



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 1736 OF 1993

NYAMODI OCHIENG NYAMOGO.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

J U D G M E N T

The plaintiff herein *Nyamodi Ochieng Nyamogo* approached the seat of justice seeking the court's intervention by way of a plaint which has been amended severally leading to the operational plaint being the amended plaint dated 19th day of February, 2007 and filed on the 20th day of February, 2007. The plaintiff's claim is directed against the defendant *Telkom Kenya Limited* which had been substituted in the place of the original defendant *Kenya Posts and Telecommunication Corporation* pursuant to the vesting order and the consent order dated the 19th day of March, 2004.

The plaintiff's complaint stems from a contract of employment entered into between the plaintiff and the defendant's predecessor the defunct *Kenya Posts and Telecommunication Corporation* in 1981 whereby the plaintiff was employed as a legal officer rising through the ranks up to the position of Senior Assistant Manager with effect from 30th day of April, 1990. By virtue of the said elevation to:

“the position of Senior Assistant Manager, the elevation entitled the plaintiff to the enjoyment of a monthly salary of Kshs.17,300/= with increments, occupation of a residential staff house No.1136A Mwingi Road Kileleshwa at a reduced rent or house allowance in lieu, leave allowance, conveyance of the plaintiff and his family by first class train to and from place of work, medical benefits for self and family, owner occupier allowance, furniture loans, house purchase loans, 30 days leave annually, promotion up to and including level of managing director to the defendant separately, an opportunity to remain in permanent and pensionable employment until the attainment of the compulsory retirement age. In addition to the aforeset out benefits the plaintiff also lost 6,000 US dollars per month ending October, 1993 as a resulting benefit from the plaintiff's appointment as a legal expert and representing the African region in an ongoing project to draft a telecommunication policy.”

The source of grievance leading to the filing of the suit arises from events of 7th April, 1993, when the plaintiff received an internal memo dated 6th day of April, 1993 informing the plaintiff that at

the 125th regular meeting held on 6th April, 1993, the defendant's Board of Directors had approved the plaintiff's compulsory retirement with immediate effect. The said communication had been signed by one a Mr. Issa A. Abdul Fazal on behalf of the Managing Director. It is the assertion of the plaintiff that the defendant's decision to retire him in the manner done is of no consequence because the plaintiff never applied for retirement and for this reason the Board had nothing to approve; the purported decision to retire him is null and void because the appellant was not given a hearing; the purported decision is wrongful in law and ultra vires the provision of the Kenya Posts and Telecommunication Corporation Act and the Regulations made there under; by reason of his position the mandate to retire him could only come from a properly constituted Board of Directors after him plaintiff has been given notice and accorded a fair hearing and being granted an opportunity to make representation to the Board.

The plaintiff has gone further to state that by reason of the defendant's wrongful actions complained of the plaintiff has suffered loss and damage particularized as: -

- (i) Salary and allowance Kshs.5,306,930/=.*
- (ii) House purchase Kshs.1,600,000/=*
- (iii) Owner occupier House Allowance Kshs.1,081,000/=*
- (iv) Payment in lieu of leave Kshs.392,403/=*
- (v) Medical claims outpatient Kshs.124,000/=*
- (vi) Agricultural land Kshs.532,200/=*
- (vii) Television loan Kshs.100,000/=*
- (viii) Furniture, refrigerator & cooker Kshs.120,000/=*
- (ix) Car loan Kshs.700,000/=*
- (x) Outfit allowance Kshs.50,000/=*
- (xi) Special allowance Kshs.45,000/*
- (xii) Gratuity Kshs.1,654,716/=*
- (xiii) Court costs wrongfully deducted by KP&TC in 1995 Kshs.100,000/=.*

In consequence thereof the plaintiff sought the following reliefs from the court: -

(a) A declaration that the purported retirement of the plaintiff by the defendant is malicious, capricious, arbitrary, unlawful and thereof in breach of the plaintiff's contract of employment with the defendant.

(aa) General damages for loss of career and employment.

(b) Special damages of Kshs.11,803,249/=

(bb) Exemplary and punitive damages.

(bbb) Interests at 39% from the 4th July 1995 being the amount wrongfully deducted from the pension gratuity by KP&TC as alleged court costs.

(c) An order directing the defendants to pay to plaintiff all his terminal benefits in full under the

permanent and pensionable scheme of the defendant's corporation.

(cc) An order directing the defendants to pay the plaintiff all his salary and benefits for the unexpired period before his attaining his age of compulsory retirement.

(d) Costs and interests on the above.

(e) Any other or further relief that this honorable court may deem just and proper grant.

In response to the plaintiff's claim, the defendant relies on the defence dated the 14th day of March, 2000 and filed under protest on the 15th day of March, 2000 in which the 2nd, 3rd and 4th defendants as they were then urged the court to dismiss the plaintiff's claim by relying on the 1st defendant's defence dated 3rd June, 1997. In the said defence they denied the locus standi, legality or capacity of entities sued as the 3rd and 4th defendants namely, Postal Kenya Ltd and Teleposta Pension Scheme, by claiming that they are strangers to the plaintiff's assertion and put him to strict proof of all those allegations, by alleging that the plaint is incurably defective as it contravened the provisions of the limitation of Actions Act Cap 22 and by violating the provisions of Order 1 and VIA CPR and by reason of the issues being raised being nonexistent.

The first defendant's defence adopted as aforesaid admitted the plaintiff's allegations contained in the then paragraph (3)(a), (b), (c), (d), (f), (g), (h), (i), (j) of the amended plaint but denied allegations contained in paragraph 3(k) save that any benefits and or entitlements that the plaintiff may have been eligible during his employment with the defendant came to naught on the 6th day of April, 1993 when his employment was lawfully determined by the Corporation's Board and his office abolished consequently and he is put to strict proof, that the Corporation Board has powers to dismiss or retire one before attaining the age of 55 years. That the employment could be determined and the alleged permanency was/is not absolute at all, that the appointment of the plaintiff by the International Telecommunication Union as a legal expert was and had nothing to do with the defendant hence no contractual relationship was created between the plaintiff and the defendant in regard thereof. Admitted that the plaintiff was compulsorily retired and the plaintiff's employment with the defendant was thus lawfully and effectively determined on the 6th of April, 1993, the said determination was lawfully determined by a duly and properly constituted Board of Directors and the defendants deny contrary delegation and the plaintiff is put to strict proof. That no notice was applicable as the case of the plaintiff was one of compulsory retirement occasioned by irreversible restructuring process ordered by the World Bank and International Monetary Fund through the Government of the Republic of Kenya. They also contend that the plaintiff has no reason to complain because for reasons unknown to the defendant and which is evidence of bad faith on the part of the plaintiff refused to collect his pension entitlements despite repeated requests by the defendant to him to do so. The defendant further asserts that the plaintiff has received payment in part acceptance of the compulsory retirement save for that which he has refused to accept. Denies the plaintiff's entitlement to salaries and or other benefits beyond the 6th day of April, 1993 because the plaintiff's position was abolished. By reason of the afore said assertions the defendants urged this court to dismiss the plaintiff's claims with costs to them.

The matter proceeded to hearing and two witnesses testified for the plaintiff. (PW1) the plaintiff ***Nyamodi Ochieng Nyamogo*** gave evidence to the effect that in the year 1981 he joined the employment of his then original employer ***Kenya External Telecommunications Company – Kenextel*** as a designated legal officer and deputy to the company secretary. ***Kenya External Telecommunications Company - Kenextel*** subsequently merged with ***Kenya Posts and Telecommunication KP & TC*** in the year 1982 where upon he was redesignated Principal legal officer and subsequently promoted to the position of Senior Assistant Manager.

His duties included handling all legal matters in which the Corporation was involved or had an interest in. He was also directly involved with projects financed by the ***World Bank, Japanese Development Corporation, European Investment Bank and African Development Bank***. These involved the drawing up of international contracts, provision of consultancy services. Some of the entities which benefited from

such services were ***International Telecommunication Union, International Satellite Communication Organization (Interset), African Telecommunication Union, African Regional Satellite Organization(Rescor).***

This networking and interlinking earned the plaintiff a position as Kenya's representative to the UN Legal Subcommittee on outer space, leading to the plaintiff being appointed by the International Telecommunications Union as one of the legal experts to prepare the African Green Paper (a policy paper) for the future development of International Telecommunications in Africa. This was in line with similar developments having taken place in Europe with the European paper and the Americans with the American Blueprint.

The foregoing international exposure led to the plaintiff's appointment to the International Panel of Arbitrators in Civil Aviation Organization which necessitated him attending various International Conferences and Workshops. He was thereby ranked among the top 4 experts in Africa in the area of telecommunication with the plaintiff being the top legal expert from Kenya. The other three were an Economist from Tanzania, a Telecommunicationist from Cameroon and a Telecommunication Policy Expert from Benin.

This rising trend to stardom in the career of the plaintiff was rudely interrupted by events which eventually led to the filing of these proceedings sparked off by the plaintiff's receipt of an internal memo received at 6.30 p.m. on 6th April, 1993 with a screaming message that him plaintiff had been mandatorily retired. The memo had been signed by one Issa Abdul Faraj purportedly on behalf of the Managing Director of the defendant.

The plaintiff takes issue with the said memo for the following reasons: -

(i) He had not applied to be mandatorily compulsorily retired hence the issue of approval of the retirement could not arise.

(ii) The memo is purported to have been originated by the Board of Directors but to his knowledge at the material time there was no Board of Directors of the defendant, which could have met and deliberated on the issue as there was no regular chairman in place then as the term of the immediate incumbent chairman a Mr. NgataKariuki who had been appointed vide gazette notice NO.1203 of 11th March, 1987 for three years and renewed for one more term had expired in February, 1993 and his replacement a Mr. Kobia had not been gazetted until June, 1993.

(iii) The action was in contravention of the defendant's regulation on retirement as him plaintiff was never notified that such a move was being planned against his employment in the first instance and in the second instance he was not given an opportunity to make representations on the same before any action was taken against him. Thirdly, he had not reached the compulsory retirement age of 55 years as he was only 45 years old at the time.

(iv) Further, another grievance was because he was not given full terminal benefits. He concedes to have received some payments from the defendants but these were on a without prejudice basis as they did not amount to full benefits he should have been paid in the first instance, and in the second instance they contained erroneous deductions which the defendant's failed to defend.

By reason of the aforesaid matters complained of, the plaintiff's rising star in his career was unlawful dimmed, his prospects of rising up in higher level of employment both at the local and international level were cut short. The genuineness of this grievance is allegedly supported by the fact that some of his seniors rose to the rank of Managing Director locally and other senior ranks internationally. By reason of the afore said grievances the plaintiff filed this suit seeking the reliefs claimed. He concedes he engaged the services of the experts who looked at the documents he had presented them with and other information to carry out the tabulations contained in the two reports produced as exhibits.

In a brief cross-examination by the defence counsel, the plaintiff conceded that basis of his claim is laid

out in the plaint filed on the 20th day of February; 2007, that he ceased being an employee of the defendant as from 6th day of April, 1993; maintains the termination of his employment was irregular as to his knowledge the alleged meeting of the 125th regular Board of directors never took place first because he had knowledge that it could not have taken place without a chairman being in place. It is also his firm testimony that there was no chairman in place then. Secondly, it is not supported by any minutes. He has knowledge having attended Board meetings prior to his termination as Deputy Secretary for the Company Secretary that minutes of such meetings were not only recorded but also well-kept and if the defence had such minutes then they could have produced them when they were served with a requisite notice to produce. He concedes he received some payments from the defendant but these do not amount to full benefits as per the regulations.

The plaintiff called one witness **Silas Yimbo** an accountant by profession who testified that the plaintiff engaged his professional services to assist in working out his terminal benefits. The witness informed the court that the plaintiff had earlier hired the services of another accountant a **Mr. Aboka** but he could not attend court because he had taken up employment overseas. (PW2) **Silas Yimbo** concedes the reports prepared by **Mr. Aboka** and him are similar in material particulars because they were based on the same set of facts, same documents and prepared using the same professional standards and naturally they are similar in material particulars. In a brief cross-examination he denied plunging the report of **Mr. Aboka** and that the reason he advanced for the reports being similar is the correct one.

The defence called no evidence. At the close of the case both counsels filed written submissions. Those of the plaintiff were filed on the 11th day of May, 2009. These stress that unchallenged evidence on the record is that the plaintiff was employed by the defendant's predecessor **Kenya Posts and Telecommunication** in 1981 as a legal officer rising to the position of Senior Assistant Manager at the time his contract of employment was brought to an end; it is the plaintiff's assertion that he could only be compulsorily retired upon attaining the age of 55 years; that the said termination of the plaintiff's contract of employment was contrary to the law and regulations governing the plaintiff's statutory and contractual obligations with the defendant hence the lawfulness of the plaintiff's claim as laid; the court is invited to believe the plaintiff's assertion that the defendant's termination of the plaintiff's contract of employment was malicious, arbitrary, capricious, unlawful and in breach of the contract of employment with the defendant because the communication to him of the retirement was on an unheaded paper which was not signed by a senior officer, he was purportedly relegated to a similar rank of Assistant Manager instead of Senior Assistant Manager, he was not given an opportunity to make representations before any action was taken against him; at the time the action was taken, the Board of Directors could not validly sit as it had no Chairman considering that the last Chairman had retired in February, 1993 and the next one published in the Daily Newspapers as having taken office in June, 1993; the plaintiff had not reached the compulsory retirement age of 55 years, the plaintiff had not voluntarily applied for retirement in accordance with regulation 3, 4 and 8; issues of the plaintiff having been forced into retirement on disciplinary grounds does not arise as the officer who signed the retirement memo was not a member of the board; there was no proof that the said officer had been mandated by the Board of Directors to do so as no minutes of any Board meeting were exhibited to show that the said officer had been mandated so by the board. They submit the plaintiff has proved his special claim as the tabulations done by the experts whose services the plaintiff engaged are in line with the circular produced by the plaintiff of 1994, 1996 and 1997 on the one hand and on the other hand that the memo of termination though in issue which was conveyed to the plaintiff indicated clearly that the plaintiff was entitled to receive full retirement benefits from the defendant the plaintiff was not paid full benefits; that the evidence tendered all showed that the plaintiff had rendered exemplary service to the defendant with a clean record and by the defendant issuing the subject memo exhibit 2, in the manner it did, it was calculated to demean, annoy and destroy the plaintiff's reputation in the eyes of the general public, both nationally and internationally and more so before any prospective employer.

With regard to payment made by the defendant to the plaintiff, allegedly in full and final settlement of the plaintiff's claims as against the defendant, the court was invited to disregard the same because it was made after the plaintiff had already lodged his claim in court. It contains a deduction of a sum of Kshs.100,000/= towards legal costs, whose deduction has not been defended by the defendant. The court was invited to go by the plaintiff's witness calculation of the plaintiff's pension payable by the

defendant. As for interest, the plaintiff is entitled to payment of the interest considering that the defendant's action in terminating the plaintiff's employment in the manner done was actuated by malice. The court was invited to find that the plaintiff's claim is properly anchored on applicable principles of law and it has not been challenged by the defendants in their defence, firstly and secondly by adduction of evidence by the defence.

The defendant's submissions were filed on the 26th day of May, 2009 stressing that the defendant's defence to the plaintiff's claim is on two fronts, namely that the plaintiff's claim is time barred and if not then the same does not disclose any reasonable cause of action; the burden of proof lies on the plaintiff and it is the defendant's contention that the plaintiff has not discharged this burden because although the plaintiff has pleaded the special damages claim, the same has not been proved because the main employment documents which go to show that the plaintiff was an employee of the defendant and earned and drew a salary and allowances from the defendant have not been exhibited; the plaintiff's assertion that he was wrongfully retired on an unheaded memo does not hold as there is no law which specifies how an internal communication, a memo on retirement should be communicated to the would be recipient. To them, the mode used by the defendant to convey that information to the plaintiff sufficed in terms of the provisions of the Kenya Posts and Telecommunication Corporation Act Cap 411 as repealed by Act No.2 of 1998 which vests the managing Director with over all executive power inclusive of the power of delegation; the plaintiff did not prove that at the material time when the memo on retirement was issued there was no chairman of the Board of Directors. Alternatively even if there was no chairman of the Board, the law mandated any other Board member to chair the meeting; contends that the plaintiff had not been contracted to work for life or until he attained the age of 55 years and the relationship could be brought to an end at any time by either side. As such principles of natural justice and human rights do not apply to such contracts, even if the termination was unlawful; they contend the plaintiff stands non suited because:-

(a) He did not comply with the provisions of section 109 of the Kenya Posts and Telecommunication Corporation Act Cap 411 because the plaintiff did not issue notice of intention to sue to the corporation as there was no evidence adduced to show that such intention to sue had in fact been given to the defendant.

(b) He did not commence proceedings within the stipulated period of twelve months as the suit was filed on 12th April, 1993 and yet summons to enter appearance were only applied for on 28th April, 1997, a period of 4 years later in the absence of proof that these had been extended beyond the 12 months lifespan of the summons to enter appearance, the entire suit should be declared a nullity.

On case law the plaintiff referred the court to the case of ***Gad David Ojwando versus Prof. Nimrod Bwibo Chairman Maseno University (2) Prof. F. N. Onyango Vice Chancellor Maseno University; Maseno University, Kisumu CA No.336 of 2005*** decided by the Court of Appeal on the 24th day of December, 2007. In issue in this cited case was an appeal arising from a decision of the superior Court in whose proceedings the appellant had challenged the decision of the respondents to retire him from the respondent's service of Librarian which retirement the appellant had contended as being unlawful. Relevant highlights of this decision relevant to issues in controversy herein are that; the Law Lords of the Court of Appeal found as a fact that the appellant as a librarian fell into the category of officers designated under "***Section 18(1) of the Maseno University Act 2000 as a member of the academic staff***". By reason of this categorization the appellant's compulsory retirement age was 65 years and that by retiring him otherwise than in terms of the relevant terms of employment; the University had acted recklessly and in wanton breach and disregard of the Act and in flagrant violation of the appellant's rights as an employee and on that account the Court of Appeal confirmed the issuance of a declaration that the appellant was unlawfully retired and that being so, he was entitled to his benefits. Salaries, allowances and all other entitlements appertaining to his office under his terms of employment with the University until he attained the compulsory retirement age of 65 years as may be determined by the superior court.

The case of ***Rookes versus Barnard [1964] 1 All ER 367*** a house of Lords decision wherein the house of Lords held inter alia that:-

“(i) English Law recognizes the awarding of exemplary damages that is damages whose object was to punish or deter and which were distinct from aggravated damages whereby the motives and conduct of the defendant aggravating injury to the plaintiff would be taken into account in assessing compensatory damages and there were two categories of cases in which an award of exemplary damages could have been a useful purpose i.e. in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant’s conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff.

(ii) That when considering the making of an award of exemplary damages three matters should be borne in mind: -

(a) The plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour

(b) The power to award exemplary damages should be used with restraint and as the means of the parties are material in the assessment of exemplary damages.

The defence on the other hand referred the court on **“Phipson on evidence Fifteenth Edition Sweet & Maxwell (200) Chapter 4 pages 55”** on the burden of proof wherein it is stated that this is an **“obligation imposed on a party by a rule of law to prove or dispose a fact in issue to the required standard of proof. A party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question...(page 56). This rule is adapted principally because it is but just that he who invokes the aid of the law is to be the first to prove his case (page 58) in actions on contract, proof of the contrary, performance of condition precedent, breach and damages is upon the plaintiff while the defendant has the onus of facts pleaded in confession and accordance...”**

The case of **Simon Mumo Malonzaversus British American Tobacco (K) Ltd Nairobi HCCA No.633 of 2002** decided by **Okwengu Jas** she then was on the 24th day of September, 2008 wherein the learned Judge as she then was (now JA) declined to **“find for the appellant, upon whom the burden of proof lay as it was the appellant who had desired the court to give judgment in his favour to redress his loss alleged to have been suffered as a result of the respondents negligence and/or breach of statutory duty. It had been upon the appellant to reestablish the circumstances upon which his case was grounded;** the case of **James Kosei Chirchir versus Chairman Board of Governors, Eldoret Polytechnic Eldoret HCCA 32 of 2003** decided by **George Dulu** on the 16th day of June, 2005 in which the learned Judge **“declined to find for the appellant because although the appellant had specifically pleaded his special damages, he had however failed to specifically prove them as it was now trite that special damages must not only be specifically pleaded but that they must be specifically proved as well;** the case of **Kenya Airways Corporation Ltd versus Tobias Oganya Auma, Aaron Muisyo Muachi, John Otieno Owili, Kaiter Ojwangawich, Fidelis Nthunthi and Henry Munene Karibiu, Nairobi CA No.350 of 2002.** In these proceedings the respondents had sued the appellant in the superior court in their capacity as employees of the appellants alleging that they had unlawfully been declared redundant and in the process they were denied their rightful terminal dues. The court of appeal raised a question as to whether an employee whose services have been terminated is entitled to general damages. The Law Lords answered that question by holding that the said court (CA) in the case of **Kenya Ports Authority versus Edward Otieno Civil Appeal No.120 of 1197 (UR)** drawing support from the case of **Addis versus Gramophone Company (1909) A.C 488 “that there can be no general damage, in respect of suits based on termination of employment contracts”.** Went further to hold that **“it was unreasonable for the respondents to believe that it was their entitlement and right to be employed by the appellant during their whole working life. The expectation has no basis in law as employment relationship, is contractual and thus terminable under the terms of the contract”;** the case of **Kenya Ports Authority versus Silas Obengele Mombasa Court of Appeal No.38 of 2005.** In this case, the Law Lords of the Court of Appeal were faced with the question as to whether a person who had been wrongly retired or dismissed, the measure of damages payable to such a person should include loss of house allowance, telephone facility, traveling allowances and other related benefits normally enjoyed by staff while still in employment. These benefits are paid to serving employees not as payment to services rendered or to be rendered but to enable the officer concerned perform his work more conveniently and therefore more

efficiently. It is a facilitation payment. That being the case there is or there could be no basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remuneration.

At page 7 of the said judgment line 4 from the top the following. Observation was made: -

***“In a case where the need for hearing was entrenched not in the contract but a statutory regulation. The appellant flippantly ignored it. We say flagrantly because in the letter retiring the respondent, it quoted the relevant regulation. Such a breach makes the termination of a contract of employment malicious and motivated by spite. It is conduct meant to hurt the employee. The need for a hearing he thinks is to prevent the employer from acting capriciously and whimsically. The need for a hearing appears to us to be available to employees who under the regulations may opt to retire. The regulations appear to be silent on the consequences of breach. It is our view that such cases are different from other cases of termination of contract of employment. Special protection is given to the category of employees who have attained the age of voluntary retirement.*”**

We think that the respondent was entitled to damages. True he was paid his retirement benefits. For those benefits he had already qualified to get the same. He had however decided not to retire at the date the appellant terminated his employment. Had he been given hearing he would have perhaps convinced the Board of the appellant not to retire him at the time they did. In these circumstances what would have been the measure of damages? Certainly not the money he would have earned had he worked until he attained the compulsory retirement age of 15 years. There are several imponderables which affect an award of damages in such cases. We draw guidance from the case of Southern Highlands Tobacco versus MC Queen [1960] E|A 490, in which the predecessor of this court rendered itself thus: -

“A person wrongfully dismissed is entitled to be fully compensated for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emolument which the plaintiff would have received it may be more or less but that sum will generally form the basis of the calculation ...”

At page 8 line 13 from the top the court went on: -

“As we stated earlier the respondent’s service with the appellant spanned a long time. He rose through the ranks and his service was exemplary. As at the time his case was heard he had attained the age which if he had continued with his employment he would not have been compulsorily retired when he was 51 years old. He therefore lost about 4 years of service. That being the case, no allowance could have been taken of death or sickness as he was healthy when this matter was heard. However the issue of accelerated payment should have been considered and taken into account. It would also appear from the evidence of Joel MuseeKisembe (DW1) who was called by the appellant that housing allowance was regarded as remuneration as it was taken into account in compiling pension. In our view therefore, considering the facts and circumstances of this case, the trial court should have discounted a percentage of the award made on salary for accelerated payment. However considering that the respondent’s salary could probably have been adjusted upwards through annual increments or promotion. The trial court should have but did not take that into account. Such an increment could probably have affected the total pension. Bearing the foregoing in mind we interfere with the award on the head of salary by increasing it by a conservative 5%. We would then discount the total award by 3% to allow for the accelerated payment with the net result that the award on loss of salary is increased by two percent...”

At line 12 from the top the court went on further to state that

“the respondent did not explain how he arrived at the figure of 5,013,635.80. In our view therefore the pension loss by the respondent should be worked out on the basis of the number of months he would have worked had he retired at the age of 55 years less what he was paid. As we do not have the figures with us the Deputy Registrar of the Superior Court with the assistance of the parties to work out the

exact sum due on this head we set aside the awards on loss of telephone facility, loss of annual leave, loss of insurance cover and loss to travelling warrants...

Then the case of ***Barclays Bank of Kenya Ltd versus Joseph MuasyaNjau Nairobi CA No.314 of 2001*** in which the Court of Appeal revisited the case law on wrongful or unlawful dismissal of an employee and then quoted with approval its own decision in the case of ***National Cereals of Produce Board versus Albert Ongaro Civil Appeal No.9 of 1999(UR)*** thus: -

“As the respondent’s appointment wasterminable by three months’ notice, he was entitled only to damages as the employer would have been obliged to pay if it had dismissed the respondent in accordance with the provisions of the contract.”

The court went further to add that

“an inferior court has no jurisdiction to overrule a superior court and although each case depends on its own facts established principles of law generally remain the same in each case and it is only the application of those principles to the facts of the case in hand that might vary from case to case...”

Other case law on the subject cited for purposes of enrichment of the assessment are the case of ***GitauVersus East African Power and Lighting Company Ltd (1986) KLR 365*** where it was held inter alia that

“wrongful dismissal cannot arise where the dismissal is carried out in accordance with the terms of the contract”;

The case of ***Wanjohi versus Mitchell Cotts Kenya Limited HCCC No.1862 of 1995*** wherein it was held inter alia that

“Where termination has been effected in accordance with a term of the contract, the employer need not even assign a reason for invoking an employment clause on both sides”;

The case of ***Rift Valley Textiles Limited versus Edward Onyango OgandaNakuru CA No.27 of 1992*** wherein the Court of Appeal held that

“Rules of naturel justice have no application to a simple contract of employment unless if the parties themselves have specifically provided in the contract that such rules apply.Where a notice period is provided for there is no need for employer to assign a reason wherethe notice period is invoked”.

The case of ***Imenje versus Kenya National Company Ltd [1986] KCR 350***, where it was held inter alia that

“Termination of a contract can only be said to be wrongful, if the same is done outside the contract”;

The case of ***Muthuuri versus National Industrial Credit Bank Ltd [2003] KLR 145*** where Ringera J as he then was held that

“Exemplary damages are not available just because of the circumstances of harshness and oppression accompanying the dismissal and injuring of the feelings of the servant and also for considering the fact that the dismissal will make it more difficult for him to obtain fresh employment”;

The case of ***Kenya Ports Authority versus Edward Otieno Mombasa CA 12087 (UR)*** in which the law Lords of the Court of Appeal quoted with approval the case of ***Addis versus Gramophone Company [1909] A.C. 488*** wherein it had been held that

“Where a servant is wrongfully dismissed from his employment the damages for dismissal cannot include damages for the manner of the dismissal, for injured feelings or for the loss he may sustain

from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment. Lastly there is the case of Kenya Revenue Authority versus ManginyaSalimMurgani Nairobi CA No.108 of 2009 decided by the Court of Appeal on the 16th day of July, 2010 in which the learned Law Lords of the Court of Appeal revisited the issue of termination of an employment contract on grounds other than by way of a dismissal or termination by way of issuance of a notice. In a summary form, the following principles were reiterated to be the correct position: -

(i) At page 19 line 3 from the bottom that: -

“There are clear past decisions of this court that even where dismissal or termination is wrongful, the damages payable to the employee is the salary which would have been paid a law of notice (see the case of Alfred Githinji versus Mumias Sugar Company Ltd (Nairobi C.A. No.149 of 1995 (UR) and John ChegeMwangi versus University of Nairobi CA No.144 of 1995 (UR))”.

(ii) At page 23 line 4 from the bottom quoting with approval own a decision in the case of **Obongo versus Municipal Council of Kisumu [1971] EA** at page 91 that

“Exemplary damages are available in Kenya on torts where there is appearance of arbitrariness or unconstitutional actions by the servants of government”.

(iii) At page 25 line 4 from the bottom quoting with approval own decision in the case of **Central Bank of Kenya versus Nkabu [2002] EA 34** held that

“In cases where the dismissal was wrongful, the complainant is only entitled to damages equivalent to the salary he would have earned for the period of notice.”

(iv) At page 31 line 13 from the bottom that

“the superior court was not entitled to award general damages in respect of an alleged breach of contract”.

(v) At page 32 line 5, from the top that

“The decision in Rookes versus Bernard [1964] IALL ER 367, (supra) lays down the parameters in which an award of exemplary damages could serve a useful purpose”.

(vi) At page 32 line 3 from the bottom that

“Where the superior court is performing a judicial function, it has no jurisdiction to delegate either the whole of that function or a portion of the same to the Deputy Registrar”.

This court has given due consideration to the afore set out assessment of the rival pleadings, the sole testimony of the plaintiff and his witness, the bundle of exhibits relied upon by the plaintiff as contained in the bundle of documents exhibited; the rival submissions and principles of case Law relied upon by either side and those sourced by the court on its own and in this court’s opinion in the absence of parties having filed agreed issues or alternatively each filing its own issues for determination by the court, the court has no alternative but to draw up its own issues for determination in the disposal of the dispute herein. In this court’s opinion these are issues for determination by this court: -

(1) Is the plaintiff’s claim time barred?

(2) If the said suit is not time barred does it raise triable issues?

(3) If the response to own framed issue number 2 above is in the affirmative, was the plaintiff an employee of the defendant? If the answer to the first limb of this issue is in the affirmative what were the terms of the said contract of employment?

- (4) Is the said contract still subsisting? If the answer to the first limb to this question is in the negative then what are the alleged circumstances which had led to the termination of the said contract?
- (5) Is any of the contacting parties aggrieved by the said termination? If the response to the first limb of this issue is in the affirmative which of the contracting parties is aggrieved?
- (6) What complaints is the aggrieved party raising?
- (7) What reliefs is the aggrieved party seeking from the seat of justice as a remedy for those grievances?
- (8) Are the claimed reliefs available to the aggrieved party or not? If the response to the first limb of this issue is in the affirmative or in the negative what are this court's reasons for finding so?
- (9) What are this court's final orders in the disposal of these proceedings?
- (10) Who will bear the costs of these proceedings?

With regard to own framed issue number (1), the issue of the competence of the plaintiff's suit is raised in paragraph 8 of the 2nd, 3rd and 4th defendant's defence filed under protest on 15th March, 2000. In the said paragraph, it has been pleaded that the plaint is incurably defective and fatally defective because it contravenes the relevant provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya and also violates the provisions of order 1 and order VIA of the CPR and that it sues nonexistent entities. In the defendant's submissions, objection to the validity of the plaintiff's suit is on two fronts. The first front form noncompliance with the requirement in Section 109 of the Kenya Posts and Telecommunications Corporation Act Cap 411 because the statutory notice was not issued to the defendant in the first instance and in the second instance proceedings against the defendant were not commenced within twelve (12) months of the rising of the cause of action.

Section 109 of the Kenya Posts and Telecommunications Corporation Act Cap 411 Laws of Kenya provides: -

“Where any action or other legal proceedings is commenced against the corporation for any act done in pursuance or execution or intended execution of this Act or if any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or any such duty or authority, the following provision shall have effect –

(a) The action or legal proceedings shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action, or legal proceedings has been served upon the Managing Director by the plaintiff or his agent.

(b) The action or legal proceedings shall lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuing injury or damage within six months next after the cessation thereof.”

When construed and applied to the rival arguments on this issue the court makes a finding that indeed the bundle of documents exhibited by the plaintiff does not contain the statutory notice stipulated in Section 109 of the parent Act. But paragraph 9 of the operational plaint filed on 20th February, 2007, pleads that the notice of intention to sue was served.

Paragraph 6, of the 2nd, 3rd and 4th defendants' defence filed under protest on the 15th day of March, 2000 states that the defendant's under protest are strangers to the contents of paragraphs 3, 4, 5, 6, 7, 8, 8A, 9 and 9A and put the plaintiff to strict proof. Paragraph 10 of the first defendant's defence adopted by the current substituted defendant denied the contents in the said paragraph of the plaint and put the plaintiff to strict proof.

As mentioned earlier in the assessment in this judgment, the statutory notice issued was not included in

the bundle of documents exhibited by the plaintiff. Not even the demand notice. But what is clear is that the plaintiff pleaded compliance and sought to bring the original defendant on board in these proceedings on the basis of that compliance. The original defendant duly entered appearance and filed a defence but these were not under protest. On this account this court is of the opinion that the only inference that can be drawn from the conduct of the first defendant in failing to protest when entering appearance and filing of the defence is that there was compliance with the requirements in Section 109 of Cap 411 Laws of Kenya.

Secondly since this was a matter which touched on the vesting of the jurisdiction in the court to entertain the matter, this court's inference is that if there was any breach of any statutory provision by the plaintiff, then that breach was waived by the defendant's conduct of not filing a preliminary objection to the plaint at the earliest opportunity, considering that the same had been pleaded in their defence. Although the plaintiff was put to proof, the defendant was likewise to adduce evidence proving non service of the statutory notice on them which was not done.

As for the issue of noncompliance with order 1 and order VIA of the retired civil procedure rules, the court is satisfied that these were cured by subsequent amendments which culminated in the current defendant being substituted in the place of the defunct original first defendant whose defence was adopted in whole by the current defendant.

With regard to the issue of service of the summons, out of time, a perusal of the court record reveals the presence of a ruling which had been delivered by G.P. Mbiti J. as he then was on the 11th day of March, 1998. It arose from an application by the defendant wherein the defendant was moving the court to set aside, on interlocutory judgment. There is mention that the defendant had been served, entered appearance but had not filed a defence for the last 4 years. Issue of stale summons was not raised before the court then. This leads to a reasonable inference to be drawn to the effect that had the issue of stale summons arisen then, the same could have been raised when the court was dealing with the issue of setting aside of the interlocutory judgment. What was central in the said proceedings was the defendant's lawyers in action in failure to move with speed to file a defence but not the issue of stale summons to enter appearance intact if this had been the correct position the issue of the validity of the interlocutory judgment would have been central.

As for the issue of failure to file suit within the stipulated time in contravention of Section 109 of the afore mentioned Act, the court has perused the original plaint on the record and found that the cause of action arose on 6th April, 1993 whereas the suit was filed on 21st April, 1993 within the stipulated time.

Alternative to the court's disposal of the legal technicalities in the manner done above, this court is alive to the current constitutional provision in the current Kenya 2010 Constitution with regard to procedural technicalities. Article 22(3) enjoins the courts "**while observing the rules of natural justice not to be unreasonably restricted by procedural technicalities**". Whereas article 159(2)(d) on the other hand enjoins the court to administer justice without due regard to procedural technicalities.

This court is alive to the fact that these new constitutional prescriptions can only apply subject to the provisions of Section 23 and 25 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya which qualifies the operation of new legislation in so far as such a legislation would operate to deny enjoyment of an accrued right.

The right that the court is concerned with herein is the right of the defendant to take refuge under the technicality of the plaintiff's failure to comply with the service of the statutory notice if any and then use it to defeat the plaintiff's claim, as opposed to the plaintiff's right of access to justice and the right to have his cause heard on its merits under the old provisions of Sections 77(a) of the retired Constitution. In addition to this there are human rights prescriptions which were operational before the 2010 Kenyan constitutional enactment. There is article 8 of the Universal Declaration of Human Rights which guarantees the right to an effective remedy by a competent National Tribunal, and Article 7(1) of the African Charter on Human and Peoples Rights which guarantees a right to have his cause heard.

This court has judicial notice of the fact that Kenya as a Nation is party to those International Covenants among others. It has an obligation to avail those rights to its citizens. The court also has judicial notice of the fact that these are handy tools where the law is deficient. This court finds them handy here because the law is silent on whether a party who is aware of an alleged breach against its interest takes no action to remedy the breach and then wishes to use that breach as an axe to axe the breach the party complained against from the seat of justice at the conclusion of the proceedings. In this court's opinion, the right of access to justice outweighs the right to adhere to procedural technicalities especially where these have not occasioned a failure of justice to the complaining party. Apart from the defendant alleging non-compliance with this procedural requirement, there is no mention of any prejudice or miscarriage the defence has alleged to have been occasioned to it considering that it does not deny the existence of master and servant relationship; the premature retirement before attaining of the age of 55 years and the fact that the plaintiffs alleges he is aggrieved and for which he seeks compensation which issue the defendant has no problem having it determined on its merits. For this reason and the reasons given earlier on, the court is satisfied that the plaintiff is properly before the seat of justice and will have a merit decision on his complaints.

Coming to own framed issue number (2), the court is satisfied that the plaint presented by the plaintiff raises several triable issues and that is why the defendant did not move the court to have it struck out for lack of disclosure of triable issues. In addition to the foregoing, the central issue as to whether the defendant's action leading to these proceedings was wrongful or not and whether the plaintiff is entitled to the reliefs raised or not are sufficient issues to sustain the plaintiff's suit and have it determined on its merit.

Own framed issues number 3, 4, 5 and 6 are interrelated and will be dealt with as one. These relate to the existence or non-existence of a contract of employment between the disputants. It is on record and undisputed by the defendant that the plaintiff pleaded so in paragraph 3 of the operational plaint. The defendant admitted all the particulars of the employment save for one dealing with the plaintiff's promotion to the position of a managing director. The defendant further in its payment produced as exhibit 9 by the plaintiff indicated that it was paying the plaintiff his terminal dues. The internal memo giving rise to these proceedings exhibit 2 dated 6th April 1993 indicated that the plaintiff was being retired from his employment. From the foregoing the court is satisfied that there was indeed a contract of employment between the disputants notwithstanding the non-production of the letter of employment by the plaintiff. This court has judicial notice of the fact such documents are usually accessible to both contracting parties meaning that the defendant was also in a position to tender it in evidence. As such there is no justification for the defendant calling upon the court to penalize the plaintiff for its non-production when it had not and yet it was in a position to do so.

The details of the terms of employment are not exhibited to the court. But these too were pleaded by the plaintiff in the same paragraph of the operational plaint and admitted by the defendant save for the denied allegation of promotion. The court is therefore satisfied that the terms pleaded by the plaintiff by and admitted by the defendant are the ones to provide guidance as the operational terms of engagement. With regard to the subsistence of the contract, the court's response is that the contract is not still subsisting having been brought to an end by the content of exhibit 2, the internal memo of 6th April, 1993. With regard to any party to the said contract being aggrieved, the court's response is in the affirmative because the plaintiff has pleaded so in the operational plaint and that is why he is before this court seeking redress.

The grievances raised are contained in paragraph 4, 5, 6, 7 and 8 of the plaint. They have already been assessed on the record in this judgment when assessing the pleadings and the plaintiffs are testimony in court and that of his sole witness hence there is no need to repeat them here but will be borne in mind when determining the credibility of the remedies sought.

The reliefs raised by the plaintiff against the defendant are contained in paragraph 8, 9, 9A and 10 of the operational plaint. As to whether these succeed or not and in what manner they are to succeed or not to succeed will depend on the results of the application of the law to the facts assessed herein.

The undisputed facts of this case as established by this court's assessment are as follows: -

(i) That indeed the plaintiff was an employee of the defendant at the material time when events leading to the initiation of these proceedings were sparked off.

(ii) The plaintiff pleaded and reiterated so in his testimony on oath which was also tested in cross-examination that he had a clean record and that is why he rose through ranks up to the position of an assistant manager. His good record earned him the confidence of the defendant and this enabled him to access international links involving the defendant which links were brought to an end when the internal memo of 6th April, 1993 was written, signed and handed to the plaintiff.

(iii) The content of the internal memo read that "***the 125th regular meeting of the Board held on the 6th April, 1993 had approved the plaintiff's compulsory retirement***" giving an impression that the plaintiff had applied for compulsory retirement.

(iv) The plaintiff has disputed the compulsory retirement asserting that both in his pleading and testimony that he did not apply to retire.

(v) The defendant has not produced any evidence that the plaintiff had any hand in the events which led to the issuance of the subject internal memo.

(vi) The defendant has not produced any proof that the plaintiff instigated the same.

(vii) Circumstances which led to the issue becoming a candidate for deliberations before the said Board meeting have not been displayed by the defendant. There is therefore nothing to counter the plaintiff's assertion that he had a good work record with the defendant and it is only malice which could be made to account for the defendant's action.

(viii) The plaintiff has also disputed the allegation that the alleged meeting took place on the grounds pleaded in the plaint and reiterated in his testimony and affirmed on cross-examination. It is on record that the defendant was put on notice to provide proof that the said meeting took place in the first instance and in the second instance that it was properly constituted which they failed to do. It is therefore the finding of this court that the plaintiff did not apply to be compulsorily retired in the first instance and in the second instance that he was not procedurally divested of his employment with the defendant.

It is on record that the plaintiff pleaded and reiterated in his evidence that he had been employed on permanent and pensionable terms and was due to retire either voluntarily or compulsory upon attaining at the age of 55 years. As at the time events leading to this case were set in motion, he was 45 years of age and he therefore suffered a loss of 10 years' service together with attendant employment benefits.

The defendant has not disputed the fact that the plaintiff had been employed on permanent and pensionable terms and that he was due to retire at the age of 55 years. They have countered the plaintiff's assertion by pleading and submitting that the employer has a right to terminate the services of an employee as and when the need arises even without assigning reasons.

It is on record that each side cited case law for the guidance of the court. This case law has been assessed and it fell into two categories. The first category deals with termination of an employment contract by an employer either by way of notice or by way of dismissal. The principles of law applicable to this category as drawn from the said case law by this court are as follows: -

(a) Either party to a contract of service is at liberty to bring to an end such a contract even without reasons.

(b) Such a contract fell into the category of contracts that are not specifically performed and cannot be ordered to be performed as such.

- (c) Where termination is by way of a notice the damages that an aggrieved party is entitled to are the value of the notice period and any accrued employment benefit.
- (d) Where the contract does not provide for a notice period the adjudicating body has a mandate to assess a reasonable period as the notice period.
- (e) General damages are not available in the circumstances of breach of such a contract of employment.
- (f) Circumstances surrounding termination, injured feeling and the hardship suffered as a result of the termination or the subsequent inability to secure other future employment are not elements to be taken into account when assessing damages payable to.

The second category deals with termination dealing with premature retirement. The Court of Appeal has indicated in two decisions namely *Gad David Ojuando versus Prof. Nimrod Bwibo and others* (supra) and in the case of *Kenya Ports Authority versus Silas Obengele*(supra) that where a person has been prematurely retired the employer does not have a free hand to retire an employee as he wishes. The retirement whether premature or not has to be done in accordance with the law and or regulations governing that relationship. The plaintiff's complaint has all along been that the defendant did not purport to retire him within the provisions of the relevant Act nor the attendant regulations.

The plaintiff has relied on the *Kenya Posts and Telecommunication Corporation (Pension Regulation 1985)* produced as exhibit 7 and the *Kenya Posts and Telecommunication Corporation* (approved special retirement scheme (Pensions Regulation) 1985 produced as exhibit 8. A perusal of the same reveals that Clause 4, 5 and 8 of exhibit 7 and clause 4, 5 and 6 of exhibit 8 are relevant. These provide: -

“Clause 4- notwithstanding the provision of these regulations the Minister may in relation to a specified class of officers approve a scheme of retirement providing for payment of pensions, gratuities or other allowances in these regulations referred to as an approved special retirement scheme and that scheme shall have effect as if provisionsthereof were part of these regulations: -

Clause 5 - (1)Subject to paragraph (2) and (3) no pension gratuity or other allowance shall be granted under these regulations to an officer except on his retirement from the public service in one of the following circumstances: -

(a) On or after attaining the age of fifty years,

(b) In the case of transfer to other public service as in circumstances in which he is permitted by law or regulations of the service in which he is last employed to retire on pension or gratuity provided that if his service in that other public service superannuated under the Federated Superannuation System for such service in circumstance corresponding to one of the grounds mentioned in sub-paragraphs (a), (c), (d), (e) or (f).

(c) On the abolition of his office.

(d) On compulsory retirement for the purposes of facilitating improvement in the organization of the corporation of the department to which he belongs by which greater efficiency or economy may be effected.

(e) On medical evidence to the satisfaction of the corporation that he is incapable by reason of any infirmity of mind or body, of discharging the duties of his office and that the infirmity is likely to be permanent.

(f) In the case of same in the corporation on termination of service in the public interest as provided for in Regulation 7 or in the case of transfer to any other public service on termination of service in the public interest under a corresponding provision in any law or regulation relating to the grant of

pension in respect of that public service.

(g) On retirement in accordance with any appealed special retirement scheme.

(1)

(2)

Clause 7- where an officer's service is terminated on the ground that having regard to the condition of public service and the usefulness of the officer thereto and all the other circumstances of the case termination is desirable in the public interest and a pension, gratuity or other allowance cannot otherwise be granted to him under the provision of these regulations the corporation may grant pension, gratuity or other allowances as it thinks just and proper not exceeding in amount that for which the officer would be eligible if he retired from the public service on medical ground as per order in regulation 5(f) (e).

(1) Under this regulation the Corporations shall not grant a pension gratuity or other allowance less imminent than that for which the officer is eligible without the concurrence of the Minister.

Clause 8 - (1) subject to paragraph (3) an officer may elect to retire on or at any time after attaining the age of Fifty Years.

(2) The Corporation may with the agreement of an officer require him to retire from the service of the Corporation at any time after attaining the age of Fifty years but before he attains the age of fifty five years.

(3) The Corporation may require an officer to retire from the service of the Corporation: -

(a) At any time after he attains the age of fifty five years.

(b) In accordance with the terms of any approved special retirement scheme and an officer so required shall retire accordingly.

Exhibit 8 clause 4 - Where under these regulations: -

(a) An officer wishes to retire he shall submit his application to the Managing Director who shall forward it together with his comments to the Board for approval.

(b) If an officer is required by the Board to retire, the Managing Director shall notify the officer in writing that his compulsory retirement is under consideration and ask the officer if he wishes to make any representation to the Board and on receipt of the officer's representation, 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.

Clause 5 - For the purpose of considering whether or not an officer should be allowed to retire or be required to retire under these regulations the Managing Director and the Board shall take into account all relevant circumstances, including the overall effect of the officer's retirement and in particular whether that retirement may provide an opportunity for improvement in the same and that the retirement of the officer will not adversely affect the services of the Corporation.

Clause 6 – An officer who retires in accordance with these regulations shall be eligible for a pension or gratuity at the rate provided by the Pensions Regulation as if he had retired under normal circumstances.”

This Court has duly construed these regulations and considered them in the light of the rival pleadings as well as submissions herein and the Court proceeds to make the following findings on the

same: -

(i) That the issue of retirement is not an alien to employment contracts between the defendant and its employees among them the contract governing the relationship between the plaintiff and the defendant herein.

(ii) Both sides are in agreement that the defendant as an employer had put in place relevant regulations to govern that relationship among them the contents of exhibit 7 and 8 particulars of which have been set up above.

(iii) It is the general belief and understanding of both contesting parties subject to these proceedings that the expectations of either is that these regulations be respected and observed by both sides.

(iv) The moment the issue of termination of employment or retirement arises, they bring to the fore the consideration of issues of gratuity, pension and other employment benefits payable upon termination or retirement. The circumstances under which these benefits are payable or withheld have also been specified under the said regulations.

(v) There is provision for termination of service of an employee with the defendant under Clause 7 of exhibit 7 but the exercise of this right is not absolute. It has a caveat attached to it. The caveat being that such a retirement must be shown to be desirable in the public interest.

(vi) The regulations make provision for normal retirement and special retirement: -

(a) Normal retirement arises when an officer attains the age of fifty (50) years and makes an election to retire upon attaining that age of 50 years.

(b) There is also provision for compulsory retirement with a caveat that this can only be resorted to by the employer if it is meant to facilitate improvement in the organization of the Corporation or of the department to which the officer belongs.

(c) There is also provision for retirement on medical grounds whereby by reason of infirmity of mind or body or of inability of discharging the duties of his officer which infirmity is likely to be permanent.

(d) Where an officer has attained the age of fifty years he cannot be forced to retire by the Corporation. Where the Corporation requires such an officer to retire upon attaining the age of 50 years it has to be in agreement with the officer.

(e) The defendant only has an upper hand in unilaterally requiring any officer under it to retire after the said officer has attained the age of 55 (fifty five) years.

(vii) There is also provision for retirement under the approved special retirement scheme in exhibit 8. These fall into two categories. The first category is where the officer himself wishes to retire and submits his application to the Managing Director who then forwards the same to the Board for approval with the Managing Director's comments. The second category is where an officer is required by the Board to retire. In this second category it is mandatory that the Managing Director notifies the officer in writing that his compulsory retirement is under consideration and ask the officer if he wishes to make any representations to the Board and upon receipt of the officer's own representations these are required to be placed before the Board for deliberations. During these deliberations, the Board is mandatorily required to take into account the following factors namely: -

(i) The overall effect of the officer's retirement.

(ii) Whether that retirement may provide an opportunity for improvement in the service.

(iii) Satisfy itself that the retirement of the officer will not adversely affect to services of the Corporation.

When the aforeset out findings are applied to the plaintiff's complaint leveled against the defendant herein, the Court makes a finding that the plaintiff has a genuine complaint for which he is entitled to a redress for reasons that the regulations in exhibit 7 did not apply to the plaintiffs at the time because: -

(1) (a) At the time the plaintiff was allegedly purportedly retired he was outside the age bracket whereby he could either voluntarily retire or be compulsorily retired as he had not attained the ages of Fifty years and or fifty five years as his assertion that he was then aged 45 years has n either been disputed or ousted by the defence.

(b) The plaintiff also had no medical complication for which he could be compulsorily be required to retire on medical grounds. The Court is therefore satisfied that the defendant breached its own clause 4, 5, 6, 7 and 8 of the Kenya Posts and Telecommunications Corporations (Pension) Regulations 198 exhibit 7 when it purported to retire the plaintiff vide its internal memo exhibit 2.

(2) Having found that the plaintiff's retirement at the material time did not fall into the regulation an exhibit 7, the defendants can only escape liability if it can demonstrate that the action they took fell into the provision of the Kenya Ports and Telecommunication Corporations (Approved Special Retirement Scheme (Pension Regulation) also 1985). Exhibit 8.

For the reasons given, the court finds that the defendant did not comply with these regulations also because: -

(a) The plaintiff's assertion that he did not apply to voluntarily retire has not been ousted by the defence and this Court finds that he did not so voluntarily apply to retire.

(b) Even if the instigation to retire can be said to have come from the defendant the defendant. The defendnat did not comply with regulation 4 because:

(i) There are no minutes to show that indeed such an issue even arose before the Board for deliberations.

(ii) There is no communication from the defendant to the plaintiff alerting the plaintiff that such deliberations are going on about his retirement.

(c) It is not the Managing Director who communicated the purported decision of the Board to the plaintiff.

(d) In the absence of exhibition of minutes of the deliberations of the Board on the issue, there is nothing to show that indeed such deliberations took place.

(e) Matters afore said in (a), (b) and (c) above are within the control of the defendants who were in a position to produce them but they did not. Their failure to do so invites the drawing of an inference by the Court that these are either nonexistent and if they exist their production would have been prejudicial to the interests of the defendant in this case.

(f) Clause 5 was not complied with as there is nothing to show that the effect of the retirement of the plaintiff in the manner done both onto the plaintiff and the Corporation were taken into considerations as is required by the regulations.

(g) Case law assessed on termination of employer/employee contracts is clear that rules of natural justice do not normally apply in such contracts unless if the parties themselves choose to incorporate them. Herein the defendant incorporated these principles in Clause 4(b) of exhibit 8 and their failure to comply with that requirement amount to a breach of those rules. The court therefore finds that the defendant breached Clause 4 and 5 of exhibit 8.

Having found that the plaintiff has a genuine complainant against the defendant the Court now proceeds to make assessment on the mode of redress sought. As mentioned earlier on, these have been set out both

(4) <i>Payment in lieu of leave</i>	<i>Kshs.392,403.00</i>
(5) <i>Medical claims outpatient</i>	<i>Kshs.124,000.00</i>
(6) <i>Agriculture land</i>	<i>Kshs.532,200.00</i>
(7) <i>Television Loan</i>	<i>Kshs.100,000.00</i>
(8) <i>Furniture, refrigerator and others</i>	<i>Kshs.120,000.00</i>
(9) <i>Car</i>	<i>Kshs.700,000.00</i>
(10) <i>Outfit allowance</i>	<i>Kshs.50,000.00</i>
(11) <i>Spectacles allowance</i>	<i>Kshs.45,000.00</i>
(12) <i>Gratuity</i>	<i>Kshs.1,651,716.00</i>
(13) <i>Legal fees wrongfully deducted by the</i>	
<i>KP&TC in 1995</i>	<i>Kshs.100,000.00</i>
<i>Total</i>	<i>Kshs.11,803,249.00</i>

Besides the aforementioned report, the payment voucher exhibit 9 does not offer much assistance as the information on it is very scanty. In the 11(a) page 3 of exhibit 11(a) shown that loss of salary was worked out taking into account increments the plaintiff could have earned up to the compulsory retirement age of 55 years. This means that the plaintiff lost nine (9) years and 9 months of service. When converted into months it comes to 117 (one hundred and seventeen) months. No payslip was exhibited to show the plaintiff's earnings but the Court takes note of the fact that the plaintiff pleaded his salary in paragraph 3(a) of the plaint which was admitted by the defendant. This court has revisited the workings of loss of salary in exhibit 11(a) at page 3 and found that these have taken into account increments over the years up to the years when the plaintiff would have retired voluntarily upon although the age of 55 years.

Exhibit 3, a letter dated 30th April, 1990 which placed the plaintiff on a new appointment to the post of senior assistant manager customer service (Postal and Administration) makes mention that "**these changes do not affect the plaintiff's salary scale**". For this reason it is not possible for this Court to know the rate of percentage increment that the plaintiff stood to benefit from. Reliance has also been placed on the personnel circular issued by the defendants which went to affect employees then still in the defendants' employment. As to whether these circulars went to confer a benefit onto the plaintiff will depend on what principles applicable to such an assessment say about such increment. In the case of **Ojuando versus Prof. Nimrod Bwibo and 2 others (supra)** and the case of **Kenya Ports Authority versus Obengele (supra)** both decided by the Court of Appeal provided parameters to the effect that what is to be considered when calculating loss of salary following unlawful retirement is the actual salary lost as at the time of the alleged unlawful retirement over the period lost.

Herein the plaintiff who was aged 45 years and who was due to retire at the age of 55 years lost 9 years and 9 months. When converted into months it comes to 12 months times 9 years plus 9 months which comes to 117 months when multiplied by the amount pleaded in paragraph 3(a) of the plaint and admitted by the defendant Kshs.17,300.00. Lost salary works out at Kshs.17,300 x 9 years x 12 months plus 9 months. Alternatively Kshs.17,300.00 x 117 months which comes to Kshs.2,024,100.00.

In the case law cited the amount assessed was ordered to suffer a deduction representing a reduction for accelerated payment. Herein no deduction will be made for accelerated payment since the would be retirement age short circuited by the unlawful retirement has already lapsed.

As for increment it is undisputed that the plaintiff had a clean record. He had earned promotion and even

risen to the rank of being the African Regional Expert on the Telecommunications Green Paper. The plaintiff asserted that he earned promotions and earned increments. The defence only disputed promotion to the position of Managing Director. The promotion from the rank of legal officer to Assistant Manager were not disputed. The defence gave no reasons for bringing the plaintiff's career to an abrupt end. They offered no evidence to show that the plaintiff would not have advanced in his career and continued to earn increments in terms of his terms of employment.

The increment worked out at page 3 of exhibit 11(a) were based on the prescriptions in the personnel circulars issued by the defendant after the plaintiff's employment had been brought to an end. These were meant to benefit the defendant's employees still in employment. As asserted by the defence in their submissions these could not apply to past employees whose benefits were yet to be paid unless if they stated so. It has not been asserted that they state so. The aforeset out findings notwithstanding, and in the absence of evidence that there are strong reasons as to why the plaintiff would not have run the full race up to the compulsory retirement age of 55 years, and also in the absence of proof that had the plaintiff run the full race of his employment up to the compulsory retirement age of 55 years he would not have earned salary increments along the way there is no way this court can fail to have a reflection of such increment by means of a percentage increment to cover this aspect. In this court's opinion a percentage increment of 40% increment which works out at Kshs.2,024,100.00 x $\frac{40\%}{100}$ which comes to Kshs.809,640. This brings up the amount for salary loss to Kshs.2,833,100.00.

With regard to prayer (bb) an exemplary or punitive damages, the case law assessed demonstrates that this category of damages are payable for injury suffered by reason of oppression and high handedness of servants of the government. The court has no doubt that servants of government parastatals are covered in this category. When applied to the rival arguments herein, it is evident that in the absence of justification for the defendant's action of purportedly moving to retire the plaintiff from its employment contrary to the prescriptions in their own employment regulations and then fail to defend that action by adduction of evidence gives rise to the drawing of an inference that the defendant's action was actuated by ill motive, malice, it was capricious, arbitrary and therefore unlawful and is a proper candidate for an award for exemplary and punitive damages. Indeed the court is alive to the existence of the two defences containing denials. These do not assist much as it is now trite and this court has judicial notice of the same that a bare pleading is not evidence.

Being damages falling into the category of what is termed as damages at large, the court is required to bear in mind the following guiding principles when assessing the same namely: -

- (a) These are not meant to enrich a party but to compensate the person for the injury suffered.
- (b) These should not be inordinately too high or too low.
- (c) Each case depends on its own set of circumstances and past awards in similar cases are mere guides.

Indeed the plaintiff's testimony is that his repudiation, pride, rising career suffered and he became unemployable by any employer and that the court should take this into account when assessing damages under this head. The court has to bear in mind the cardinal principles governing such assessment that the victim has an obligation to take remedial measures to mitigate his losses. In as much as the plaintiff stated that he was unemployable, being a qualified legal mind, he did not rule out the possibility of meaningful self-employment. In addition to this the Court has to bear in mind the guiding principles that this court has judicial notice of that instances where there are allegations of wrongful termination of employer/employee relationship there is no allowance for damages for harsh or humiliating manner of bringing that contract to an end or the fact that the termination made it difficult for the employee to serve future employment. Bearing in mind all the relevant factors afore said the court would assess Kshs.850,000.00 (Eight Hundred and Fifty Thousand) as general damages for exemplary damages or punitive damages.

With regard to (c) on the interest of 39% from 4th July, 1995 charged on the amount allegedly wrongfully deducted from the pension gratuity by Kenya Posts and Telecommunications Corporation as alleged

Court costs as reflected in exhibit 9, no evidence was tendered to show as to why this percentage was pleaded. It is however not disputed and as confirmed by the content of the payment voucher exhibit 9, that amount of Kshs.100,000/= was deducted from the plaintiff's entitlement paid to plaintiff by the defendant. The plaintiff disputed the legitimacy of the said deduction. The defendant failed to defend their action. The Court has no alternative but to allow the recovery of the said amount save that interest payable on its recovery will be allowed at Court rates.

With regard to prayer (cc) on the payment of the plaintiff's benefit in full under the permanent and pensionable scheme, the court finds this is proper as the content of the applicable regulation exhibit 7 and 8 clearly state that any officer retiring under whatever arrangement is entitled to terminal benefits. These have been worked out starting at item 11 on page 11 on exhibit 11(a) running to page 12 coming to a total figure of Kshs.1,651,716.00.

Although the defendant rubbished these workings, no attempt was made by them to offer evidence on how gratuity and other pension entitlements due to the plaintiff could have been worked out in the event their decision to retire the plaintiff in the manner done was to be reversed by this court. The formula adopted based on a salary of Ksh.16,003.80 is not remote from the salary pleaded by the plaintiff and admitted by the defendant. The court finds the working proper and as proven and confirms the said working. The resulting figure of Kshs.1,651,716.00 is therefore proper and will be allowed as such. Accompanying this figure is the figure for monthly pension of Kshs.20,004.75 worked out based on the same salary figure of Kshs.16,004.75. This court approves and confirms the workings of monthly pension to be proper and the same is allowed at Kshs.20,004.75 per month.

With regard to prayer (ccc) regarding the plea for this court for payment to the plaintiff of all his salary and benefits for the unexpired period before his attaining his age of compulsory retirement, case law assessed namely ***Kenya Ports Authority versus Obengele (Supra)*** discounted payment of attendant allowances with the exception of the salary. This decision is binding on this court. Applying the ratio decidendi in the said cited case to the facts herein it is clear that only the salary allowance will be allowed as already worked out. All other attendant benefits namely house purchase, owner occupier house allowance, medical claim (outpatient) Agricultural land, leave, television loan, furniture loan, refrigeration loan and a car loan, outfit allowance, spectacles allowance, are discounted.

With regard to prayer (d) on costs and interest on the assessed figures the general rule is that costs usually follow the event unless there are other reasonable grounds for the court to depart from this practice and for good reason to be given. As for interest, the special interest from the date of filing of the suit since there is no plea that this should run from the time before the filing of the plaint. Whereas the interest on assessed general damages will inform the date of judgment till payment in full.

For the reasons given in the assessment, the court proceeds to make the following final orders in the final disposal of the suit herein.

“(1) For the reasons given in the assessment the plaintiff's suit is not time barred under the limitation of action Act Cap 22 Laws of Kenya.

(2) For the reasons given in the assessment the plaintiff's suit is not incompetent.

(3) For the reasons given in the assessment the plaintiff's suit raises triable issues which have been disposed of on merit.

(4) An order be and is hereby made, ordered and declared that there exists a valid contract of employment between the plaintiff and the defendant as pleaded by the plaintiff and admitted by the defence notwithstanding the non-production of the actual contract of employment executed by the parties herein.

(5) The said plaintiff's employment with the defendant was on permanent and pensionable terms.

(6) The said contract of employment between the disputants herein could be brought to an end in

accordance with the law and regulations governing the same.

(7) The operational regulations then were the Kenya Posts and Telecommunications Corporation (Pension) Regulation 1885 and the Kenya Posts and Telecommunications Corporation (Approved Special Retirement Scheme) Pensions Resolution 1985, Exhibit 7 and 8.

(8) The aforesaid regulations mentioned in number (4) above made provisions on how a contract of employment of any employee of the defendant could be brought to an end for purposes of retirement. It provides for retirement in three instances namely: -

(a) By election by an employee upon attainment of the age of fifty (50) years of age.

(b) Upon attaining the compulsory age of retirement of 55 (fifty five) years in which the defendant would require such an employee to retire from its service.

(c) Under the special arrangement scheme in the first instance by self-election by the employee and in the second instance at the instigation of the defendant.

(9) It is undisputed that the plaintiff was aged 45 years of age as at the time, the events leading to the initiation of these proceedings were set in motion. For this reason, the retirement age of retirement bracket of 50 (fifty) years and 55 (fifty five) years did not apply to him for purposes of voluntary retirement in his part as an employee and for purposes of compulsory retirement on the part of the defendant.

(10) Having ruled that the plaintiff's retirement did not fall into the category of those falling under the retirement age bracket of fifty (50) years and 55 (fifty five) years, the defendant could only retire the plaintiff under the special retirement scheme whereby either at the instigation of the plaintiff himself or at the instigation of the defendant.

(11) It is on record and it is undisputed that the plaintiff did not volunteer on his own volition or motion to retire from the defendant's employment under the special retirement regulations.

(12) It is on record and undisputed that the move to retire the plaintiff in the manner done was instigated by the defendant on its own motion. The reasons for such instigation have not been demonstrated by the defendant.

(13) By reason of the defendant moving to retire the plaintiff from its employment in the manner done, the defendant was obligated to comply with the prerequisites stipulated in the said special retirement scheme regulations, when retiring the plaintiff from his employment.

(14) From the assessment done herein it is the finding of this court that the defendant did not comply with the aforesaid special retirement scheme regulations afore stated in number (13) above because:

(i) They failed to take note of the fact that the plaintiff had not voluntarily opted to retire from their service of his own volition or motion.

(ii) They did not serve the plaintiff with a notice in writing notifying him that the defendant was contemplating to retire him for whatever reason as was required by their own regulation.

(iii) They did not invite the plaintiff to make any representation with regard to the proposed retirement.

(iv) They did not take into consideration the effects of the plaintiff's retirement from their service on the plaintiff himself and itself.

(v) They failed to controvert and oust the plaintiff's assertion that no such Board meeting took place on the date mentioned and no proper Board meeting could have been convened by reason of there having

been no chairman appointed to chair it, which assertion could have been ousted by production of minutes of the said meeting which was not done. In the absence of explanation for this non-production of proof of existence of the minutes of the said meeting which purportedly retired the plaintiff, this court has no alternative but to even on adverse inference that there was no such a meeting as asserted by the plaintiff. Alternative if it did place production of the minutes would have been adverse to the defendant's interest in these proceedings.

(15) By reason of matters afore stated in number 14 above, it is the finding of this court that the purported retirement of the plaintiff by the defendant from their employment was in fact malicious, capricious, arbitrary and unlawful.

(16) By reason of matters stated in number 15 above, the plaintiff has raised a genuine complaint against the defendant and is entitled to redress.

(17) By reason of what has been stated in number 16 above the court proceeds to grant the following reliefs to the plaintiff: -

(a) An order be and is hereby made and declared that the purported retirement of the plaintiff by the defendant from its employment is malicious, capricious, arbitrary unlawful and for which unlawfulness the plaintiff is entitled to a redress.

(b) The plea for an award of general damages for loss of career and employment is declined because case law on principles governing employee/employer employment contracts does not make provision for payment of this nature of damages. In instances where there is proven unlawful termination of the contract of employment.

(c) Under special damages and on the basis of the principles of case law assessed and applied, the plaintiff is entitled to payment of his salary for the period of lost years being 9 years and 9 months or alternatively one hundred and seventeen (117) months. The salary to form the working figure is the amount pleaded in paragraph 3(a) of the plaint which was admitted by the defendant. Loss of salary will therefore work out as Kshs.17,300x117 months which comes to Kshs. 2,024,100.00.

(d) (i) For the reasons given in the assessment the plaintiff will receive a further compensation of Kshs.809,000 to cover the lost increment over the period lost.

(ii) The total aggregate of amount aforesaid in (c) and (d) above comes to a total figure of Kshs.3,433,100.00.

(iii) The figure of Kshs.3,433,100.00. (Three million, four hundred and thirty three thousand one hundred only) will carry interest at court rates from the date of judgment till payment in full.

(e) For the reason given in the assessment the plaintiff will receive an award of Kshs.850,000.00 (eight hundred and fifty thousand only) as general damages under exemplary or punitive damages head. This payment will carry interest at court rates from the date of judgment till payment in full.

(f) For the reasons given in the assessment that the defendant failed to justify the deduction made by it from the plaintiff vide exhibit 9, an order be and is hereby made and ordered that the defendant do refund the said amount which was wrongfully deducted of Kshs.100,000 to the plaintiff.

(g) The said refunded amount of Kshs.100,000.00 will carry interest at court rates from the date of filing of the suit till payment in full as no evidence was adduced by the plaintiff to justify an award of interest of the pleaded rate of 39%.

(h) By reason of what has been stated in number 15,16 and 17(i) – (g) above and also for the reasons given in the assessment the defendant is directed to payment gratuity and pension to the plaintiff to the total tune of Kshs.1,651,716.00 as assessed by PW2 in exhibit 11(a) and as approved and confirmed by

this court for the reasons given.

(i) (i) The amount awarded under (h) above of Kshs.1,651,716 (one million, six hundred and fifty one thousand, seven hundred and sixteen only) will carry interest at court rates from the date of exhibit 9 as that is the date the defendant was expected to have made a correct calculation of the correct gratuity and paid it over to the plaintiff. In addition to the amount forming gratuity and pension the plaintiff will also be entitled to an award of Kshs.20,004.75 as monthly pension as worked out by PW2 in exhibit 11(a) and as approved and confined by this Court.

(ii) Likewise the amount of Kshs.20,004.75 forming the monthly pension is ordered to start running and will also attract interest at court rates from the date of exhibit 9 as that was the date the defendant was also expected to have calculated it correctly and commenced its payment to the plaintiff.

(j) Other future claims which ought to have accrued to the plaintiff had his employment not been prematurely brought to an abrupt end in terms of future house allowance, leave allowance, conveyance allowance for the plaintiff and family, future medical allowance, owner occupier, car allowance, furniture loan, house purchase loan and future leave days are disallowed for the reasons given.

(k) Future salary earnings is allowed as assessed herein above.

(18) The plaintiff will have costs of the proceedings paid to him by the defendant.

(19) The delay in the drafting and delivery of this judgment which is regretted was occasioned by constraint of a heavy work load.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2012.

**R.N. NAMBUYE
JUDGE OF APPEAL**