**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 357 OF 1992**

**(AS CONSOLIDATED WITH CIVIL SUIT NO. 412 OF 1992)**

**AND**

**CIVIL SUIT NO. 811 OF 1992)**

**FRANCIS WAITHAKA NGOKONYO**

**SUDI ABDALLA**

**ANDREW MUGA …..…………….…...........…..…...…. PLAINTIFFS**

**VERSUS**

**TELKOM KENYA LIMITED ……….............……..…. DEFENDANT**

## J U D G E M E N T

1. This matter has taken an exceptionally long time in determining and, for that the Court must first apologise to the litigants for the regrettable inconvenience. There were initially three matters that were later consolidated pursuant to the Orders of this Court on 2nd July, 1992. They emanate from the same subject matter, the Plaintiffs being former employees of the Defendant, formerly known as the Kenya Posts and Telecommunications Corporation. The matter was initially heard by Hayanga, J and judgment delivered on 11th April, 2001. The same was dismissed on a technicality by the Court of Appeal, which then ordered a retrial of the matter. That is the position that this Court finds itself at the moment and having re-heard the parties, do now render its decision.

### Background

2. Francis Waithaka Ngokonyo (hereinafter referred to as the 1st Plaintiff) was employed as a pupil Engineer by the Defendant on 10th June, 1973. His employment with the Defendant was confirmed on 25th October, 1973. Sudi Abdalla (hereinafter referred to as the 2nd Plaintiff) was employed on 5th October, 1971 as an Assistant Telecommunications Controller, Grade II whilst

Andrew Muga (hereinafter referred to as the 3rd Plaintiff) was employed on 17th April, 1961 as a Clerical Officer Grade II. The Plaintiffs went up through the ranks in their respective job categories ending with them being the Assistant General Manger (Data Processing), Area Manager-Nairobi South and Senior Assistant Manager (Accounting) respectively at the time of their alleged unlawful retirement from the Defendant's employ. The Plaintiffs, as attested by the Defendant, worked diligently and were committed and dedicated to their employer, from time to time received commendations for excellent and exemplary performance in their duties. To their consternation and disbelief, however, they all received letters dated 19th July, 1991, sending them on compulsory leave, on allegations of continued and persistent un-explained laxity and were subsequently summarily terminated on public interest grounds. Being aggrieved by the decision to terminate their services, the Plaintiffs filed Civil Suits Nos. 412 of 1992, 357 of 1992 and 811 of 1992, all of which were consolidated into the present suit on 2nd July, 1992.

**The Plaintiffs' Case**

3. The Plaintiffs were employed by the now defunct Kenya Posts and Telecommunications Corporation in various capacities and on various dates as aforementioned. In the Amended Plaints, they were all retired before attaining the statutory age of Fifty Five (55) years, with each being denied benefits accruing and subject to their terms of employment as per their employment contracts. They prayed for general damages and interest for wrongful termination and costs of the suit. They each claim special damages and loss incurred subsequent to the termination from the Defendant, which they term as unlawful and prejudicial.

**1st Plaintiff**

4. The 1st Plaintiff was the Assistant Manager-Data Processing at the time of his termination having been appointed to the position on 30th April, 1990. In the Plaintiff's List of Documents dated 11th May, 2006, the 1st Plaintiff outlines his career progression from his first appointment as a pupil engineer on 25th October, 1973 to that of Manager-Data Processing on 30th April, 1990. At paragraph 9(a)-(p) in his Amended Plaint, he particularizes his losses and damages, totaling to Kshs. 23, 702, 882/- , calculated from his early termination at the age of Forty One (41) years to the tentative age at which he would have compulsorily retired of Fifty Five (55) years. By paragraph 10, the 1st Plaintiff reiterates the loss of employment benefits and privileges that come with having served the Defendant for over twenty (20) years, and pegged on lost opportunities including promotions, salary and career as an Engineer. The 1st Plaintiff received a letter dated 19th July, 1991 in which it was stated therein that he was to go on compulsory leave. He wrote a letter dated 7th August, 1991 to the then Managing Director K. Arap Ngeny' seeking an intervention on the issue. The same was not responded to and by a letter dated 22nd October, 1991 the 1st Defendant was effectively terminated from his employment.

5. In his testimony during the hearing of the matter, he stated that he earned a salary of Kshs. 14,350/- with a house allowance of Kshs. 4,200/-, leave subsistence of Kshs. 1,600/-, out-patient cover for Kshs. 8,000/- and unlimited in-patient cover. He further stated that he would have earned Kshs. 10,560,286/- computed from the date of his alleged unlawful retirement to his actual retirement age, a claim for pension gratuity of Kshs. 2,336,191/- and other claims as set out under paragraph 9(a)-(p) of the Amended Plaint. He also claimed other allowances, benefits that make up the total claim of Kshs. 23,702, 682/- although it was admitted in cross-examination that at the time of his retirement, he did not receive any club membership, car allowance or utility allowance as claimed in paragraphs 9(e), (f) and (p) of his Plaint.

**2nd Plaintiff**

6. The 2nd Plaintiff reiterated that he was employed as an Assistant Telecommunications Controller

Trainee Grade II on 19th August, 1971 with the same being confirmed in a letter dated 20th November, 1973. By the time he received his retirement letter dated 22nd October, 1991 he was working as the Area Manager/Nairobi South, having been appointed and promoted in various positions within the organization. His career progression is also outlined in the Plaintiff's List of Documents dated 11th May, 2006. After receiving the letter sending him on compulsory leave on 19th July, 1991, he responded by writing two (2) letters dated 15th August, 1991 and 16th August, 1991 addressed to the Managing Director and General Manager, Human Resources respectively.

7. At paragraph 9(a)-(g) the 2nd Plaintiff sets out the particulars of loss and damage suffered from his alleged unlawful retirement, totaling to Kshs. 21,367,752/-. In his testimony, the 2nd Plaintiff reiterated that the letter sending him on compulsory leave at Pg. 85 of the Plaintiff's List of Documents aforementioned stated laxity as the main reason for the Defendant's actions. He stated that the action by the Defendant did not conform to the procedure as set out in the Posta Code, and in particular Code J. He further stated that in his entire career working with the Defendant, he had not once received any warning letter, or reprimand for inefficiency at work or indeed any disciplinary action to warrant his termination on public interest grounds.

**<u>3rd Defendant:</u>**

8. The 3rd Defendant was employed on 27th July, 1963 and the same confirmed to that effect in a letter dated 17th April, 1961. He rose through the ranks and was promoted severally, being the Senior Assistant Manager as confirmed in a letter dated 31st May, 1990. At the time of his dismissal on 22nd October, 1991 he had worked with the Defendant for over thirty (30) years. He was served with the letter dated 19th July, 1991 on 22nd July, 1991 sending him on compulsory leave for persistent laxity at his work. On 22nd October, 1991, he received the letter terminating his services at the Defendant organization. He requested the management of the organization for reasons for his unlawful termination but was neither given a response nor an opportunity to be heard, necessitating the instant suit.

9. At paragraph 9(a)-(i) of the Amended Plaint, the 3rd Plaintiff sets out the particulars of loss and damage suffered following his alleged unlawful retirement. Although the 3rd Defendant admitted to receiving his pension, he reiterated that the benefits and allowances accruing from his unlawful termination at the time of unlawful retirement accumulated to Kshs. 2,734,804.05. He further stated in his testimony, that he had worked diligently for the Defendant and had over time, received several commendations for exemplary service, to which his promotions through the ranks attest.

10. The 3rd Plaintiff also testified that his retirement was prejudicial and contrary to the provisions of the Posta Code, and especially Code J as related to his termination. He stated that he had never received any warning and had not been interviewed by any officer as stipulated under Code J.13. He, however, admitted that prior and subsequent to the alleged unlawful retirement, he was paid salary in lieu of notice and that he has been receiving his pension payments. He further admitted that at Code J.14 there was no requirement for the retiring employee to receive a warning before retirement. Further, he averred that there was no payment made by the Defendant in full and final settlement of the claim against wrongful dismissal or otherwise.

**<u>The Defendant's Case</u>**

11. The Defendant's DW1 **Isaiah Kandie**, the former Human Relations Officer, was called to testify against the Plaintiffs. In his testimony on 30th May, 2013 he stated that he was aware of the circumstances of the termination of the Plaintiffs and the regulations under which they were allegedly retired. He recanted the various ways in which an employee at the Defendant Corporation could be terminated, culminating with the retirement of employees pursuant to public

interest. Such, he averred was pursuant to Regulation 5(f).He further stated that the Plaintiffs were offered an opportunity to respond to the letter dated 19th July, 1991 sending them on compulsory leave before their retirement on 22nd October, 1991. He stated that the allegations by the Plaintiffs that they were entitled to allowances, salaries and benefits offered to employees did not suffice as they were retired not terminated from their employment and such entitlement was not extendable beyond the retirement date. He submitted that any outstanding salaries or benefits had been paid in accordance to the regulations on retirement and the Plaintiffs had no further claim against the Defendant.

12. Even though he admitted that the Plaintiffs were entitled to a hearing, DW1 stated that he was not aware whether they were accorded the same by the senior management or the Board. He admitted that the Defendant's regulations were silent on the issue or whether there were any warnings that had been issued to the Plaintiffs. This was despite him admitting that he was a Human Relation Officer and later a Communications officer.

13. After listening to the deliberations by the parties and the evidence adduced thereto, there are certain issues that are not in doubt: firstly, the Plaintiffs were employees of the Defendant, and had been for a considerable period of time, secondly, the Plaintiffs were exemplary employees, each having received commendations for their diligence, commitment and dedication in the service of their employer. This was shown by the numerous accolades and certificates that they all included in their respective Lists of Documents. The Defendant has not produced any documentary evidence or oral testimony to contradict the same. Accordingly and thirdly, it is undisputed that each of the Plaintiffs rendered satisfactory and commendable service to the Defendant over many years. It was understandable therefore to their utter shock and consternation, that the Defendant terminated their services on purported persistent laxity, as cited in the letters sending them on compulsory leave dated 19th July, 1991. Despite their fervent efforts to be heard by the management and/or Board of the Defendant, they were ignored and instead served with termination letters dated 22nd October, 1991.

14. At pages 69, 85 and 17 of the Plaintiffs respective Lists of Documents was a letter dated 19th July, 1991 which reads in part:

**"Due to persistent laxity in your duties, it has been decided to send you on compulsory leave with immediate effect and until further notice".**

After receiving these letters, the 1st and 2nd Plaintiffs wrote to the Defendant's Managing Director requesting audience and a hearing as regarded such compulsory leave. The letters were dated 7th August, 1991, 15th & 16th August, 1991 for the 2nd and 1st Plaintiffs respectively. The 3rd Plaintiff said that he visited the offices of the Defendant where he sought audience with management, which despite several attempts, he was unable to receive any response. Despairingly, the Plaintiffs each received a letter dated 22nd October, 1991 effectively terminating their services with the Defendant, ostensibly following the grounds as set out in the letters dated 19th July, 1991. The termination letters are contained at pages 77, 93 and 18 of the Plaintiffs' respective List of Documents. The letters all read in part:

**"Further to the circumstances which lead to your being sent on compulsory leave, the Board of Directors of K.P & T.C approved at its 109th meeting, your retirement on public interest with effect from 22nd October, 1991".**

In the Plaintiffs' submissions dated 28th June, 2013, it was suggested that the Defendant's allegations of persistent laxity were not evidenced or proved during the hearing ,with no documentation of the same being produced. It was further submitted that the minutes to the meeting supposedly held to terminate the Plaintiffs, were not produced by the Defendant, and that it persistently flaunted the procedure provided for retiring employees under the Posta Code J

exhibited by the Plaintiffs at pages 215-235, 227-237 and 106-116 of their bundles of documents respectively. It was also submitted the Posta Code J6 as read with J4 (i) and (ii) provided for retirement on public interest and the disciplinary procedure to be followed prior to retirement under that provision.

15. Retirement in the public interest was illustrated in the Industrial Court case of **D.K Njagi Marete v Teachers Service Commission [2013] eKLR; 379 of 2009** as follows:

**"Retirement on public interest is a form of termination of employment, instigated by the employer, and would therefore fit the description of involuntary termination. It is not necessarily the result of disciplinary process. It may for instance, result from an administrative decision by the employer, taken for the removal of persistent non-performers from the employers business."**

16. Under the **Kenya Posts and Telecommunications Corporation (Approved Special Retirement Scheme)(Pensions) Regulations, 1985** it is provided at regulation 4(b) thus:

**"Where under these regulations –**

**An officer is required by the Board to retire, the Managing Director shall notify the officer in writing that his compulsory leave is under consideration and ask the officer if he wishes to make any representations to the Board; and on receipt of the officer's representations, the Managing Director shall forward those representations to the Board together with his own comments, if any, and, where the Board is not satisfied with those representations it shall order the retirement of the officer concerned".**

The 1st Plaintiff wrote a letter dated 7th August, 1991 addressed to the Managing Director addressing the issue of compulsory leave. This is at page 70 of his List of Documents. Similarly the 2nd Plaintiff wrote to the Managing Director on 15th August, 1991 also with regards to the issue of compulsory leave. The Defendant, however, did not produce any evidence that indeed the Board considered these representations as made by the 1st and 2nd Plaintiff, and whether they formed part of the final decision to terminate the Plaintiffs services. This was reiterated by DW1 in his testimony wherein he stated that he was not aware whether the Plaintiffs were given a hearing by management or indeed the Board that resulted in the decision to terminate them. In its submissions dated 12th August, 2013, the Defendant relied on the cases of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** and **Rift Valley Textiles Ltd v Oganda [1990] EA 526** to support the position that the rules of natural justice did not, in this instant, apply to the parties. However, in **Peter Ndungu v K.P& T.C** in **H.C.C.C No. 920 of 1977** Chesoni, J (as he then was) reiterated as follows:

**"The board of directors was an administrative body, its decision was an administrative one and it would affect the Plaintiff adversely. The "audi alteram partem" rule requires that a party who may be adversely affected by a decision has the right to be heard before the decision is taken. In other words, before an administrative action is taken both parties parties concerned should have equal opportunity to state their case."**

17. It follows that under the rules of natural justice and the rule of ***"audi alteram partem"*** (to hear the other side), the management and the Board of the Defendant did not provide or accord the Plaintiffs an opportunity to be heard before rendering their decision to terminate their services. According to Chesoni, J this is elementary justice, and which, according to him, is a fundamental rule. I find that the Defendant was in flagrant and blatant breach of the express provision of Regulation 4(b) having failed to accord the Plaintiffs an opportunity to make their representations. In **Personnel Circular No. 4 'C' of 1974** it is provided that:

**"From what is said above it will be seen that it is desirable that retirement in the public interest should become effective from the date the decision is communicated to the officer, *it***

***<u>being borne in mind that he would already have been notified of the intended action and invited to say why it should not be taken</u>".*** (Emphasis mine).

Although the Defendant submitted that the aforesaid circular was not of any use to the Plaintiffs in their claim, given that it was issued under the defunct East African Posts and Telecommunications, the same however, gives to Court a useful insight about the operation of that body's successor, especially with regard to retirement in the public interest. The Defendant, despite disparaging the same circular, makes reference to it at paragraph 15 and 16 of its submission and seeks to rely on it with regard to the lack of procedure under Posta Code J as regards retirement in the public interest.

18. This Court in rendering its decision as regards administrative action applied the English case of **<u>Ridge v Baldwin</u> (1964) A.C 40** in which the House of Lords held that the dismissal of Police Constable Ridge was void as he had neither been informed of the grounds for his dismissal nor given a proper opportunity to present his defence. In this case, the Defendant reiterated in its testimony that there was no provision under the regulations for a hearing, and thus the Defendant acted accordingly in adherence to the regulations. For a party to be allowed under the said Regulation 4(b) to make a representation to the Managing Director for onward transmission to the Board is, according to this Court, affording the Plaintiffs an opportunity to put in their defences to the allegations brought against them and in the absence of such allegations, it could not be urged that the Board, had the choice to either listen to any complaints or not. Regulation 4 is set out in mandatory terms, and the Managing Director was mandated with the duty of notifying the Plaintiffs of the consideration by the Board of their retirement. The Managing Director failed in undertaking this obligation, and therefore, the Plaintiffs were not properly accorded an opportunity to defend themselves or put in a defence to the allegations brought against them of persistent laxity.

19. It is Defendant's position that the Plaintiffs' retirement was in the public interest. DW1 stated that the retirement was under the **Kenya Posts and Telecommunications Corporation (Approved Special Retirement Scheme)(Pensions) Regulations, 1985** in particular Regulations 4(a) and (b) and Posta Code J, particularly J-3(f), J-6 and J-14. According to the **Personnel Circular No. 4 'C' of 1974**, the applicability of retirement in the public interest is provided. The circular reads in part:

**"Retirement in the public interest is applicable *<u>where an officer is inefficient for reasons that would not render him liable for disciplinary action</u>*. Such officer is not only ineffective on duty but also bad influence to colleagues. His retention in the service for any length of time is therefore, not in the best interest of the corporation, hence the purpose of seeking his retirement".** (Underlining mine).

At Clause J-14 Termination of Service on Grounds of Public Interest it is provided that:

**"An employee may be retired from the service on grounds which are neither wholly disciplinary nor wholly of health nature, provided that the *<u>best interests of the service</u>* are so served.**

***<u>The cases which commonly lend themselves to this procedure are those of general and sustained inefficiency which cannot clearly be attributed to negligence or failing mental or bodily health</u>*. Cases of persistent unsatisfactory conduct are not proper to be dealt with under this regulation, and should be dealt with by taking appropriate disciplinary action".** (Emphasis mine).

20. In as much as the termination in the public interest was not necessarily as a result of a disciplinary process as enunciated in **<u>D.K Njagi Marete v Teachers Service Commission</u>** (supra), Regulation 4(b) as applied in **<u>Peter Ndungu v K.P & T.C</u>** (supra) applying **<u>Ridge v Baldwin</u>** (supra), clearly provides that the employer when taking such action as the termination of the employment/services of an employee, due processes have to be followed so as to ensure that the employee is accorded a fair hearing and an opportunity to be heard. This is similarly so stipulated under the provisions of

the *Employment Act Cap 226 of the Laws of Kenya* at **Section 45** as read with **Sections 46 and 49** thereof. As was further provided in **Personnel Circular No. 4 'C' of 1974,** the Plaintiffs were accordingly not invited to say why the action by the Defendant should be taken and neither were they notified of the intended action. In the premise, therefore, this Court finds that the Plaintiffs were not properly accorded an opportunity to defend themselves, and condemns the decision by the Defendant's Board to terminate their services. I find that the Plaintiffs were unlawfully retired by the Defendant.

21. In the Plaintiffs claim, they prayed for damages, calculated from the time of their unfair termination, to the time which they would have been compulsorily retired at the age of Fifty Five (55) years. In support of their claim for damages and loss of possible advancement, the Plaintiffs relied on **Civil Appeal No. 336 of 2005** **<u>Gad David Ojuando v Prof. Nimrod Bwibo & 2 Others</u>**, **Civil Suit No. 920 of 1977** **<u>Peter Ndungu v Kenya Posts & Telecommunications Corporation</u>** and **Civil Suit No. 1736 of 1993** **<u>Nyamodi Ochieng' Nyamogo v Telkom Kenya Ltd</u>**. In **<u>Gad David Ojuando v Prof. Nimrod Bwibo</u>** (supra) the Court of Appeal sitting in Kisumu held as follows:

**"It must follow, therefore, that the superior Court came to the correct conclusion in granting a declaration that the appellant was unlawfully retired. This being so he is entitled to his benefits, salaries, allowances and all other entitlements appertaining to his office under his terms of employment with the University until he attains or attained the compulsory retirement age of 65 years as may be determined by the superior Court."**

Further in that judgment, the Court made reference to the judgment in **Civil Appeal No. 27 of 1992** **<u>Rift Valley Textiles v Edward Ogando</u>** **(UR)** and reiterated as follows;

**"…it made no sense for the learned judge to grant a prayer of declaration to the effect that the appellant was consigned to compulsory termination of services without granting him his salary arrears, house allowance, leave allowance, pension etc. These benefits were enumerated by the appellant in paragraph 5 of the Memorandum of Appeal. This contention is justified and we would agree with him. The learned judge had no valid reason to deny these benefits to the appellant as he was entitled to them…Having on our own assessed the evidence on record we are satisfied that the appellant was illegally ejected from office in utter disregard of the Act and before his due retirement age, and in the process he was denied his benefits, and consequently had thereby suffered damages."**

22. The damages and loss suffered by the Plaintiffs are particularized in their respective Amended Plaints. The 1$^{st}$ Plaintiff claims Kshs. 23,702,682 computed from paragraph 9(a)-(p) in his Amended Plaint. Similarly the 2$^{nd}$ and 3$^{rd}$ Plaintiffs claim is for Kshs. 21,367,752/- and Kshs. 2,734,804/- respectively, computed from paragraphs 9(a)-(q) and 9(a)-(i) in their Amended Plaints. In the submissions filed on their behalf at pages 9-34, the Plaintiff reiterate the contents of the Amended Plaints, and further claim for damages for possible advancements by promotion. The 1$^{st}$, 2$^{nd}$ and 3$^{rd}$ Plaintiffs each had Fourteen (14), Twelve (12) and Five (5) years respectively left before their unlawful termination on 22$^{nd}$ October, 1991.

23. The Defendant on its part denied that the Plaintiffs were entitled to any benefits or claims as set out in their Amended Plaints. It was submitted that the Plaintiffs had admitted being paid their salary dues and one month's gratuity and salary in lieu of notice. These were as evidenced by the Plaintiffs' documents at pages 78, 80-82 for the 1$^{st}$ Plaintiff, 94-101 for the 2$^{nd}$ Plaintiff and 19-20 for the 3$^{rd}$ Plaintiff. The Defendant, however, admitted that there were no procedural requirement in the case of retirement on public interest, but the Defendant had nonetheless, upon termination of the Plaintiffs' services, paid terminal dues. In reliance on **<u>D.K Njagi Marete v Teachers Service Commission</u>** (supra), the Defendant submitted that the Plaintiffs were only entitled to what was stipulated under their contracts of employment, and further that the Defendant had satisfied all that was due to the Plaintiffs, by paying out a lump sum in terms of pension and continued by paying

out the balance of the pension due in monthly installments, which the Plaintiffs admitted to receiving. This was premised as per the judgment in **Kenyatta University v Murianki [2000] LLR 4154 (CAK)**. In **Rift Valley Textiles Ltd v Oganda** (supra), the matter was in reference to summary, dismissal and not unfair termination as the present case is. In the other cases referred to by the Defendant, namely, **D.K Njagi Marete v Teachers Service Commission** and **Kenya Revenue Authority v Menginya Salim Murgani** (both supra), the Court, after considering the evidence placed before it, ordered, in each case, a compensatory award for breach of contract and payment in lieu of notice respectively. In **Mary Wakwabubi Wafula v British Airways PLC [2006] eKLR**, the Court was guided by the contract of employment in which it was stipulated that termination was by notice, in this case three months, and to which the Court awarded to the Plaintiff. This was similar to the position adopted by the Court of Appeal in **Kenya Revenue Authority v Menginya Salim Murgani**, (as above).

24. The circumstances in the instant case, however, are that there were no procedural precedents in the termination of an employee on public interest grounds. There is no procedure as to the period of notice required, the requirement for a response by the Plaintiffs nor what measure of damages or loss of benefits the employer has to contribute to mitigate the termination of the employee. In **D.K Njagi Marete v Teachers Service Commission** (supra), Rika, J directed his mind as follows in his determination:

**"A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The claimant has moved on after the unfortunate and capricious decision by the TSC. He no longer renders any labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of the Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore, not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round."**

However, the Court of Appeal in **Gad David Ojuando v Prof. Nimrod Bwibo & 2 Others** (supra) and **Rift Valley Textiles v Edward Ogando** (supra), held that in the event that unlawful termination had been declared, it would therefore follow that the Claimant was to be awarded benefits, salaries and allowances accruing from the unlawful termination.

25. This Court is therefore, mandated and obligated to assess the quantification of the benefits, allowances and salaries that the Plaintiffs are to be awarded. In light of the evidence on record, the submissions by the Plaintiff and the testimonies therein, the Court awards damages as prayed for by the Plaintiffs, subject to the rejection of some of the benefits claimed as follows:

A. The 1st Plaintiff's claim as per his Amended Plaint dated 12th April, 2006 was for Kshs. 23,702,682/- which was inclusive of loss of interest on concessionary loans and long service bonus award. The Court accepts the amounts of special damages pleaded save for the long service award which is provided by the employer on merit and which is not awarded as a matter of course to all employees. The Court also rejects the claim in paragraph 9(o) as to loss of interest on concessionary loans as the 1st Plaintiff has not shown that he would have indeed qualified for such loans. As a result, the 1st Plaintiff is awarded Kshs. 16,084,621/- being less the loss of interest on concessionary loans and loss of long service benefits pegged at Kshs. 7,329,445/ and Kshs. 288,616/- respectively. However, at paragraph 12 of his amended Plaint, the 1st Plaintiff admits and concedes that he has received sums of Shs. 828,744/= by way of pension and Shs. 290,309/= by way of gratuity, totaling Shs.1,119,053/=. Such is to be deducted from the total award as above

which leaves the 1st Plaintiff's entitlement by way of special damages at Shs. 14,965,568/=.

B. The 2nd Plaintiff's claim as per the Amended Plaint dated 12th April 2006 and as further amended at the Hearing, was for Kshs. 21,010,651/=. The Court would also apply the same reasoning as for the 1st Plaintiff in rejecting claims 9(l) and 9(o) being loss of long service bonus and interest on concessionary loans, pegged at Kshs. 173,515/- and Kshs. 7,329,445/ respectively. However, as for the 1st Plaintiff, the 2nd Plaintiff concedes at paragraph 12 of his said Amended Plaint that he has already received Shs. 206,616/= gratuity as well as Shs. 517,671/= as monthly pension which totals Shs. 724,287/= which will be deducted from the above amount of Shs. 21,010,651/=. As a result, the Court hereby awards Kshs. 12,783,404/= to the 2nd Plaintiff.

C. The 3rd Plaintiff's claim was for Kshs. 2,734,804/-. However, as for the 1st and 2nd Plaintiffs, the 3rd Plaintiff concedes at paragraph 12 of his amended Plaint dated 12th April, 2006 that he has already received pension amounts totaling Shs. 528,895/= and a gratuity of Shs. 331,229/70 which together come to a total of Shs. 860,127/70. Such would need to be deducted from the amount of special damages and accordingly, the Court awards the 3rd Plaintiff Shs. 1,874,676/30 by way of special damages as prayed.

26. With regard to general damages, the Court of Appeal in **Walter Musi Anyanje v Hilton International Kenya Ltd & Another [2006] eKLR** held in that regard;

**"The Court in Kenya Ports Authority v Edward Otieno (Civil Appeal No. 120 of 1997 (unreported) drawing support from the case of Addis v Gramophone Company (1990) AC 448 emphatically stated that there can be no general damages in respect of suit based on termination of employment contract since the relation of the parties to such is contractual and thus terminable only under the terms of the same contract."**

The Court, in following the judgment by the Court of Appeal as aforementioned, declines to award general damages, and interest on the award to the Plaintiffs. For the avoidance of doubt, the Court enters Judgement for Kshs. 14,965,568/= to the 1st Plaintiff, Kshs. 12,783,404/= to the 2nd Plaintiff and Kshs. 1,874,676/30 to the 3rd Plaintiff together with interest thereon at Court rates from the date hereof until payment in full. Costs in any event, are awarded to the Plaintiffs.

**DATED and delivered at Nairobi this 20th day of December, 2013.**

**J. B. HAVELOCK**

**JUDGE**