson JJ. held at paragraph 5 of their speech:

“All that this subrule requires is numerous parties who have the same interest. The subrule is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions. It has been suggested that the expression “same interest” is to be equated with a common ingredient in the cause of action by each member of the class (PRUDENTIAL ASSURANCE VS NEWMAN INDUSTRIES (1981) Ch.229 at 255). In our view this interpretation might not adequately reflect the content of the statutory expression. It may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognized that persons having separate causes of action in contract or tort may have the same interest “in proceedings to enforce those causes of action.”

And McHugh J. in paragraph 1 of his speech said:-

“In my opinion, a plaintiff and the represented persons have “the same interest” in legal proceedings when they have a “community of interest” in the determination of any

substantial question of law or fact that arises in the proceedings. Other factors may make it undesirable that proceedings should continue as a representative action, but that is a matter for the exercise of discretion not jurisdiction.”

In the Robin Cahill's case (*ibid*), this Court held that the key words in the decision are “*significant common interest*” and “*community of interest*” and that it is manifestly clear that in order to invoke **Order 1 rule 8**, it is not necessary that the “cause of action” must be the same. What is required is that there should be the “same interest”, i.e.

- i) Common interest; or
- ii) Common grievance.

Also, “same interest” must be distinguished from the expression “same transaction” – see MULLA: The *Code of Civil Procedure, 16th Edn. p 1527*. In other words, what is required under the rule is that the parties should have the same interest; it is not necessary that their interest arises from the same transaction.

It is our view that the respondents before us have the same interest within the meaning of **Order 1 rule 8**. They challenge the redundancy visited upon them by the appellant. All claim damages and unpaid compensation for loss of service and severance pay amongst other reliefs. The rule, as we said in Robin Cahill's case, was enacted to facilitate decision of questions in which a large body of persons, as in this case, are interested without recourse to the ordinary procedure. This would forestall insuperable practical difficulties in the institution of separate suits in cases where the common right or interest of a community or members of an association or large section, is involved.

In our view, therefore, the learned Judge acted properly in holding that the six named plaintiffs were entitled to sue on behalf of all persons declared redundant.

As persons having separate causes of action in contract or tort may have the same interest “in proceedings to enforce those causes of action” there is no legal bar for the respondents herein to bring a representative action for the reliefs sought in the *Plaint* and in the *Further Amended Plaint*. We think that the six named plaintiffs and the represented persons have “the same interest” in legal proceedings when they have a community of interest in the

determination of substantive questions of law relating to the consequences of their redundancy. Grounds 2, 3 and 4 of the grounds of appeal must fail and are accordingly dismissed.

Mr. Fraser has also complained in the main that the learned Judge was in error when he held that the redundancies were misplaced and illegal. In a lengthy submission, Mr. Fraser contended that the appellant was lawfully entitled to declare the respondents redundant and that in doing so, its act fell within the legally recognised grounds under the **Trade Disputes Act**. In countering Mr. Fraser's submissions, Dr. Khaminwa's principal contention was that the appellant had no valid reason to declare the respondents redundant. He maintained that the appellant's financial constraints were brought about by gross administrative mismanagement by its top management and the Board. He averred the appellant had no legal or moral right to render the respondents jobless without any alternative well knowing that unemployment in Kenya is a serious problem. He submitted that the act of the appellant had rendered the respondents unemployable in view of their advanced ages. He urged the Court to act fairly and contended that where there is a void in the domestic law, the Court should draw assistance from the application of international human rights law and other regional instruments. Dr. Khaminwa referred, for example, to **Article 40** of the Constitution of the Republic of Uganda which states –

“40. (1) Parliament shall enact laws –

(a) to provide for the right of persons to work under satisfactory, safe and healthy conditions;

(b) to ensure equal payment for equal work without discrimination; and

(c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.

(2) Every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business.

(3) Every worker has a right –

- (a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests;
 - (b) to collective bargaining and representation; and
 - (c) to withdraw his or her labour according to law.
- (4) The employer of every woman worker shall accord her protection during pregnancy and after birth, in accordance with the law.”

He also brought to our attention *Articles 22* and *23* of the Constitution of South Africa which provide that:

“22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23. (1) Everyone has the right to fair labour practices.

(2) Every worker has the right

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.”

In citing those provisions and several others, Dr. Khaminwa challenged us and all courts in Kenya to adopt a new approach to social justice concepts. This approach was exemplified in a paper presented by Justice P.N. Bhagwati, former Chief Justice of India, to the **Judicial Colloquium in Bangalore** in February, 1988 wherein the eminent jurist posed the question:

“Can judges really escape addressing themselves to substantial questions of social justice? Can they simply turn round to litigants who come to them for justice and the general public that accords them power, status and respect and tell them that they simply follow the legal text, when they are aware that their actions will perpetuate inequity and injustice? Can they restrict their inquiry into law and life within the

narrow confines of a narrowly defined rule of law? Does the requirement of constitutionalism not make greater demands on the judicial function?"

The former Chief Justice thought that the constitution is what judges make it and judges cannot therefore remain oblivious to social needs and requirements while interpreting the constitution. He asserted that there are normative expectations from judges and these normative expectations arise from the revolution of rising expectations which characterizes modern society in most parts of the Third World. He advised that the world is at present on the threshold of a new era of freedom and progress because with a passion unequalled in the past century, the peoples of developing countries are today demanding freedom; not only freedom from arbitrary restraint of authority, but, also freedom from want, independence from poverty and destitution and from ignorance and illiteracy. It is this freedom which is now demanded by millions of people all over the world and the judges in interpreting the fundamental rights enshrined in the constitution cannot remain aloof and alienated from this demand of the people for social and economic freedom which he subsumed under the label 'social justice'.

We agree with Dr. Khaminwa that economic, social and cultural rights now occupy an increasingly important place in the legal systems and political aspirations of different countries of the world and that they are given much attention in the activities of the United Nations and other international and regional organizations. It is evident that since the Second World War, largely under the impact of the Universal Declaration of Human Rights, the constitutional recognition of both civil and political rights and of economic, social and cultural rights has become a very widespread practice. Indeed this Court has had occasion in the recent past to examine the applicability of international laws in the domestic context when it stated:

“Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two international human rights covenants: the Covenant on Economic, Social and

Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the United Nations General Assembly in 1966).

There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing State law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states:

“It is within the proper nature of the judicial process and well established functions for national Courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation of or the common law.””

- see Rono v. Rono & another [2005] 1 EA 363 at page 370.

Thus, to the extent that it can be demonstrated, in a suitable case, that the domestic law is ambiguous, uncertain or totally lacking, there is no reason, in our view, why courts cannot have regard to international customary law and international instruments ratified by Kenya without reservation, to resolve such ambiguity or uncertainty. It is an onerous task to discharge in view of the provisions of **section 3(2)** of the Judicature Act (Cap 8), and that is why, despite vigorous opposition from Mr. Fraser, we allowed Dr. Khaminwa a wide berth to explore territory outside our domestic labour laws.

Dr. Khaminwa asserted that the respondents’ right to work and protection from unemployment are some of the fundamental rights in the whole system of human rights and freedom. As regards termination of employment, he contended that there exists a general

principle that a worker's employment should not be terminated by an employer unless there is a valid reason connected with the worker's capacity or conduct or based on the operational requirements of the enterprise. We accept these principles. We would also reiterate that the respondents, and indeed all Kenyans, are entitled to expect the courts in the country to guarantee them the enjoyment of their economic, social and cultural, civil and political rights. But, with the greatest respect to Dr. Khaminwa's spirited and learned submissions, we doubt whether these universal principles can assist us in any way to resolve the pertinent issues we are called upon to determine in this appeal.

Dr. Khaminwa argued that the issues at hand were complicated and that there was a dearth of case law material. He sought to persuade us to apply the doctrine of positivistic jurisprudence by which the court may take a bold step by laying down a new rule or principle which itself contains the potentiality of creative expansion and development. In this regard, he referred us to the celebrated and trail-blazing cases of Rylands v Fletcher and Donoghue v Stevenson. The courts in these cases were obliged to choose between conflicting lives of past cases but settled for a wider field and thus created new law judicially. Thus, the judges had filled the gaps left by rules by using their discretion. *Freeman* in his book Lloyd's Introduction to Jurisprudence 7th Edition wrote at page 1389 that:

“It has long been received opinion that judges filled in the gaps left by rules by using their discretion. Positivistic jurisprudence from Austin to Hart placed emphasis on the part played by judicial discretion. “In these cases it is clear”, Hart has written, “that the rule-making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests.” A competing twentieth-century view was espoused by realists who emphasised the paramountcy of the Judge's discretion.”

However, other philosophers and jurists especially *Ronald Dworkin* and *Rolf Sartorius* – see (1963) 60 J. of Phil. 624 – *Taking Rights Seriously* and (1968) 78 *Ethics* 173 – hold different views. For *Dworkin*, judges are always constrained by the law. There is no law beyond the law. He asserts that judges should not act as “*deputy legislators*” for two reasons. First, it offends the democratic ideal that a community should be governed by elected officials

answerable to the electorate; and if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he has violated some duty he had, but rather a new duty created after the event.

We are grateful to Dr. Khaminwa for his scholarly research and persuasive submissions. However, we are far from being persuaded that there exists a void or a missing link in our Labour Laws which the courts must bridge by resorting to international instruments and other innovative devices. The learned Judge basically declared the redundancy exercise illegal for three main reasons. Firstly, the mismanagement of the appellant of which the learned Judge thought the respondents were not responsible for; secondly, the hurried, clumsy and haphazard manner in which the dismissal was effected; and thirdly, failure by the appellant to strictly abide by *Regulation 15 of The Regulation of Wages (General) Order*.

‘Redundancy’ is defined in the *Trade Disputes Act (Cap 234)* as:

“..... the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous.”

In *Halsburys Laws of England* Vol. 16 at page 460, paragraph 667 it is stated that an employee who is dismissed is taken to be dismissed by reason of redundancy if the dismissal is attributable, wholly or mainly, to the fact that:

- i) the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish,**
- iii) the requirements of that business for employees to carry out work of a particular kind in the place where they were employed have ceased or diminished or are expected to cease or diminish.**

The Industrial Court of Kenya has attempted to define what amounts to *redundancy* in the case of *Kenya Pilots Association v Kenya Airways Limited - Cause No. 94 of 1993*. It describes *redundancy* as involuntary and permanent loss of employment caused by an excess of manpower. It states:

“The situation can be brought by many factors such as change in the method of working, reorganization and technological changes due to economic conditions, etc. Although redundancy moves are generally made by the employer, it is a method of determining the employment contract. However, in many establishments there are agreements on redundancy between the union and management. In the main, agreements stipulate that where redundancy is apprehended in any section of the Employment the employees have to be informed through the union representatives, so that those to be affected will be told exactly why they, and not the other employees, are being affected; and in all cases of redundancy, the initial burden lies upon the management to prove (i) that the grounds of redundancy exist, (ii) that the employer has acted *bonafide*, and (iii) that the employer has followed the golden rule of “last come first go” or “first in last out.”

It is common ground that the appellant was facing severe financial hardship during the period 1989 – 1990. It is further not disputed that its creditors could not be paid on time; salaries for the respondents were often delayed and that overdraft facilities with its banks were of serious concern. Further, statutory deductions had to be deferred.

It is apparent that emergency remedial measures were attempted but all in vain. It was proved that the employees were hopelessly outdated in modern air industry technology. Other methods aimed at cost reduction and efficiency improvement were tried, but, with no success.

The evidence tendered before the trial court, in our view, established on a balance of probability that the appellant was entitled to retrench some members of staff including the respondents by declaring them redundant. It was obvious that the excess or superfluous staff had to leave in the process of rationalization. It became clear that the appellant had totally no option; it either had to restructure and cut costs or collapse altogether.

The appellant has tendered evidence to show that most of its employees including the respondents were members of several Trade Unions, for example, Kenya Airline Pilots Association (KAPA), Transport and Allied Workers Union (TAWU) and Kenya Airways Staff Association (KASA). It has also been shown that all the Unions had negotiated Collective Bargaining Agreements (CBA) with the appellant. All the CBA provided for procedures of declaring the members redundant and the mode of payment for the loss of

service subsequent thereto. The evidence on record further proves that all the Trade Unions of which the respondents were members agreed that the redundancies were inevitable and they consented to it. Further, the Ministry of Labour was advised before hand as is mandated by the *Regulations of Wages (General) Order*.

It comes from the recorded evidence that both the appellant and the respondents' Unions selected a criteria for the retrenchment and that the procedure agreed upon was followed. In our view, the respondents have not demonstrated that the selection process was faulty. We are satisfied on our own independent assessment of the evidence that the appellant observed all relevant laws and regulations governing the redundancy of the respondents.

Dr. Khaminwa, in canvassing the appeal, dwelt largely on what he claimed to be breach of natural justice by the appellant. Once again, we are grateful to him for his vigorous and powerful submissions. However, we would reiterate that in determining the lawfulness or otherwise of termination of employment whose terms and conditions have been reduced into a contract, the only test is whether the said termination or redundancy was in accordance with the contract itself. The rules of natural justice have no application to contracts of employment - see *Rift Valley Textiles v Edward O. Ogando – Civil Appeal No. 27 of 1992* (unreported).

Mr. Fraser argued that the learned Judge did not examine the evidence to see whether the reasons for redundancy were genuine. We would agree with Mr. Fraser. It was economically illogical for the learned Judge to expect the appellant to retain in employment workers until they attain the age of retirement whether they delivered or not and whether the employer is solvent or not. Further, it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations.

In concluding his arguments, Mr. Fraser submitted that the learned Judge erred in entering judgment “*for the sums to be computed*” and for which he had received no evidence and for which the learned Judge had no basis on which to calculate or compute. Mr. Fraser further argued that the learned Judge was wrong in law to award damages for breach of contract; and that in any case, damages for wrongful dismissal should not exceed the salary that would have been earned if the contract of employment had been properly terminated. Mr. Fraser also contended that the alleged loses should have been pleaded and proved as special damages.

In a lengthy reply to these submissions, Dr. Khaminwa strenuously argued that the respondents deserved enhanced damages in that the respondents have, in addition to loss of employment, suffered psychological anguish, public ridicule due to negative publicity, break-up of families due to sudden loss of income, and discontinuation of children's education.

In his judgment on the question of compensation for redundancy, the learned Judge held:

“If I were to find that the redundancies were properly effected, I would have arrived at the conclusion that the plaintiffs were properly compensated under the law and terms of agreements executed on their behalf by their union representatives. But that is not the case.”

What the learned Judge, in effect, is saying is that the respondents had been properly compensated under the law save that the redundancies had not been properly effected. On our part, having held that the redundancies were properly effected according to law, we must find as surmised by the learned Judge that all the respondents herein had been properly compensated by the appellant. Also, it is evident that the exercise was conducted in an elaborate manner and the provisions of the Collective Bargaining Agreements were adhered to.

The most glaring aspect of this case is that there are several respondents who are not part of the employees declared redundant. It was admitted that such employees still work for the appellant. Moreover, another group of the respondents whose names were not known had retired both before and after the redundancies. However, no attempt had been made to delete their names from the pleadings. We would agree with Mr. Fraser that the respondents had not proved each of their claimed dues and hence special damages, though pleaded, could not be awarded. The learned Judge correctly so found and there was no cross-appeal on that finding.

On the issue of Provident Fund Reserve claim for Shs.10 million, we observe that the Fund is run by Trustees who are independent from the appellant. Any claim thereto should therefore be directed at the Trustees and not the appellant. Once again as correctly found by the superior court, the claim against them would appear to be misplaced.

Is an employee whose services have been terminated entitled to general damages? This Court in *Kenya Ports Authority vs. Edward Otieno* – *Civil Appeal No. 120 of 1997* (unreported) drawing support from the case of *Addis v Gramophone Company (1909) A.C. 488* emphatically stated that there can be no general damages in respect of suits based on a termination of employment contracts.

We would also think that it was unreasonable for the respondents to believe that it was their entitlement and right to be employed by the appellant during their whole working life. The expectation has no basis in law as employment relationship is contractual and thus terminable under the terms of the same contract.

Grounds 7 to 16 of the grounds of appeal have, in our view, been sufficiently resolved by us and are hereby allowed. It is unnecessary for us to deal with any other grounds of appeal since we believe that they will not have any bearing in the ultimate decision which we are about to pronounce.

In the result, and for the foregoing reasons, we allow this appeal. The judgment and decree of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) dated 23rd February, 2001 in Nairobi **H.C.C.C No. 4434 of 1992** and all subsequent orders are hereby set aside and vacated. We substitute therefor an order dismissing the suit. The costs of this appeal are awarded to the appellant. These shall be our orders.

Dated and delivered at Nairobi this 23rd day of November, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR