



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.4973 OF 1992

D. P BACHETA.....PLAINTIFF

-VERSUS-

THE GOVT OF UNITED STATES OF AMERICA.....DEFENDANT

JUDGMENT

1. The plaintiff filed this suit via a plaint dated 14th September, 1992 later filed a further amended plaint on 10th March 2003 with the Court's leave seeking judgment against the defendant for a sum of Kshs. 729,634.35, general damages and costs. The Plaintiff claims that he was employed by the defendant in its agency for international development office in Kenya USAID from 3rd March, 1966 to 10th April, 1992, that it was a term of the contract of employment that the defendant could terminate the contract of employment upon severance cause necessitated by reduction in force or redundancy. It was also a term that upon termination the defendant would pay to the plaintiff a gross sum computed at the rate of 3.5 % p.a. equivalent pay for the number of service years resting or based on the last rate of annual pay on the date of such severance. He states that on 10th April, 1992 the defendant purported to terminate the said contract of employment under the guise of summary dismissal for alleged misconduct whereas such termination was necessitated by redundancy due to re-organization therefore he claims Kshs. 729,634.35/= and general damages for wrongful termination.
2. The defendant filed its amended defence on 22nd April, 1994 and its amended defence filed on 13th March 2003. The defendant admitted that the plaintiff was its former employee but denies that it unlawfully terminated the contract of the plaintiff and stated that the terms of the plaintiff's employment were stated on various administrative circulars issued to the employees from time to time. It further stated that it was an express term that the plaintiff would maintain the highest level of integrity and impartiality to ensure proper performance of the defendant's business and to ensure that he did not have any financial interest that conflicted with his duties and responsibilities. That the plaintiff's employment could be terminated for malfeasance, misconduct, unsatisfactory, insubordination, theft fraud, accepting or soliciting for favors or gifts. That on 7th March, 1991 the defendant received a written reprimand for conflict of interest and plaintiff's failure to disclose business relationship between his wife and one Mr. Kinuthia from whom the defendant leased houses; on 28th February the defendant was suspended for 5 days for verbal abuse, threats and intimidations of other employees of the defendant; on 25th March, 1992 the plaintiff was informed of the defendant's intention to terminate his employment for misrepresentation and interfering with investigations and was given 5 days to appeal which time was further extended to 6th April, 1992 but the plaintiff failed to appeal and was led to the termination of his contract having been paid all monies due to him. The defendant denied that it

was indebted to the plaintiff but went on to state that the plaintiff's contract was terminated due to redundancy. It denied that the plaintiff suffered any loss or damage and that no award for general damages can be made for wrongful termination.

3. When this matter came up for hearing on 24/08/2001 **PW1; Dharam Pal Bacheta** testified that he was the plaintiff and sought to rely on his statement dated 17/12/2012. He testified that he was employed on 3/08/1965 and served for 26½ years and left his employment as a general service specialist. That his employment was terminated in 1992 and indicated that there was no provision that catered for unlawful termination and sought to claim redundancy as the termination shouldn't have taken place that he should have been paid severance pay at 3.5% of the basic pay as was entitled to him, that his position was advertised because the defendant had ulterior motives and wanted to get rid of him. That after working for 15 years he would have been eligible for a green card which he was looking forward to; that when his contract was terminated by the defendant he was offered employment by Trident Insurance and a UN program but since he did not have any testimonials from the defendant he missed out on these positions and as a result of not being able to secure another job he underwent depression, suffered a heart and kidney problem which problems he didn't have before he was terminated from his employment. On cross examination he indicated that his salary per annum was Kshs. 623,224/- and Kshs 801,796. That there was a notice period of 30 days and that during the same period about 15 to 20 people were declared redundant. He sought to indicate that there was no conflict between him and his colleagues or even his juniors. On whether he was paid his dues he stated that although money was paid to him not all that was due to him was paid and he emphasized specifically on severance pay and 1 month's pay in lieu of notice but added that leave pay was not part of his claim. He also confirmed that Kshs. 646,609/- was money due to him from the provident funds deducted from his salary but no terminal benefits were given. He stated that his complaint was that he was never given a copy of the complaint, was condemned unheard and wasn't able to confront the persons who accused him.
4. **DW1 Lucy Segero** sought to rely on her statement filed on 14/9/12. She testified that she was not employed by the defendant during Bachetta's time but she was in custody of Bachetta's file and stated that it had various disciplinary matters arising from conflict with other members of staff. He had been given a right of appeal which he failed to exercise and his employment was terminated on 10/4/1992; that the plaintiff's position was not abolished but he was replaced; that Antony Payne was employed between 2/01/1990 to 1/01/1991 and left employment more than a year before Bachetta left; that Mr. Bachetta was paid all his dues. She added that Mr. Ba Mr. Bachetta was terminated on one month notice pay of Kshs. 66,816.33/- and was not eligible to severance pay which was only paid on one being declared redundant. On cross examination by Mr. Kigano for the plaintiff she indicated that although the plaintiff rendered exemplary service for 25 year it was not unusual for him to have disciplinary issues. She also conceded that the summary dismissal wasn't justified as there was evidence to justify summary dismissal but denied that the Mr. Bachetta's dismissal was unfair; she testified that Payne was employed at a higher grade but the record did not show if he was head of department and that it wasn't clear why Mr. Payne's contract wasn't renewed. She further stated that the contract only provided for "notice periods" as provided for in the regulations and the contract.
5. Plaintiff submitted that the plaintiff offered exemplary service leading him to be elevated to the position of Divisional Head designated as General Service Specialist. That after 27 years of service the defendant wrongfully and unlawfully terminated his services. He submitted that the Bill of rights as enshrined by Article 41(1) provides that, "*every person is entitled to fair labor practices*" and that the said Article are fine tuned to breathe life to the Employment Act 2007 which as per the pre-ambles, define the fundamental rights of employees, to provide basic conditions of employment of employees....He submitted that section 3(1) of the said Act provides; "*this Act shall apply to all employees employed under a contract of service*. That the said provision is unambiguous and howsoever whether past present or future and clearly discounts any notion of non-retrospectivity of the 2007 Act. He further submitted that applicability of the employment act 2007 is fortified by the provision of Article 259 of the constitution and indicated that the rights as enshrined under Chapter 4 of the Constitution and that the said Act must be

interpreted as an embodiment of the Constitution and sought to rely on the case of **West Gwynne [1990 W. 976] – (1911 Vo III)** where it was held that, “*the statute must be examined, and considering the express generality of the provision namely in all leases. Without making any distinction on leases granted after the passing of the Act...I come to the conclusion that the same applies to every lease, both existing and future....*” He submitted that liability having been admitted the only issue for determination was damages and that he no longer wished to pursue his claim based on redundancy. His submission was that wrongful, unlawful and unfair termination is not provided for in the documents titled, “*Personnel Policies and Practices for Foreign National Employees*” nor in the “*Aid mission Order*” and argued that by dint of Article 162 (2) of the constitution section 50 of the Employment Act the court is obligated to invoke the provisions of Section 49 thereof to award damages for “*wrongful dismissal and unfair termination*” that the said section provide that “*the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*” That since his pay was Kshs 66,816 per month this translated to Kshs. 801,792/- He submitted that it was trite law that there can be no injury or wrong without a remedy and stated that the plaintiff was not entitled to redundancy and further submitted that it would be ridiculous for the defendant to offer 3.5% of total pay per annum for each year worked and not pay a single dime to an employee wrongfully dismissed after 27 years unblemished service. He referred to section 35 of the Employment Act.

On general damages and quantum counsel submitted that is dependent on factors and circumstances attendant to each case and on this he relied on the case of **Michie Gitau Vs Nssf Board of Trustee (HCC suit no. 3264 of 1993-unreported)** where it was held that, “*every employee except one excluded by statute has the right not to be unfairly dismissed by his employer. Where he is unfairly dismissed his remedy is in damages. The amount or measure is the amount an employee would have earned under the contract for the period until the employer could lawfully terminate it.*”

He submitted that the plaintiff’s dismissal was arbitrary and tainted with malice. Malicious because the interdiction letter was sent when he was away on leave and there was no evidence that he was supplied with the complaint details. That damages must of necessity cover the embarrassment, inconvenience and humiliation the plaintiff may have been subjected to. He submitted that the normal retirement age was 55 with 15 years of service. That bearing any unforeseen circumstances the plaintiff would have had a fruitful working life of another 11 years and that a service pay for wrongful dismissal under section 35(5) of the Employment Act is quantifiable by: 11 years x 12 months x principal pay of Kshs. 66,816/- =8,819,712/- .He submitted further that he received unmatched meriteous accolades as evidenced by his evaluation reports. That the defendant’s refusal to give him testimonials curtailed his opportunities to obtain alternative employment and also made him ineligible for emigration to the USA and as such he is entitled to 23,520,288=(Kshs. 178,184/- x 12 months x 11 years) = 23,250 on account of opportunities. He urged the court to take judicial notice of the inflationary trends and other propositions and increment over the 11 years justified and supplementing with a figure of Kshs. 5,880,072/- representing 25%.

6. The defendant submitted that the plaintiff as per its witness’s evidence was never made redundant and as such the 3.5 % for each year of service was evidence that the plaintiff never cross examined on and the same lacks merit and the same should fail. He refuted the plaintiff’s allegations that he was made redundant based on an advertisement dated 5th September, 1989 on a claim that the defendant wanted to employ Tony Payne as he was terminated almost 2½ years later. That Mr. Payne had left employment 15 months prior his termination. That due to the period the suit had taken in court and lack of witnesses to prove the plaintiff’s claim of summary dismissal the plaintiff conceded to his claim of summary dismissal and left it to the discretion of the court to access damages for wrongful termination and as such the same should be assessed under Kenyan law. That the defendant has conceded it is unable to produce evidence to justify the plaintiff’s summary dismissal. That it was not provided for in the contractual documentation on what was to happen in the event of an unjustified termination as the same only provides on how termination was to be carried out Notice of 30 days was to be issued, resignation- 30 days’ notice. He relied on various cases **Ombaya v Gailey and Roberts Ltd [1974] EA 522** where it was held that; where an

employer summarily dismisses an employee and it is later held that there is no justification for the summary dismissal then the measure of damages is in the period of notice which the employee would otherwise have been entitled to. The claim for general damages was disallowed. Central Bank of Kenya –vs- Nkabu [2002] 1 EA 34 where it was held that; “any contract of employment can be terminated on the notice provided in the contract or by 28 days’ notice under Section 14(5) of the Employment Act”. *Addis v Gramophone Company (1990) AC 488* “emphatically stated that there can be no general damages in respect of suits based on termination of employment contracts.” *Kenya Airways Corporation Limited –Vs- Tobias Ong’any Auma And 5 Others [2007]* where it was held; “we would also think that it was unreasonable for the respondent 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 is contractual and terminable under the terms of the same contract.”

7. It was submitted that the contract was terminable by 30 days’ notice under the contract document and alternatively if there is no provision in the contract documents by 28 days under section 14(5). That the evidence shows that the defendant went through the prescribed procedures and did not act willfully or without giving the plaintiff an opportunity to respond. That the defendant paid the plaintiff all sums due to him on termination of his employment and even factored in a backdated salary increment and that the only damages the plaintiff is entitled to is one month’s salary which translates to Kshs.66,816.33 being the period of notice by which the plaintiff’s employment could be terminated without cause. It was submitted that the matter had taken so long over 11 years to conclude due to plaintiff’s own doing and leaves it at the discretion of the court as provided under section 26 of the Civil procedure Act and added that the plaintiff should not be rewarded for delaying the proceedings and that in the interest of justice the amount of judgment should only run from date of judgment at the court rate of 12% p.a. from date of judgment and costs.
8. The issue for determination is:-
 - a. Whether the plaintiff is entitled to Kshs 729,634.35 for 26 years of completed service
 - b. Whether the plaintiff is entitled to damages as sought.
 - c. What interest should be awarded?
 - d. Who pays costs
9. I have considered the pleadings, the evidence, and submissions by both parties. It is not in dispute that the plaintiff was an employee of the defendant and was dismissed from employment. The defendant has conceded that they are unable to prove that the plaintiff was properly dismissed for the reasons that the persons they would have called as witnesses no longer work for the organization and therefore it was difficult for them to prove their case. On 24th September 2001 parties entered consent where judgment on liability was entered for the plaintiff against the defendant. What remained was for the court to make an assessment of damages. The contract provided that it was terminable by 30 days’ notice and in the alternative alternatively if there is no provision or if in doubt Section 14(5) of the Employment Act provided for 28 days’ notice. The defendant on the other hand stated that the plaintiff’s employment was terminated for a just cause and acknowledges at paragraph 15 of their submissions that termination was unjustified and that the plaintiff was summarily dismissed. It is common practice that a contract of service must be terminated by notice unless the hiring is for a definite period. If the contract is silent as to the length of such notice the court will not construe this as meaning that no notice is required on either side. In the case of *Ombwaya –vs- Gailey & Roberts Limited (1974)EA 522* it was held that that where an employer summarily dismisses an employee and is later found that there was no justification for summary dismissal then the measure of damages is the period of Notice which the employee would have otherwise been entitled to. This court is guided by the said authority in making a finding that the plaintiff was not given notice and therefore holds that the defendant shall pay the plaintiff a salary in lieu of one months’ notice.
10. The plaintiff also claims for general damages for wrongful termination and argues that if he had continued to work for the defendant he would have retired at the age of 60 years. The plaintiff as pleaded general damages for wrongful dismissal. This court holds that there can be no general

damages in respect of suits based on a termination of employment. And the court is guided by the Court of appeal case of **Kenya Airways Corporation Limited –vs- Auma & 5 others [2007]2 KLR** where the court had this to say, “we would think that it was unreasonable for the respondents to believe that it was their entitlement and right to be employed by the employer during their working life. The expectation has no basis in law as employment relationships are contractual and thus terminable under the terms of the contract “Further in the case of **Walter Musi Anyange v. Hilton International Limited & Anor. Civil Appeal No. 269 of 2003** on disputes arising out of contract after the passage of the 2007 Labour law, the Court of Appeal held that there can be no damages where the employer employee relationship is contractual. The plaintiff cannot be awarded damages under the current Employment Act as he is bound by the terms of the employment contract and further the provisions of the provisions of the Constitution cannot apply as the terms of his contract were specific and he is bound by his pleadings and prayers sought. Lastly, The Plaintiff is therefore awarded one month pay salary of Kshs 66,816.36/-

11. The plaintiff has sought to have Interest and costs of this suit at Court rates .The plaintiff has submitted that he is entitled to interest at court rates on total damages under section 26 of the Civil Procedure Act from the date of filing this suit to the date of the judgment stating that the defendant had unjustifiably held the said sums for the whole period this suit was pending in court. The defendant has submitted that the suit has taken over 11 years to be concluded and part of the reasons that the defendant raised in conceding that the plaintiff was wrongfully dismissed was because most of the employees who would have testified no longer worked with the organization. This clearly shows that the suit has dragged in the court to the detriment of the defendant. The defendant submitted that in the interest of justice the amount of the judgment should run from the date of judgment at the court rate of 12% p.a.

12. Section 26 provides that: **(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.**

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

13. The case of **Pius Kinuthia Njuguna –vs- John Musembi & another Nairobi High Court Civil Case No. 1616 of 1992** where Rawal J as she then was stated that, “..... the provisions of section 26 of the Civil Procedure Act the award of interest is discretionary ..” My finding is that courts are empowered to award costs under section 26 of the Civil Procedure Act to award interests. In the case of **Gulamhusein –vs- The French Somaliland Shipping Company Limited [1959]EA 25** the court held that “the power conferred is to order interest upon the principal sum adjudged from the date of suit to the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of principal and interest as at the date of the decree”

14. In this case the defendant has conceded that they wrongfully dismissed the plaintiff therefore he is entitled to interest which is payable from the date of the dismissal .However, I do not that the suit has taken 22 years in court. The plaintiff indeed made an application on a point of law on which law as to whether the law of Kenya or the United States of America should determine the damages to the plaintiff. His application was dismissed on 17th September 2004 and his appeal at the Court of Appeal was dismissed in 2006. From the record the matter has been pending in court since then and was only heard by this court in the year 2013. From the court record it is apparent that the parties did not fix this matter for hearing until March 2012. None of the parties took steps to fix the matter for hearing between 2006 and 2012. Awarding interest from 1992 would be unconscionable in my view to award interest from the date the suit was filed. In my view though the court is

empowered under section 26 to award interest it can award interest for a different period. With this in mind, I find that it is reasonable to award the interest at 1/3 of the 22 years the suit has been pending in court. Interest shall be calculated at a 1/3 of the 22 years of the sum awarded of Kshs 66,816.36/-

15.The defendant shall also pay the costs of this suit.

Dated, signed and delivered this **18th** day of **March** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the
Plaintiff

.....For the
Defendant

.....Court
Clerk