



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 437 OF 2008

CAROL KARIMI MURIUKI PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED DEFENDANT

J U D G E M E N T

1. By a Plaint dated 17 July 2008 and filed herein on 5 August 2008, the Plaintiff prays for orders from this court for terminal benefits arising out of loss of employment totalling Shs. 79,012,500/- which is made up as for severance pay, loss of future earnings, one month's salary in lieu of notice and leave pay. She also seeks general damages for breach of contract as well as the issuance of a Certificate of Service from the Defendant bank. The Plaint detailed that the Plaintiff was appointed by the Defendant to be its Manager, Corporate Affairs, subject to a probationary period of 6 months, with effect from 2 January 2007. However, and most confusingly, the contract letter (hereinafter "the contract") as between the Plaintiff and the Defendant was dated 10 May 2007, although the Plaintiff signed the same detailing the date of 2 January 2007. The contract was noted to be an interim one which would come into full effect once the Defendant bank was officially licensed (presumably by the Central Bank of Kenya). The contract detailed one month's notice on either side for determination of the same. Further, under clause 2 thereof under the heading "Probationary Period" the Defendant detailed that it would complete the checking of the Plaintiff's references and assess her performance during the probationary period.
2. Somewhat surprisingly, at clause 3 of the Defence, the Defendant denied the contract dated 17 May 2006 or that there existed any contractual terms set out as between the Plaintiff and the Defendant. The Defence thereafter denied every single paragraph of the Plaint and detailed that the Plaintiff had suffered neither loss nor damage in the amount of Shs. 79,812,500/-or any other sum. The Defendant maintained that the contract was in fact dated 10 May 2007 and was to run from the date that the Defendant was granted its Banking Licence. The Defendant noted that the Defendant bank was licensed on 8 October 2007. The main thrust of the Defence was that the Defendant maintained that during the probationary period it found out that the Plaintiff's previous employer, Kenya Commercial Bank had sued her for fraudulently obtaining Shs. 650,000/-from it. It had also discovered that the Plaintiff had moved from the Kenya Commercial Bank to Equity Bank Ltd from which bank she had suddenly resigned in unclear circumstances. Accordingly, and in this regard, the Defendant bank had found that the Plaintiff unfit to work for it and terminated her services during the probationary period which it maintained it was lawful, proper and regular.
3. In her Reply to the Defence, the Plaintiff denied that the probation period as stipulated in the contract of 6 months was to allow the Defendant to check on the Plaintiff's past references and job

- performance. The Plaintiff also maintained that her employment was not subject to the licensing of the Defendant bank at all. She also joined issue with the Defendant's averments that she had been sued by the Kenya Commercial Bank for fraudulently obtaining Shs. 650,000/- in *CMCC No. 1574 of 2006* (Milimani). She also challenged the averment that she had resigned from her employment with Equity Bank Ltd in unclear circumstances as alleged by the Defendant. The Plaintiff further denied that she was unfit to work in the Defendant bank and strongly maintained that the termination of the contract by the Defendant was unlawful, improper and irregular.
4. This case came for hearing before Muga Apondi J. on 10 May 2010. The Plaintiff testified that she was currently operating a Public Relations and Advertising Agency and that she held a MBA from Nairobi University in Strategic Marketing. She recalled that she received a letter of appointment from the Defendant dated 10 May 2007. The letter offered her the position of manager, Corporate Affairs with effect from 2 January 2007. This was the contract between her and the Defendant and pages 2, 3 and 4 thereof clearly set out the terms of service. She maintained that she provided references as required by clause 15 of the contract, her first reference being from the Deputy Chief Executive Officer of the Kenya Commercial Bank one Sam Kimani. The witness testified that prior to her engagement on 2 January 2007, she worked as a consultant for the Defendant. She confirmed that upon her engagement, the Defendant had not been licensed as a bank. She recalled that the Defendant bank had been licensed to operate in September, 2007 but she had not been issued with any fresh letter of appointment and had always been treated as an employee of the Defendant bank. Thereafter, the Plaintiff testified as to the work that she had undertaken at the Defendant bank including a management crisis in June 2007 and the fact that some of the Defendant's suppliers had threatened to sue for non-payment of bills. These matters fell under the Plaintiff's docket, particularly as the Defendant had introduced a completely different concept of banking known as "sheria banking". She produced before court emails and correspondence that she had entered into on behalf of the Defendant prior to her joining it, as well as the part she played with regard to marketing the Defendant bank prior to its opening its doors to the Kenya public in September 2007.
 5. The Plaintiff then recounted the circumstances leading to her dismissal from employment. On 22nd of December 2007, she had been called by the Defendant's Head of Human Resources to attend at the office of the acting Chief Executive Officer, one Salim Abdalla. The latter had informed her that the Defendant bank had received some negative references about her and that it would be difficult for the bank to confirm the Plaintiff as its Manager, Corporate Affairs. According to the Plaintiff, Mr. Abdalla asked her to resign and informed her that the Defendant bank would give her work on a consultancy basis as it had done previously, prior to her formal appointment under the contract. No reason was given to the Plaintiff as to why the Defendant wanted her to resign. Thereafter, on 7 January 2008, the Plaintiff was called in to the Chief Executive Officer's office and handed a letter of suspension. She had refused to accept the same without consulting her lawyer first. The Plaintiff noted that by that stage, she had completed a year's service but had not received any confirmation letter. Then, on 14 of February 2008, she received a letter of termination of employment which had been dropped at her house by a driver.
 6. On 24 June 2010, the Plaintiff resumed giving her evidence before court. She stated that she did not know any of the circumstances how investigations were conducted against her. She then referred the court to the correspondence passing between her advocates and the Defendant's advocates as to the termination of her employment and the handover of the Defendant's property concluding with an Acknowledgement of her terminal dues signed by her on 24 December 2008 together with acknowledging receipt of a cheque in the amount of Shs. 369,735/- which she had signed for "without prejudice". The Plaintiff also placed before court, copies of correspondence that passed between her, the Defendant and Commercial Bank of Africa Ltd in which she had to renegotiate a loan from the latter bank owing to her changed circumstances as a result of her dismissal from employment. The Plaintiff confirmed that she had asked the court for severance pay as well as loss of future earnings. She considered that she had left her own private business to go to work for the Defendant bank. She had taken loans which had been guaranteed through her salary. The termination had caused her a lot of financial strain. She referred to page 27 of her bundle of documents in which she felt that she had been discriminated against, as the Defendant bank had been set up under sheria law and she had been replaced by a Muslim lady only 14 days after her termination, without advertisement or interview. Finally in her examination in chief, the

- Plaintiff stated that it was almost impossible for her to secure new employment following her termination. The letter of termination painted her in a bad light.
7. Under cross examination on 20 September 2010, the Plaintiff confirmed that she operated a public relations agency called Media Links Ltd which was the same agency that had provided the Defendant bank with consultancy services at a fee, prior to her employment. She also confirmed that she had not as yet received her MBA from Nairobi University, although she had done her coursework and submitted her thesis. She acknowledged that when she applied for employment with the Defendant bank, she had informed it that she had a MBA. However, she never intended to mislead the Defendant bank in that regard. The Plaintiff also confirmed that she conducted interviews on behalf on the Defendant and that during the year 2006, she had earned Shs. 2 million from the Defendant by way of consultancy fees for her company. She also confirmed that she had been employed by the Kenya Commercial Bank between 2001 and 2005 as the Deputy Head of Corporate Affairs, Community Relations. Under cross-examination, the Plaintiff's evidence was much clearer in that she testified that she was recruited by the Defendant bank in January 2007 and that the contract was dated 10 May 2007. She confirmed that the appointment was supposed to be on an interim basis pending the full licensing of the Defendant by the Central Bank of Kenya. She confirmed that the letter suspending her was dated 7 January 2008 and that the bank had been licensed 8 October 2007. She confirmed that the period between the licensing of the Defendant bank and her suspension was 4 months. The probationary period was supposed to be 6 months and the Plaintiff confirmed that during that period, the Defendant bank was supposed to check her references. She confirmed that the offer of employment was subject to receipt of satisfactory references from the referees provided by her. She also agreed that by the time she joined the Defendant bank, there was a pending court case brought against her by the Kenya Commercial Bank. However she maintained that she had informed the initial Chief Executive Officer of the Defendant bank, Dr. Nzibo, of the pending case. She maintained that she would be shocked if the Kenya Commercial Bank had given her any negative reference. However, she agreed that her contract was subject to satisfactory references. She also agreed that her employment could be terminated by one month's notice. She confirmed that she had received the sum of Shs. 369,735/- after she had filed this suit. She confirmed that her services had been terminated and that her position was later taken over by somebody else. She also confirmed that that she had never received a letter of confirmation from the Defendant bank that she had been put on permanent and pensionable terms. However, she noted that in the Defendant bank's letter to the Commercial Bank of Africa dated 23rd of November 2007, the Defendant bank had stated that she was on permanent and pensionable terms. Such were beneficial to her as the Defendant bank was trying to help her to obtain a loan from the Commercial Bank of Africa. Finally, she confirmed that, in her opinion, she had been discriminated against as a non-Muslim even though some of the employees of the Defendant Bank had asked her to continue offering consultancy services even after her departure from the Defendant bank. She loudly maintained that she was not trying to unjustly enrich herself in her claim before court.
 8. In her re-examination, the Plaintiff reiterated that the cause of her termination of employment was not the fact that she had not been awarded or presented with a MBA. However, she had never seen any negative references as regards her performance. She had been shown the Kenya Commercial Bank's letter dated 21 February 2008 but by then that she had already been terminated. She was also shown the letter dated 9 January 2008 but, by that time, she had already been suspended. As above, she confirmed that that the Defendant bank had written a letter dated 23 November 2007 addressed to the Commercial Bank of Africa Ltd confirming that she was on permanent and pensionable terms. She maintained that her claim is justified based on the fact that the Defendant had terminated her services unprocedurally. The Defendant had also given the impression that the Plaintiff should be given loan facilities such would be paid through her salary.
 9. The Defendant brought one witness before court namely Mr. Abdillahi Mutwafy, its Head of Human Resources. He gave evidence to the effect that he knew the Plaintiff when she worked for the Defendant as the Manager, Corporate Communications. The Plaintiff had joined the Defendant bank in March 2007 although her letter of appointment was dated 10th May, 2007. The Defendant bank was licensed in September 2007 as per the Banking Licence attached to the Defendant's supplementary list of documents. The witness stated that the Plaintiff's confirmation in her position was subject to satisfactory references and her performance during the probationary period

of 6 months. The witness stated that the Plaintiff was not confirmed in employment. One of the references that she had given in her Curriculum Vitae was Kenya Commercial Bank. The witness stated that the Defendant had called Kenya Commercial Bank as was standard practice to check with a previous employer. He noted that the Kenya Commercial Bank had given the Defendant bank a very non-committal reply to the Defendant's query. However the Defendant bank was told about the pending court case brought by Kenya Commercial Bank as against the Plaintiff demanding about Shs. 650,000/- from the Plaintiff. The witness stated that the sum related to fraudulent accounting by the Plaintiff. Kenya Commercial Bank (in its said suit as against the Plaintiff) had also alleged that the Plaintiff had made various false imprest entries for that bank's corporate events for the years 2004 and 2005. Mr. Mutwafy stated that the information obtained from the Kenya Commercial Bank had come as a shock to the management of the Defendant bank particularly as the Plaintiff had never told anyone at the Defendant bank of the pending case. Management's first reaction was that the matter was not tenable given the fact that the Defendant bank was still new. The Plaintiff's role entailed organising events and dealing with suppliers. Later, the Defendant bank had given the Plaintiff the opportunity to resign, which she declined. Thereafter, it had been decided to terminate the Plaintiff's employment. The witness went on to say that Defendant bank had paid the Plaintiff one month's salary plus 22.7 leave days that were pending. The Defendant bank paid to her a net amount of Shs. 369,735/-. The Plaintiff had received the money and acknowledged the same. The witness was aware that the Plaintiff was still claiming more money but to his knowledge, she was not entitled to any further amounts of money. The witness went on to say that the Plaintiff had not been discriminated against. Then Mrs. Fatuma Hirzi referred to had joined the Defendant bank at a higher level than that of the Plaintiff.

10. Under cross-examination, Mr. Mutwafy admitted the contents of a letter at page 5 of the Plaintiff's bundle of documents which had been addressed to Barclays Bank of Kenya by the then Chief Executive Officer of the first Defendant, Dr. Nzibo, dated 26 April 2007. The said letter had confirmed that that the Plaintiff was an employee of the Defendant bank (in formation) on a permanent basis having previously worked at Kenya Commercial Bank for 10 years. The witness noted that by the date of the letter, the Plaintiff had already worked for the Defendant bank for about 4 months. Further, the witness agreed that the HR Manager had written a letter dated the 23 November 2007 addressed to the Commercial Bank of Africa Ltd., confirming that the Plaintiff had been employed on permanent and pensionable terms. He further noted that the Plaintiff had been employed from 2 January 2007. He stated that before the bank was licensed, everybody was employed on a temporary basis. The aforementioned letter dated 26 April 2007 had been written by Dr. Nzibo in good faith and was for the purposes of addressing third parties. The witness reiterated that employees of the Defendant bank only got confirmed in their employment after the bank was licensed. The witness confirmed that the appointment letter addressed to the Plaintiff by him dated 10 May 2007 was not merely a formality. It was not written merely to comply with Central Bank of Kenya rules. At the time, the Defendant bank's management had doubts as to whether or not the Defendant was going to be licensed or otherwise.

11. Unfortunately, Aponde J. who had been hearing this case was transferred in October 2011 and it wasn't until 17 December 2012 that the cross-examination of Mr. Mutwafy could continue before me. After being reminded of his previous evidence, the witness confirmed that he had received negative references with regard to the Plaintiff. To his recollection, the Plaintiff was a private consultant prior to her appointment and before that she was working at Kenya Commercial Bank. The witness confirmed that at page 9 of the Defendant's Supplementary list and bundle of documents, was the letter that he had written on 9 January 2008 to the director of Human Resources at Kenya Commercial Bank. He had sought a confidential report with regard to the Plaintiff. He was asking afresh for references so he did not refer to the previous telephone conversation that he had had with the Plaintiff's immediate past supervisor at Kenya Commercial Bank. He detailed that the Plaintiff had been suspended in order to facilitate the investigation. Mr. Mutwafy confirmed that the Defendant bank in carrying out investigation, had discovered the court proceedings in which the Plaintiff was involved with Kenya Commercial Bank and the evidence therein reflected upon her integrity. He could not remember however whether a report had been made to management. However, later, the records showed that the response to his enquiry from the Kenya Commercial Bank which was dated 21 February 2008 had reached the Defendant bank after the Plaintiff's services had been terminated under cover of the Defendant's

letter dated 14 February 2008. On being pressed, the witness agreed that there was no other record that could be produced as regards the Plaintiff other than the record of the Court case confirming charges as brought against the Plaintiff. The witness agreed that the letter from Kenya Commercial Bank dated the 21 February 2008 detailed nothing in the negative about the Plaintiff and did not refer to either the telephone conversation nor indeed the Court case brought against the Plaintiff. In the latter regard, the witness confirmed that he had obtained a copy of the Plaintiff dated 12 June 2006 as against the Plaintiff, from the Defendant's investigating team and he surmised that the same must have been obtained from court. He confirmed that the Plaintiff and the Defence at pages 21 – 26 of the Defendant's bundle were the two documents that had led to the dismissal of the Plaintiff. He agreed that it appeared therefrom that the court case had been pending for 2 years and that there was no judgement that the Defendant bank was aware of. To his way of thinking, the pleadings in that case cast doubt on the Plaintiff's integrity. He was not aware of the result of the suit. He thought at the time, that the allegations were sufficient to dismiss the Plaintiff as the Defendant bank's Corporate Manager. He denied that his actions as regards the Plaintiff's dismissal were driven by malice or absence of good faith. He further denied that it was correct that the Plaintiff had been dismissed because she was a Catholic not a Muslim. He confirmed that the Defendant bank had not replaced nor refilled the Plaintiff's position, as that occupied by the said Fatuma Hirsi was a much higher position although he admitted that the lady was a Muslim. Finally in cross-examination, Mr. Mutwafy confirmed that the letter of offer (the contract) dated 10 May 2007 showed permanent terms but these matters were subject to investigation and also to references being taken up. He agreed that the letter of suspension had detailed that the Plaintiff's position was still subject to confirmation. He also agreed that *prima facie* the position as between the letter of suspension and the letter of dismissal were different.

12. Upon re-examination Mr. Mutwafy confirmed that there were many ways of checking up on personal references – one could write a letter or take a reference over the phone. You could also employ an agency to seek out the references. He maintained that as regards the case brought against the Plaintiff by the Kenya Commercial Bank there were two levels for consideration. The first one was the question of disclosure which did not come up at the time of the Plaintiff's appointment. The second one was that the Defendant bank is a Muslim bank and where you have issues such as were raised as against the Plaintiff by Kenya Commercial Bank, it should be necessary to clear up all such integrity issues. Such is a requirement of the Central Bank of Kenya. There was no communication from the Plaintiff denying the veracity of the documentation. This was about fraud and management could not accept that. The Defendant bank's officials had asked the Plaintiff for information in that regard but she had refused to give the same. He confirmed that that the Plaintiff was not summarily dismissed but terminated under the provisions of clause 13 of the contract. He confirmed that despite the issues of negative references, the Plaintiff was terminated in accordance with the contract and she was paid in full. The witness added that by saying a person who is permanent and pensionable in writing to external parties did not mean that somebody who was on probation may still be permanent and pensionable. He concluded by saying that the Plaintiff was aware of her status internally at the Defendant bank and that she never wrote to say that she was on permanent and pensionable terms. Finally, the witness noted that quite a number of the Defendant bank's staff were not of the Muslim faith.
13. The Plaintiff's submissions were filed herein on 17th January 2013. In summary the Plaintiff detailed her case as follows:

“i) The Plaintiff entered into a contract of service with the Defendant on or about 17th May 2007. The terms of the contract are as follows:

- a. **The Plaintiff was appointed Manager Corporate Affairs subject to a probationary period of six months with effect from 02nd January 2007;**
- b. **The Plaintiff was to be employed on a permanent and pensionable basis upon the successful completion of probation;**

- c. **Either party could terminate the contract by giving one-month's notice to the other party;**
- d. **An implied term of the contract was that any issues arising therefrom were to be resolved amicably and with full compliance with the rules of Natural Justice.**

ii) **The Plaintiff completed the six months probation in June 2007 and was confirmed as a permanent and pensionable employee.**

iii) **the Plaintiff avers that during the period she was working with the Defendant, she worked for long hours in order to get the Defendant licensed.**

iv) **The Plaintiff avers that the Defendant unlawfully, unjustifiably and/or unfairly terminated her contract of service which amounted to a breach of contract;**

v) **The particulars of the breach of contract are as follows:**

(a) **That on or about 07th January 2008, the Defendant wrote a letter to the Plaintiff purporting to suspend her from employment;**

(b) **That on 14th February 2008, the Defendant wrote a letter to the Plaintiff purporting to terminate the contract of service;**

(c) **The specific particulars of the alleged "negative inferences" referred to by the Defendant had led to the Plaintiff's haphazard dismissal are unknown to the Plaintiff to date.**

vi) **The Defendant discriminated against the Plaintiff particulars of which are as follows:**

- a. **The Plaintiff was suspended and subsequently terminated due to her Christian beliefs;**
- b. **The Defendant replaced the Plaintiff with a Muslim lady fourteen (14) days thereafter without advertising the Plaintiff's post and/or interviewing her.**

vii) **The termination was in breach of the provisions of the Employment Act, Act No. 11 of 2007 as well as the contract of employment. Hence, the Plaintiff has suffered loss and damages. The particulars of the loss and damages are as follows:**

- **Severance pay (297x12) ... Kshs.3,570,000**
- **Loss of future earnings under the permanent and pensionable contract (Monthly salary x years of service due under the contract x 12 x 297,5000 x 21x12 Kshs.74,970,000**

viii) **The one month's salary in lieu of notice amounting to Kshs.297,500 as well as leave pay amounting to Kshs.175,000 were settled on 24th December 2008".**

14.As regards the law, the Plaintiff referred to **section 45 (4)** of the *Employment Act (2007)*. That

section provides that a termination will be deemed unfair where:

“(a) The termination is discriminatory; or

(b) The employer did not act in accordance with justice and equity in terminating the employment of the employee”.

It was the Plaintiff’s submission that it was manifest that there was an element of discrimination in the dismissal of the Plaintiff by the Defendant bank. Thereafter the Plaintiff referred the court and the number of authorities including: Kenyatta University v. Murianki (2000) LLR 4154 (CAK), Salim Murgani v. Kenya Revenue Authority HCCC No. 1139 of 2002 (unreported), Robinson v. Harman (1948) 1 Exch. 850 as quoted by A. S. Burrows in his volume Remedies for Torts and Breach of Contract, African Highland Produce Ltd v. Kisioro (2001) 1 KLR 171, Boniface Kabaka v. Mugasia & Kenya Railways HCCC No. 625 of 1997 (unreported), Mburugu v. Attorney-General HCCC No. 3472 of 1994 (unreported), Githinji v. Mumias Sugar Company Ltd Civil Appeal No. 194 of 1991 (unreported), Denmark Productions Ltd v. Boscobel Productions (1968) 3 All ER 513, Rose Ojuwang t/a Fida 2000 Caterers v. Baraka Apparel EPZ (K) Ltd HCCC No. 62 of 2003 (unreported), Gad Ojuando v. Prof. N. Bwibo, Prof. F.N. Onyango & Maseno University Civil Appeal No. 336 of 2005 (unreported), N. B. Shah versus M. M. Patel & 2 Ors HCCC No. 165 of 2007 (unreported), Ogonye v. KNTC (1996) LLR 450 (CAK) and Mwangi v. University of Nairobi (1995) LLR. The large majority of these cases brought upon the extent of damages that a court may award where a plaintiff was wrongfully dismissed by the employer. As per the Kabaka case (supra) it seems clear beyond argument that a wrongfully dismissed employee cannot merely sue for his salary/wages as such, but only for damages. The above cases amplified decisions reached both in this Court and also in the Court of Appeal with regard to the quantum of damage.

15. The Defendant’s submissions were filed herein on 8 February 2013. They opened by detailing the Defendant’s position as regards its relationship with the Plaintiff. It maintained that the relationship revolved around the letter of employment (the contract) dated 10 May 2007 in which the Defendant had offered her the position of Manager, Corporate Affairs of the Plaintiff with effect from 2 January 2007. The Defendant’s detailed what it regarded as the salient terms of the contract as follows:

“i. The contract was an interim contract which would only come into full effect once the Bank was officially licensed;

ii. The Plaintiff’s appointment was subject to a probationary period of six (6) months during which the Defendant would complete checking the Plaintiff’s references and assess her performance;

iii. The Plaintiff’s employment would become permanent upon her successful completion of the probationary period;

iv. The offer was subject to the receipt of satisfactory references from the Plaintiff’s referees; and,

v. The contract could be terminated at any time for any reason which need not be specified by either party giving to the other one month’s notice in writing or paying one month’s salary in lieu of notice.

Thereafter, the Defendant reviewed the evidence before court and identified the issues for determination as follows:

“i) Whether the Plaintiff’s employment was still probationary

ii) If (i) above is in the affirmative, what is the applicable law on termination of probationary

contracts

iii) Whether the termination was fair in light of ii) above

iv) Is the Plaintiff entitled to the reliefs sought?”

16. The Defendant referred the Court to a number of authorities including Joseph M. Ndambuki & 4 Ors. v. Delmonte (K) Ltd (2012) eKLR, Kenya Revenue Authority v. Menginya S. Murgani (2010) eKLR, Marshalls (East Africa) Ltd v. Jeremiah K. Lang’at (2009) eKLR, Mary W. Wafula v. British Airways PLC (2006) eKLR, Central Bank of Kenya v. Martin King’ori (2009) eKLR, Githinji v. Mumias Sugar Company Ltd (supra), Kenyatta University v. Murianki (supra) and Walter M. Anyanje versus Hilton International Kenya Ltd & Anor. (2006) eKLR. It maintained that the remedy of severance pay was only available where an employee is terminated on account of redundancy as per **section 40 (g)** of the *Employment Act*. Further, the Defendant surmised that the Plaintiff was not terminated on account of redundancy. The Defendant also submitted that an employee cannot claim a loss of future earnings unless the same was specifically provided for under the contract of employment. In this case, such future earnings had not been so provided in the contract and were thus not payable as damages, if the court was to find that there had been a breach of the contract. Under the heading of general damages, the Defendant submitted that it was now settled law that upon the termination of a contract of employment, a plaintiff is only entitled to the amount stipulated under the contract of employment. The Defendant quoted the Court of Appeal in the Kenya Revenue Authority case (supra) as finding:

“Indeed, a contracting party does not have to rely on misconduct in order to terminate a contract of service and a party can terminate such a contract without giving any reason! In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damage should have been in respect of the period of the notice specified in the contract...”

Finally, the Defendant submitted that the Plaintiff had acknowledged that she had received one month’s salary in lieu of notice and that she had been paid for days worked in February 2008 and further that she had been paid for her leave days due. The Defendant maintained that there was no other payment due to the Plaintiff that was justifiable under the law.

17. What was entitled as a “Statement of Agreed Issues” was filed in court on 22 February 2010. The same was signed by both the advocates for the Plaintiff and the Defendant. The Defendant’s submissions as referred to above detailed 4 further issues supplementary or complementary to those detailed in the said Statement as above. I would consider that those 4 further issues have been adequately covered in the Statement of Agreed Issues. In determining this matter, I would refer directly to the Statement of Agreed Issues and would respond thereto as follows:

- a. I find that the Plaintiff was employed by the Defendant pursuant to an interim contract of employment dated 10 May 2007, not 2006 as per the Statement of Issues above referred to.
- b. The contract was subject to a probationary period of 6 months. It was not a “prohibitory” period as per the Statement of Issues above.
- c. As per the 1st and 2nd paragraphs of the covering letter (to the contract) dated 10 May 2007, the contract was an interim one which would come into full effect once the Defendant bank was officially licensed. Further, by the 3rd paragraph the contract detailed the words:

“... And that you have understood that this offer is conditional upon the issuance of the License.”

On top of that, the terms of the offer contained a clause as to acceptance of the same by the Plaintiff. That read as follows:

“I accept the state in terms of offer and will report to Gulf African Bank (Pending Licensing), as agreed,”.

To my mind, the Plaintiff was perfectly well aware that she was employed by the Defendant bank only on an interim basis until the Defendant bank’s license came through from the Central Bank of Kenya. Indeed, the Footer also read:

“Interim Letter of Offer – Gulf African Bank (Pending Licensing)”.

In the evidence of DW 1, he clearly stated that all employees were taken on by the Defendant bank on an interim basis as there were doubts as to whether the Defendant bank would be licensed or otherwise. Consequently, I believe that the Plaintiff’s probationary (not “prohibitory”) period was effective from the date that the Defendant bank was licensed – 8 October 2007, as per document number 002 of the Defendant’s Supplementary List and Bundle of Documents dated 26 February 2010.

- d. As a direct result of (c) above, I find that the Plaintiff had not completed her six month probationary period under the contract. Despite this, the Defendant bank, on two separate occasions by letter to third parties, confirmed that the Plaintiff was a permanent and pensionable employee. Did such notification to third parties amount to the Plaintiff’s confirmation in employment? I don’t find so. In my view, the Plaintiff was still on probation as at 7 January 2008 being the date of the letter of suspension and also as at 14 February 2008 being the date of the letter of termination of her employment.
- e. The contract contained 2 mentions for the taking of references. The first was under clause 2 - Probationary Period wherein it was detailed that the Defendant bank would complete the checking of the plaintiff’s references during the probationary period. The second mention was in clause 15 - Conditions of Offer wherein the terms detailed that the offer was made subject to receipt of satisfactory references from the referees provided by the Plaintiff. I find that the contract of employment was conditional upon the Defendant bank receiving satisfactory references.
- f. The contractual terms for terminating the employment of the Plaintiff under the contract were contained in clause 13 - Termination which read:

“This contract may be terminated at any time for any reason which need not be specified by either party giving to the other one month’s notice in writing or paying one month’s salary in lieu of notice. In the unlikely event of gross misconduct on your part, your contract may be terminated summarily without compensation.”

- g. I find that the Defendant suspended the Plaintiff from her employment under cover of its letter dated 7 January 2008.
- h. Further, I find that the Plaintiff was paid the sum of Shs. 369,735/-being made up as 1 month’s salary in lieu of notice - Shs. 297,500/-, leave pay for 2007/2008 being 22.7 days - Shs. 222,025/- less PAYE tax - Shs. 149,790/-. The Plaintiff acknowledge the receipt of the cheque from the Defendant bank in the above amount of Shs. 369,735/-on 24 December 2008.
- i. I do not find that the Plaintiff’s services were unlawfully terminated by the Defendant bank under cover of its letter dated 14 February 2008.
- j. With regard to (i) above, I find that the negative references cited by the Defendant bank were one of the bases upon which the Plaintiff’s employment was terminated. To this end, I am of the belief that the Plaintiff was under an obligation or fiduciary duty, to bring to the attention of the Defendant bank’s management, the fact that there had been a case brought against her by Kenya Commercial Bank being CMCC No. 10,574 of 2006 (Milimani). That suit was filed on 7 September 2006 and the Plaintiff defended the same by means of a Statement of Defence dated 10 of November 2006. The said Kenya Commercial Bank made serious allegations of fraud as against the Plaintiff during the time she was its employee in 2004 and 2005. Further, I was disturbed at the revelations of the Plaintiff under cross-examination, when she admitted that she had undergone a MBA course at the University of Nairobi (2002-2005) but had not been issued with the Degree. At page 5 of the Defendant’s bundle of documents is a copy of the Plaintiff’s Curriculum Vitae which

- quite clearly shows her as holding a MBA from the University of Nairobi.
- k. I do not find that the Defendant bank unlawfully, unjustifiably and/or unfairly, terminated the services of the Plaintiff. I do not find that such termination was ill-motivated, malicious and/or discriminatory.
 - l. Adding to (k) above, the only evidence produced before court that the Plaintiff's dismissal was discriminatory, was based upon the fact that the Defendant bank allegedly re-placed her with a Muslim lady – Fatuma Hirsi Mohamed. I was satisfied with the explanation given by DW 1 that the said Ms Mohamed occupies/occupied a position with the Defendant bank of a higher grade than that of the Plaintiff who was engaged as Manager, Corporate Communications. I note from her Curriculum Vitae exhibited at page 004 of the Defendant's said Supplementary List and Bundle of Documents, that Ms. Mohamed was recruited from the Nation Media Group Ltd where she held the position of Group Corporate Affairs Manager. I do not consider that there has been any discrimination against the Plaintiff by the Defendant bank due to her Christian beliefs.
 - m. During her evidence, the Plaintiff stated that she had returned to her previous employment in consultancy and, as a result, I find that she did not suffer any loss or damage by reason of her termination from employment by the Defendant.
 - n. In determining whether the Plaintiff is entitled to any monies as a result of her termination of employment with the Defendant bank, I take cognizance of my finding as to issue (h) above. I also note that I have found that the termination of the Plaintiff's employment was not discriminatory. I also note the Plaintiff in paragraph 4 c. which reads:

“That either party could terminate the contract by giving one month's notice to the other party.”

That would seem to be in accordance with the 2nd paragraph of the letter of termination dated 14 February 2008 which read *inter-alia*:

“The Management of the Bank does not wish to confirm you into its employment does hereby terminate your employment from the date of this letter as per clause 13 of your Contract.

You will be paid a month's salary in lieu of notice, the days in February that you were deemed still in employment and any leave days due thus far.....”.

I have already quoted clause 13 of the contract as above. I find that the Defendant bank has complied with that clause by giving one month's salary in lieu of notice as well as paying for days ostensibly worked by the Plaintiff in February 2008 and the leave pay due to her at the time of her termination. I take note of the finding of my learned brother **Ngugi J.** In the **Ndambuki** case (*supra*):

“The principal which these cases establish is that where the contract of employment provides for a notice period or other way of terminating the contract between the employer and employee, either party can end the relationship by following the express terms of a contract.”

Judge Ngugi endorsed therein the Court of Appeal's finding (by which I am bound) in the **Kenya Revenue Authority** case whose judgement read as follows:

“It is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a yoke of slavery or a contract of servitude. This is the reason why either party is allowed to terminate the contract by giving the stipulated notice or a reasonable notice if not specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. This applies whether or not the contract is permanent or pensionable and this right vests in both the employee and the employer. The superior court, in our view, ought to have examined the Code of Conduct and if as it finally found it was silent on the period of notice, it had the power to award salary in lieu of notice and also determine a

reasonable period of notice, which in the circumstances and according to the applicable law and decided cases in this country range from six (6) months to twelve (12) months. Indeed, a contracting party does not have to rely on a misconduct in order to terminate a contract of service and a party can terminate such a contract without giving any reason. In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified, a reasonable notice.”

As I have already found, termination by the Defendant bank of the Plaintiff’s employment was reasonable, I need spend no time in referring to the authorities cited to me by both Plaintiff and Defendant in relation to damages.

18. The conclusion to all the above is that I dismiss the Plaintiff’s suit as against the Defendant bank in its entirety save for prayer (c) of the Plaint. I direct that the Defendant do issue to the Plaintiff, within 28 days of this Judgement, a Certificate of Service in respect of the Plaintiff’s period of employment with the Defendant bank in accordance with the provisions of the Employment Act, (2007). The Defendant will have the costs of this suit.

DATED and delivered at Nairobi this 30th day of April, 2013.

J. B. HAVELOCK

JUDGE