



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**IN NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 171 OF 2005**  
**FABIAN MURUGU.....PLAINTIFF**  
**VERSUS**  
**HENRY MINYIZI CHAKAVA ::::::::::::::: 1<sup>ST</sup> DEFENDANT**  
**BARRACK MULUKU OKWARO.....2<sup>ND</sup> DEFENDANT**  
**WINSTON MUTUA NZIOKI.....3<sup>RD</sup> DEFENDANT**  
**CHARLES ODUOR MUNJAL.....4<sup>TH</sup> DEFENDANT**  
**ABEL EVANS MURIITHI.....5<sup>TH</sup> DEFENDANT**  
**EAST AFRICAN EDUCATIONAL PUBLISHERS**  
**LTD. (REGISTERED TRUSTEES)..... 6<sup>TH</sup> DEFENDANT**  
**EAST AFRICAN EDUCATIONAL**  
**PUBLISHERS LTD. STAFF PENSION**  
**AND LIFE ASSURANCE SCHEM.....7<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

1. The current suit was instituted by way of a Plaint dated 29<sup>th</sup> March 2005 and filed on 1<sup>st</sup> April 2005. The Plaintiff seeks the following orders:-

- a. Special damages in the sum of Kshs. 2,439,305/= with interest at Court rates from May 1999 until payment in full.*
- b. Special damages in the sum of KShs. 1,291,191.00 with interest at 25% per annum from May 1999 until payment in full.*

*c. General damages for breach of duty, breach of trust and statute.*

*d. An order that the first to the Fifth defendant's severally and jointly do personally pay the damages costs and interests that may be awarded in this suit, and any further relief that the honourable may deem fit to grant in the circumstances.*

2. In opposition to the Plaintiff's suit the Defendants filed the Defence dated 11<sup>th</sup> May 2005 and amended on 4<sup>th</sup> July, 2005.

3. I will begin by setting out the facts of the case as per the Plaintiff's pleadings, the testimony led by the Plaintiff followed by the Defendant's case. I will then summarise the case of the parties as argued in their respective submissions and conclude by rendering a decision.

4. The hearing commenced on 4<sup>th</sup> July 2012 with the Plaintiff as the first witness. The Plaintiff's case continued on 16<sup>th</sup> October 2012 with Mr. Mark Agola Abonyo, a former chief accountant with the 6<sup>th</sup> Defendant testifying as PW 2. The Defendants' case commenced on 22<sup>nd</sup> July 2014 with the first Defendant (DW 1) giving testimony on behalf of the other Defendants.

### **THE PLAINTIFF'S CASE**

5. The Plaintiff, an accountant by profession (hereinafter referred to as PW1) testified that he used to work for East African Educational Publishers Limited (EAEP), the 6<sup>th</sup> defendant herein. The 1<sup>st</sup> to 5<sup>th</sup> Defendants are the trustees of the 7<sup>th</sup> Defendant which was the company's pension scheme. He stated that he is currently self-employed.

6. He was employed in September 1984 as confirmed by his letter of appointment dated 14<sup>th</sup> September 1984 at **pages 1 and 2** of his bundle of documents. He started as a Financial Controller. The company was then known as Heinemann Educational Books (East Africa) Limited, but it changed its name to Heinemann Kenya Limited and thereafter to East African Educational Publishers Limited. This was done by a special resolution and a certificate of change of name dated **2nd June 1992**.

7. According to the said letter of appointment, his first salary was K. ? 10,000 per year, including a house allowance of K. ? 2,400 per year which was equivalent to 31.6% of his salary of K. ? 7,600 per year. Other terms included:-

*i. Free car allowance (paragraph 3)*

*ii. Free medical cover for the whole family (paragraph 5)*

*iii. Probation period of 3 months (Paragraph 3) during which period notice of termination of employment was also 3 months.*

After the three months' probation, he was confirmed in his position as Financial Controller.

8. PW 1 testified that on **22nd September 1986** he was promoted and appointed as a Financial Director and Company Secretary. His terms of service were revised. For instance, his basic pay was doubled from K? 7,500 to K? 15,000 per year. He was now entitled to a fully maintained company car and a house allowance of 15% of the basic pay. The Plaintiff was also entitled to a pension contribution of 10% by the company and 5% by self of basic pay. *See pages 100 to 101 of the Plaintiff's bundle of documents.*

9. It was also his testimony that as a Director he was entitled to six months' notice period for termination of employment. He testified that this was applicable to all directors. He referred to pages 102 to 104 of the his bundle of documents in pointing out that a fellow director, one Mr. Mugweru, was given a six months' notice for termination of his employment.

10. He further testified that in **1986**, the terms of service of directors were changed, and in a circular to all directors, the period of notice for termination of notice by either party (employer or employees) was changed from three months to **six months**.

11. It was the plaintiff's evidence that he later disagreed with one of the managing directors, **Henry Chakava**, the 1<sup>st</sup> defendant herein. Consequently he was sent on compulsory leave on **1st Feb 1999** and was later suspended from work pending investigations by the company's external auditors, Price Waterhouse Coopers (herein PWC), on **12th April 1999**.

12. With regard to the car loan, it was the Plaintiff's position that any director who left the company was allowed to do so with his vehicle.

13. The Plaintiff stated that his total claim for the terminal dues and pension included interest at commercial rates since he would have invested the money and gotten a return on the same.

14. On cross-examination, it was the Plaintiff's testimony that he did not have all documents since all documents were stolen from his office. He confirmed that he was terminated from employment when he disagreed with Mr. Chakava. He denies misappropriating the company funds as alleged by the Defendants.

15. It was further his testimony that in 1998 he obtained a car loan from the Company. The total cost of the car was Kshs. 2, 828,000. By the time he was leaving the company in May 1999, the balance of the loan was Kshs. 1,777,055. *Refer to pages 4 and 5 of the Plaintiff's bundle of documents*. He testified that, in total, the benefits he received from the company was Kshs. 520, 126/= as indicated at Page 20 of the Bundle of documents.

16. The plaintiff testified that, vide his letter of **17th May 1999** as per **pages 6 and 7** of his bundle, he computed his terminal benefits based on **6 months' notice** and demanded a waiver of the car loan. He also (**refer page 7**) requested to be granted leave to continue managing his pension scheme until reaching retirement age for fear of losing on account of premature withdrawal from it. This was in line with the treatment accorded to other previous directors like **Mr Johnson Mugweru** and **Gabriel Ngari**. It was submitted for the Plaintiff that the defendants did not honour his request nor pay his dues as calculated.

17. As confirmed at pages **9 and 10** of the Bundle, a total amount of **Kshs 2,582,382/=** was paid to the company and /or the trustees of the scheme by Hogg Robinson (k) Ltd, the same being the plaintiff's total pension benefits as then calculated. The Plaintiff testified that the defendants vide a letter dated **1st July 1999** paid him only **Kshs.1, 291,191/=** being half of the amount received by the company on premature withdrawal on the pension scheme. It was his testimony that he did not give any authority to offset his pension for any of the dues he may have owed to the company.

18. The Plaintiff referred to the rules of the scheme (rule 23) at page 59 of the bundle of documents. It provides that no benefits accruing under the scheme shall be capable of assignment. It is therefore the Plaintiff's case that the employer did not act in accordance with the rules when they assigned his pension. As a result, the Plaintiff demands for payment of Kshs. 1,291,191 being unpaid pension.

19. In his testimony, PW 2 confirmed that he knew the parties in this suit as he used to work for the 6th Defendant. He further stated that he was the chief accountant dealing with finance and staff issues.

20. PW 2 testified that when the Plaintiff left he was supposed to be given a 6 months' notice and be paid his terminal benefits based on 6 months' notice. However, the Plaintiff was paid based on 3 months' notice. He admitted that they were advised and it was recommended by Price Water House Coopers that the payment was to be based on 6 months' notice. He stated that he was not so sure if the Defendants complied with the directive.

21. PW 2 further testified that from the pension which was over Kshs. 2, 582, 382/= they only paid the Plaintiff about half of it. This is how he was directed by his director. He stated that the Plaintiff did not

give any consent on how his pension was to be used.

22. The witness also testified that all the company directors had cars bought for them. By tradition, all the directors who left were given their cars free of charge. He gave the examples of Mr. Johnson Mugweru and Mr. Jimmy Magotoi.

23. On cross-examination, it was Pw 2's testimony that during his stay, four directors left the company. All were given a 6 months' notice. He stated that he was privy to their records since he was keeping them. He confirmed that when he was paying, he simply complied with the directives but he did not work with the Plaintiff's letter of appointment.

24. He clarified that he was not prejudiced as a former employee of the defendant. He averred that he came to give evidence because he was the one who was responsible. He testified that he did not steal any money from the 6th Defendant, but that there was a case against him in court.

25. On re-examination, he stated that the terminal dues were not similar to the retirement dues. The plaintiff then closed his case.

### **THE DEFENDANT'S CASE**

26. The Defendants called one witness, the **1<sup>st</sup> defendant (DW1)**. He was the chief accountant in 1984. He later rose to the position of director. The defence witness confirmed that the Plaintiff was an employee in the 6<sup>th</sup> Defendant's company. He also confirmed that the Plaintiff was promoted to the position of Financial Controller on 22<sup>nd</sup> September, 1986.

27. DW 1 testified that the Plaintiff's employment was terminated on **19<sup>th</sup> April 1999** after it was discovered that he had misappropriated and embezzled the company's funds. He stated that he dismissed him but the board met later and rectified this and gave him his benefits.

28. DW 1 further testified that at the time the Plaintiff left, staff were entitled to buy a new car and were given a 30% value of the car. He confirmed that they gave the plaintiff a car registration no. KAK 684B worth around 2,800,000/=. He was to repay the loan on it. When the Plaintiff left employment his car loan was about KShs. 2, 000,000/=. It is however indicated in the Defendants' submissions that as at 30<sup>th</sup> May 1999 when the Plaintiff's employment terminated the outstanding loan was Kshs. 1,777,055/=. I therefore take the latter figure to be the accurate position.

29. It was DW 1's testimony that when the Plaintiff left he was asked to return the car but he opted to keep it so they deducted the outstanding amount. They later gave the Plaintiff the logbook.

30. He further testified that the Company received Kshs. 2,582,382/= from the pension fund on behalf of the Plaintiff. They paid the Plaintiff Kshs. 1,291,191/= from the pension fund being half of the amount received by the company on premature withdrawal on the pension scheme.

31. It was his evidence that he was not aware that the Plaintiff's office was broken into and anything stolen when he was under suspension. He stated that when they found out that the Plaintiff had been involved in fraud on company funds they dismissed him.

32. It was his testimony that the 3 months' notice was applied across the board. He was not aware of the 6 months' notice which the Plaintiff referred to.

33. The Parties herein filed their written submissions which I have considered in this Judgment together with the cited authorities.

### **ANALYSIS**

34. From the pleadings and evidence of the parties, several issues arise. However, in my view, the following are the main issues for determination:-

- *Whether the Plaintiff was entitled to Six (6) Months' Notice as opposed to three months' notice;*
- *Whether the Plaintiff is entitled to the other half of the pension;*
- *Whether the Plaintiff was entitled to retain the car free of charge and or to its value?*
- *Whether the Plaintiff is entitled to general damages*

**Whether the Plaintiff was entitled to Six (6) Months' Notice as opposed to Three Months' Notice**

35. PW 1 stated and the defence did not deny that the terms of employment for directors were different and better from the other staff as earlier demonstrated. It is argued for the Plaintiff that the period of notice was 6 months. The Plaintiff refers to other directors who were given or gave 6 months' notice. For instance Mr.Chakava wrote to Mr. Mugweru regarding his request for early retirement in a letter dated **15th December 1988** and the retirement was to take effect after a period notice of 6 months, that is, 1<sup>st</sup> June 1989. (*see pages 102 and 103 of the plaintiff's bundle of documents*). Two years later, another director of the company, **Mr.Gabriel Ngare**, also left the company, and the same terms as those accorded Mr. Johnson Mugweru were extended to him. In addition, the same treatment was accorded to another director, **Jimmy Makotsi**, who left the organisation the same time with him much later in **1999**.

36. It is the Plaintiff's case that the six (6) months' notice issue was a board's decision and was applicable to all directors without discrimination, yet Mr. Chakava discriminated against him.

37. The Defendant's position is that the Plaintiff's letter of appointment provided that he would give a three months' notice of termination. That is not in dispute. However, it is also not in dispute that the Plaintiff was promoted to a Financial Director and his terms of employment changed. They did not remain the same as in the initial Letter of appointment. It has been established that the other directors were entitled to a 6 months' notice and no substantial evidence has been given to show why the Plaintiff was not accorded the same treatment. Price Water House Coopers, the company's own auditors recommended payment based on 6 months' notice having noted that the other directors were entitled to the same.

38. It is the Plaintiff's case that the Company calculated his benefits using **three months' notice** instead of **six months** contrary to the findings of external auditors, PWC, in their recommendation as stated above and contained in the letter of **9th August 1999**.

39. It is not in dispute that PWC is a reputable international and independent arbitrator. I have read the report and indeed PWC recommended that the Plaintiff should have been paid his dues based on Six months' pay in lieu of notice. They however put a disclaimer based on the fact that they were not privy to the Plaintiff's Letter of appointment. That notwithstanding, it is not clear why the directors of the 6<sup>th</sup> Defendant Company did not act on that directive yet they are the ones who commissioned PWC to determine whether the Plaintiff was entitled to a six months' notice instead of the three months' notice.

40. In view of the above circumstances it is clear that the directors were entitled to a six months' notice of termination. The Defendant has insinuated that the Plaintiff's case was different since he was found guilty of embezzlement of funds. I will restrain myself from dealing with the cause of the Plaintiff's termination since that issue was not sufficiently argued before me. The Defendants did not prove that the Plaintiff was guilty of embezzlement of funds or show any proof of investigations towards the same. On the other hand, the Plaintiff simply states that he was exonerated from such allegations without adducing evidence to that effect. The report by PWC does not seem to address this issue.

41. Having established that the Plaintiff was entitled to the 6 months' notice it therefore follows that the

plaintiff was also entitled to terminal benefits based on 6 months as opposed to three months' notice.

42. It is the Plaintiff's case that he was only paid based on 3 months instead of 6 months hence the balance of 3 months. He therefore claims the sum of Kshs 2,439,305.00 made up as follows;

i. Unpaid salary in lieu of notice

@ 120,000 per month.....**Kshs.360,000/=**

ii. House allowance @ 36,000.00 per month.....**Kshs. 108,000/=**

iii. Car loan.....**Kshs. 1,777,055/=**

iv. Other Benefits for three months;

Car @ Kshs .33, 750 per month, Entertainment @ Kshs.8000 per month, Security @ Kshs 8000 per month,

Educational allowance @ Kshs 9000 per month,

and domestic workers allowance

@ Kshs.6, 000.00 per month.....**Kshs 194, 250/=**

Total .....**Kshs 2,439,305/=**

43. The above figure is not in dispute. What was in contention was whether the Plaintiff was entitled to a 6 months' notice or a three months' notice. The same has already been determined by this Court. However, the car loan should not be part of this computation. I will address that issue shortly. I therefore find that the Plaintiff is entitled to the sum of Kshs. 2,439,305/= being the balance of the three months' notice less the amount of the car loan at Kshs. 1,777,055/= hence Kshs. 662, 250/=.

**Whether the plaintiff is entitled to the other half of the pension?**

44. PW 1 stated that the trustees of the pension scheme were the 1st to 5th defendants and his employer was the 6th defendant.

45. Pages 6 to 7 of the bundle, confirms that the plaintiff told his employer that he did not wish to suffer punitive deduction on premature withdrawal from the scheme, and that he wished to continue administering the scheme on his own until he reached the official retirement age. The retirement age was 60 years and he was well below that.

46. The plaintiff stated that Mr. Chakava never allowed him to continue administering his pension scheme. Counsel for the Plaintiff submitted that Mr. Chakava secretly and without the Plaintiff's knowledge wrote to Hogg Robinson (k) Ltd asking them to release the plaintiff's pension funds to him since he had left the company .On being informed of the above, the plaintiff wrote to the defendant company on **14th June 1999** asking them to release all the pension funds to him as shown on page 8 of the Bundle. He referred to page 9 of the Bundle, Letter of 1st July 1999, where the company informed him that they were ready to release to him **Kshs.1, 291,191.00** being half of his total pension entitlement.

47. Page 10 of the bundle shows and it has never been disputed that the 6<sup>th</sup> defendant company and the 1<sup>st</sup> to 5<sup>th</sup> defendants as the trustees of the 7<sup>th</sup> defendant received a total of **Kshs.2, 582,382** from Hogg Robinson (k) Ltd, as the Plaintiff's pension dues. Out of this amount the plaintiff was only paid **Kshs.1, 291,191** as pension. That was half of his total entitlement. He is now claiming the balance plus interest at 25% until payment in full.

48. It is the Plaintiff's case that he never authorised his employer to offset any part of his pension funds against anything else. Therefore, by not paying him the pension funds in full the trustees (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants) breached **Rule 27** of the Scheme (**page 59**) which states that no benefits or contributions accruing or payable under the scheme shall be capable of assignment. However these rules came in force in 2003 when the Plaintiff had already left employment and are therefore not applicable.

49. It is the Plaintiff's contention that the Defendants also breached the **Income Tax (Retirement Benefits) Rules (Legal Notice No.197) of 16th June 1994** which was applicable at the time as per clause 4 (e) also states that no benefits or contributions accruing or payable there under shall be capable of assignment.

50. It is clear that the Plaintiff requested his employer only to utilise his terminal benefits as confirmed in the letter at pages 6 and 7 but not his retirement benefits. Furthermore as is stated above, the benefits or contribution accruing to the Plaintiff were not to be assigned. The Defendants should have recovered the loan of the car from the Plaintiff's terminal dues and not the retirement dues. Therefore the Plaintiff was unlawfully denied the amount of Kshs. 1,291,000 being part of the pension.

### **Whether the plaintiff was entitled to retain the car free of charge and or to its value?**

51. The sum of **Kshs 2,439,305/=** stated herein above as the balance of the 3 months' notice terminal dues comprises of the car loan which at the time of termination stood at Kshs 1,777,055/=.

52. It was not disputed by the defence that all the company directors had cars bought for them. It was PW 2's testimony that by tradition all the directors who left were given their cars free of charge. This was the case with two directors namely, Mr. Johnson Mugweru and Mr. Jimmy Magotsi. It is therefore the Plaintiff's case that the same should have applied to him.

53. The Plaintiff has made it clear; it was by tradition that the Company gave the directors who left, cars free of charge. It therefore means that the Company had no legal or contractual basis to give cars free of charge to all directors who were leaving. In that case it was at the discretion of the Company to give the cars free of charge to directors who left or to waive the outstanding loans.

54. There is no substantial evidence that the 6<sup>th</sup> Defendant Company was bound to give the Plaintiff the car for free. In any case, it was clear when the Plaintiff was being offered the car, the same was on loan subject to the benefits accorded to directors and the loan was to be repaid. The balance of the loan when the Plaintiff was leaving the Company was at Kshs. 1,777,055/=. It was upon the Plaintiff to repay this amount to the Company.

### **Whether the Plaintiff is entitled to general damages**

55. It is submitted for the Plaintiff that the final external audit report by Price Water House Coopers exonerated him from every impropriety and all the entire allegations which had led to his suspension. As such, it meant the termination of his service was irregular and unjustified. In the report, PWC stated that there should have been no equitable valid reasons to punish the Plaintiff or make him suffer any loss. Consequently his termination of employment with the company should have been treated as normal early retirement. However, the defendants maliciously and in bad faith ignored the recommendations of their professional auditors PWC, a reputable international and independent arbitrator.

56. It is therefore Counsel's submissions that the Plaintiff was then to be entitled to the same full benefits as already approved by the Board of Directors of the company as per the 1<sup>st</sup> Defendant's letter to Johnson Mugweru dated 15th August 1998 (page 102 of the Bundle) This would have include the 6 months' benefits, the company car for free and full pension.

57. I have read the report by PWC and there is no express statement that the Plaintiff was exonerated from the allegations of embezzlement. That notwithstanding, it has already been established that the

Plaintiff was entitled to the six months' notice of termination and as well to the full pension.

58. Counsel submitted that the plaintiff had been put under a lot of grief, stress and pressure as a result of the defendants' conduct. The Plaintiff was fairly aged and had not been able to get any other job since termination. It was further submitted that he had suffered loss and damage and the defendants should jointly and severally pay general damages of at least one year, loss of salary.

59. It is however my view that in the current matter the special damages and in particular the interests claimed thereon should be sufficient to compensate the Plaintiff for any loss he suffered as a result of the termination of employment. I will therefore not award any general damages.

60. In view of the foregoing, I hereby enter Judgment for the Plaintiff against the Defendants Jointly and severally in the following terms:-

***a. Special damages in the sum of KShs. 2,439,305.00 less the outstanding amount of the car loan at Kshs. 1,777,055/= with interest at court rates from May 1999 until payment in full.***

***b. Special damages in the sum of KShs. 1,291,191.00 being the unpaid pension with interest at Court rates until payment in full. The Plaintiff submitted an interest of 25% on the basis that this was the prevailing lending rates during the period from 1999 to 2012. However, there was no documentary evidence to this effect. Therefore the Court rates will suffice.***

***c. Costs and interest of this suit shall be for the Plaintiff.***

That is the Judgment of the Court.

**READ, DELIVERED DATED AND AT NAIROBI THIS 30TH DAY OF JANUARY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Ngeresa holding brief for Munyalo for the Plaintiffs

Mitambo for the Defendant

Teresia – Court Clerk