REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 195 of 2003

ALEX MURUIKI BUNDI.....PLAINTIFF

VERSUS

KAKUZI LIMITED.....DEFENDANT

JUDGEMENT

The plaintiff, **Alex Muruiki Bundi**, by a amended plaint dated 14th March 2002 and amended on the 27th October 2004, seeks against the defendant herein the following orders:

(a) A declaration that the Plaintiff's termination was null and void.

(b) Special damages for wrongful termination as particularized in paragraphs 8, 8B, 9 and 10 of the Plaint.

(c) Costs of the suit and interest at court rate from the date of filing suit until payment in full.

According to the plaint the defendant contracted the plaintiff's services as a Procurement Manager vide a written agreement dated 30th June 1992. Following the deterioration of the defendant's performance, the defendant took measures which included the termination of the plaintiff's services with effect from 8th December 2001. That action according to the plaintiff amounted to redundancy. However, the defendant failed to adhere to relevant legal provisions relating thereto. It is on that basis that the plaintiff claims for the prayers set out hereinabove.

The defence on the other hand filed an amended defence dated 16th November 2004 and filed in Court on 16th November 2014, while admitting that the plaintiff was its employee contends that in the year 2001 due to losses made in the year 2000 the salaries and benefits of the staff members were frozen. It is also admitted that the plaintiff's services were terminated vide a letter dated 8th December 2001, and the plaintiff's final working day was agreed to be 21st December 2001and the defendant offered to pay the plaintiff his terminal benefits which the plaintiff declined to collect. According to the defendant the plaintiff's termination did not amount to redundancy as alleged and that the allowances and benefits to which the plaintiff was entitled were received by him until the final day of his employment. As the plaintiff's services were terminated in accordance with the terms of employment the defendant's position is that the plaintiff is not entitled to severance pay. The defendant accordingly contends that the plaintiff\'s claim for payment *in lieu* of benefits has no basis as the plaintiff's employment was properly terminated in accordance with the terms of his employment of contract and prays that the plaintiff's suit be dismissed with costs.

The hearing of this case started before **Nambuye, J** (as she then was) on 24th July 2008 when the plaintiff gave evidence as PW-1. According to him he was employed by the defendant in June 1992 as a procurement manager at a basic salary of K£ 9,000. With other benefits such as education allowance, fixed taxable allowance on housing, guards, electricity and consumables. These allowances were monthly payment together with the basic salary. He produced his letter of employment as exhibit 1. He worked until December 2001. The defendant, according to him started making losses in the 2000 leading to a freeze in salaries. On 8th December 2001 he was informed that as a result of the intended merger of his department of purchasing and stores with the engineering department, his position was to be abolished as a result of which he was to lose his job and was to be paid 3 months' salary *in lieu* of notice and benefits, which according to him added to a total of Kshs. 166,108.00. After a discussion the terms of termination were, according to him, agreed and this was confirmed in the letter dated 8/12/01 produced as exhibit 4. He also produced letters confirming the said losses and the merger of the two departments. However, he was unhappy with the manner in which his termination was being handled and he duly protested since according to him it was a redundancy which position was not accepted by the defendant. He also protested at the calculation of his terminal benefits based on his basic pay as opposed to his salary. In a meeting held between him and **Mr. Hume** on 20th December 2012, he proposed to be paid 45 days salary for each year worked was, which the proposal the defendant though was on the higher side and he was told that the defendant would get in touch with him. The defendant however wrote denying the redundancy claim insisting that the issue was not redundancy and therefore Employment Act did not apply. According to him he was entitled to severance pay for 9 years based on full salary and going by his payslip for November and October 2001 his gross pay was Kshs. 107,831.00 which when added to allowances comes to Kshs. 166,108.00. He further testified that he declined to take his payment of the three months' salary which was based on basic salary excluding the allowances.

After an adjournment, the hearing resumed before me on 23rd April 2012 with cross-examination of the plaintiff. In the said cross examination, he confirmed that since leaving the defendant's employment he has been in business. He confirmed that the letter of appointment sets out conditions of employment with the defendant which terms he accepted and that the same do not generally change. According to the said terms he confirmed that his employer was entitled to terminate the employment by 3 months' notice or salary *in lieu* thereof and that that was the same notice that he was given. He further confirmed that his entitlement was broken down as basic salary, education and other entitlements and that the allowance claimed was not reflected as basic salary in the contract. Although he was entitled to cash payment for the benefits, he was not paid in cash for the entire period of his employment for the same. He said that he was entitled to a company car and electricity whose benefits he enjoyed although the money was never given to him. He confirmed that the

increment in the salary was at the discretion of the Board of Directors and the he had no evidence that a meeting took place between him and the defendant before his termination. According to his understanding, the merger of the two divisions meant that his position had been abolished as somebody else took over the operations of the stores. He conceded that in his correspondence there was no reference to the said meeting before termination. He further stated that the memo on staff changes came after his termination. He conceded being aware that his duties continued being carried out and confirmed that the benefits were non-cash taxable benefits. His salary slip for December 2011 was made up of basic pay and education allowance totalling Kshs. 107,831/- and he conceded that what he was entitled was determined by the payslip. While confirming that the income tax returns are prepared for tax purposes, he however, denied knowledge of tax guidelines. He said that he had not been paid his terminal benefits including the three months' salary *in lieu* of notice. His job involved everything pertaining to stores and purchases. According to him he is entitled to severance pay which should be composed of basic pay and benefits amounting to Kshs. 166,108/-. Although he left employment in December 2001, if he had been given 3 months' notice he would have been entitled and enjoyed the benefits. He said he did not enjoy the use of the company's security, gardeners, house servants and electricity after he left the employment. He said he was claiming reasonable notice which according to him was one year's notice although this was not provided for.

In re-examination, the plaintiff stated that the terms contained in the letter of appointment were subject to the existing law and according to him there was a breach of those laws. At the time of his employment he was not doing business but had to adjust as he did not expect his employment to be terminated at that time. According to him his office of Procurement Manager does not exist within the defendant company as the same was abolished. The benefits, he contends were quantifiable and quantified monthly instalments and was taxed on them. Upon termination of his employment he lost all the benefits. His session with the Managing Director was on 19th December 2001 before the termination about the redundancy in which they discussed the issue of redundancy and were in agreement that it would be redundancy with a proposal being made for 15 days for every year served as opposed to his 45 days. He reiterated that the company promised to revert to him but instead he received a termination letter. Later a memo was issued merging the divisions and that the termination was an initiative of the employer citing losses. The tax returns were, according to him a reflection of the earnings and what the defendant was obliged to pay as long as he remained in its employment.

In its defence, the defendant called one **Daniel Laibuni**, who confirmed that the plaintiff was employed by the defendant as stores and procurement manager at an annual salary of K£ 9,000 with the directors retaining the discretion on increment. That office was a crucial one since it was the main procurement offices. At the time of the termination of the plaintiff's employment his salary was Kshs. 98,747.00 per month and he was also entitled to education allowance of Kshs. 9,083.00 per month, 35 days leave per year, leave allowance, leave travel allowance, free housing, one house servant, one gardener, firewood and lighting. He was offered a non-cash benefit. These terms according to this witness were accepted by the plaintiff. According to him the letter referred to termination by 3 months' salary or notice and that the salary referred to a specific benefit. Similar terms were reserved to the plaintiff. Th witness further testified that upon termination, the plaintiff was entitled to 3 months' salary at the rate of Kshs. 98,747/- per month which sum he left. This, however, excluded the non-cash benefits which are only available as long as one is in employment. According to him the two terms – salary and benefits – are not referred to interchangeably since the benefits were not given in cash. The benefits are only enjoyed by the people in employment and the employer is required to assign the benefits values for tax purposes in which case the employer is supposed to declare both cash and non-cash benefits payable to the employee. According to him the plaintiff was only entitled to basic salary and non-cash benefits. The termination took effect on 21st December 2001 and a termination letter was duly issued together with an offer to pay three months' salary which offer the plaintiff declined to accept but instead sued the company. The resulting figure after taking into account the salary and other dues as well as the undisputed deductions, was Kshs. 7,092.75 which the plaintiff declined to accept. According to the witness the plaintiff was not declared redundant but that his services were terminated. He stated that certain changes were made to the administrative structure of the company and that the plaintiff's position continued in existence under a new title but with same services and was not abolished. According to the witness had the plaintiff been declared redundant he would have been entitled to Kshs. 49,800/- and therefore the plaintiff is only entitled to uncollected amount.

In cross examination, the witness stated that he joined the defendant in 1985 and found the plaintiff in the company. He was in charge of salaries and maintenance of staff records although this was a junior position to that of the plaintiff which was a division manager and hence a senior manager. The witness on the other hand was not a senior manager but a manager. Other than maintenance of records the witness admitted that he was not involved in staff recruitment, discipline and performance and that the plaintiff was reporting to the General Manger who is the only person who would know what they talked about. According to this witness the letter of appointment does not specify what salary connotes and the same does not talk about basic salary. In the plaintiff's payslip the word used is basic salary. In his view salary does not include allowance although that is not indicated. Rather than being given money the company was paying on his behalf according to the witness. The benefits were a monthly commitment to the plaintiff and if the plaintiff was to serve for the 3 months he would have been entitled to payment before leaving. From Kenya Revenue Authority's point of view the benefits were monthly earning while as between the plaintiff and the defendant they were monthly commitments. Redundancy according to the witness means that the services are nolonger needed or are beyond the needs or have become irrelevant to the employer. He admitted that the circular dated 10th December 2001 stated that the company was incurring losses but did not blame the plaintiff for the same. The changes were effected to reduce the costs and stores and engineering were to be merged and hence the merger did not leave behind a stores division since the duties of the stores division were transferred to a **Mr. Kariuki** and it was nolonger necessary to have the plaintiff. After the plaintiff left there was no senior manager to the stores but his job did not go away. Formal job descriptions according to him only came into existence in 2004 after the plaintiff had left. He admitted that the plaintiff's termination was abrupt that the company still holds Kshs 7,000.00 due to the plaintiff which it has no objection handing over.

In re-examination the witness stated that as regards the contents of the documents there has never been any dispute. Only education allowance was paid in cash according to the witness and the two are treated separately. A third party could not enjoy the benefits according to the witness. After the termination the duties of the plaintiff continued in existence as someone was tasked to carry them out.

On the close of the case, parties filed written submissions.

According to the plaintiff, as submitted through his learned counsel **Mr. Obura,** the letter of offer with reference to termination on payment *in lieu* of notice did not refer to "basic salary" as used in the letter of appointment and in the payslips. Therefore it is submitted that if the plaintiff was to serve his three months' notice in employment he would be entitled to all his emoluments comprised in the contract of employment which were House allowance, Car Allowance, Electricity allowance, Gardeners, House Servants, Watchman costs and Groceries. Relying on the case **Kenya Ports Authority vs. Silas Obengele Civil Appeal No. 38 of 2005**, it is submitted that where it has been shown that the allowances payable are remunerative in nature and not merely meant to facilitate an employee in his duties the allowance payable would be taken into consideration while assessing damages. In this case it is the plaintiff's case that the allowances paid were remunerative in nature and were not merely intended to facilitate the performance of his duties, more particularly since the same were taxable. It is further submitted that under section 36 of the **Employment Act No. 11 of 2007** as read with "**Protection Against Unjustified Dismissal"** a publication of the 82nd Session of ILO 1995, as well as **R M Sifuma vs. Commercial Bank of Africa HCCC No. 1069 of 1985**, where an employee's services have been terminated by an employer payment *in lieu* of notice should be based on the employee's full remunerative package and "remuneration" is defined as the total value of all payment in money or kind, made or owing to an employee arising from the employment of that employee.

It is further submitted that there is evidence on record that the defendant's financial performance in the course of the year 2000 and 2001 deteriorated. Given the circular dated 15th December 2000 on the freezing of salaries and the circular letter dated 10th December 2001 on continuation of austerity measures on account of the financial predicament of the Company, it is submitted, the termination of employment can only be construed to be a measure taken by the Defendant to reduce costs. It is further submitted that when the defendant decided to merge the plaintiff's post with that of the Manager Engineering Division, the plaintiff's post became superfluous as defined under the **New Chambers Concise Dictionary**. On the same note, the abolition of the plaintiff's office of Manager Stores and Procurement and creation of the office of Manager Stores and Supplies with the assignment of the responsibilities of the newly created office to another manager leading to termination of the plaintiff's service rendered the plaintiff redundant under the provisions of section 2 of the repealed Trade Disputes Act as well as **Halsbury's Laws of England, 4th Edn. Vol. 16 paragraph 667**. Consequently, it is submitted, under section 16A(1)(f) of the repealed Employment Act, the plaintiff is entitled to severance pay at the rate of 15 days' pay for each completed year of service at the minimum, which according to counsel amounts to Kshs. 747,486.00. Since the conditions under the said section 16A(1) were not complied with, it is submitted that the termination of the plaintiff is null and void and the case of **Ndungu Boro vs. Peter Njuguna and Another [2002] eKLR** is resorted to for support.

Since the termination of the plaintiff's employment is void *ab initio*, it is submitted, the traditional legal theory that an employee whose services have been wrongly terminated could only recover damages to the extent of the salary he would have earned during the notice period is inapplicable. Based on **Southern Highland Tobacco vs. McQueen [1960] EA 490** and **East African Airways vs. Knight [1975] EA 165** as well as the **Obengele Case** (Supra), it is submitted that the plaintiff is entitled to full compensation for loss of income following his termination of service in breach of a statutory provision. However as the plaintiff was bound to mitigate his losses as held in **Southern Highland** and **East African Airways Cases**, instead of seeking for compensation until the Court delivers its decision the plaintiff submits that he would be satisfied with compensation in form of one years' salary which, in his view, also constitutes a reasonable notice which, according to him he was entitled to.

In the final analysis the plaintiff prays for severance pay in the sum of Kshs. 747,486/-; balance of pay *in lieu* of three months' notice in the sum of Kshs 170,985/-; compensation *in lieu* of reasonable notice in the sum of Kshs. 1,993,296/-; as well as the admitted sum of Kshs. 7,092/75 totally amounting to Kshs. 2,918,859/75 with interest and costs.

On its part the defendant through its learned counsel **Mrs Wetende**, submitted that the payment of three months' salary *in lieu* of notice was in compliance with clause 10 of the plaintiff's employment contract and section 16 of the repealed Employment Act Cap 226. Relying on **Rift Valley Textiles vs. Oganda [1992] LLR 309**; **Kenya Oilfield Services V. Njoroge [1985] LLR 1459**; **Central Bank of Kenya vs. Nkabu [2000] LLR 3498; Barclays Bank of Kenya Ltd vs. Njau [2006] 2 EA 15**; **Githinji vs. Mumias Sugar Co. Ltd [1994] LLR 1373**; and **Koech vs. African Highlands and Produce Company Limited and Another [2006] 2 EA 148**, it is submitted that when a contract of employment contains a termination clause the measure of compensation for unlawful dismissal is the period specified in the termination clause. Accordingly, it is the defendant's view that the plaintiff's contract was terminated lawfully entitling him only to payment of three months' salary *in lieu* of notice. Relying on **Kenya Ports Authority vs. Otieno [1997] LLR 575** and **Mwangi vs. University of Nairobi [1995] LLR** it is submitted that an employee is not entitled to payment *in lieu* of allowances or benefits. Based on the evidence on record, it is submitted that salary and allowances are not the same thing and that apart from education allowance, none of the other benefits were paid to the plaintiff in cash. Accordingly, it is submitted that the Court is bound to interpret the written terms and conditions of service as regards termination of the plaintiff's employment and his terminal entitlements and based on **Michira vs. Gisima Power Mills Ltd [2004] eKLR,** and **Shah vs. Shah [1988] KLR 289** and **Muthuuri vs. National Industrial Credit Bank Ltd [2003] KLR 145**, it is submitted that extrinsic evidence is not admissible to inter alia vary, contradict, add to or subtract from the terms of a written contract, hence the Court should disregard the plaintiff's attempts to incorporate extraneous matters/evidence into his terms and conditions of service in an attempt to enhance his exit package/terminal dues. Relying on **KPA vs. Otieno** (supra) it is submitted that to order payment till retirement would be tantamount to reinstatement to his employment.

With respect to the Employment Act No. 11 of 2007 and related precedents, it is submitted that the same should be disregarded as the Act was not in force when the plaintiff's employment was terminated and the applicable legislation, the Employment Act Cap 226 and the plaintiff's contract allowed for termination without reasons. With respect to the Convention No. 158 of the ILO it is submitted that the same had not been domesticated in 2001. With regard to **Obengele's case**, it is submitted that the same was based on the peculiar provisions of the Kenya Ports Authority Act and hence distinguishable. In any case that case supports the view that benefits are paid to serving employees not as payment to services rendered but to enable the officer concerned perform his work more conveniently and therefore more efficiently. It is, in the defendant's view immaterial that the benefits were quantified for taxed purposes since they were non-cash benefits. It is further submitted that the case of **East African Airways vs. Knight** is distinguishable from this case as in the former, there was no provision for termination notice hence the invocation of a reasonable notice and has been distinguished in **Kenya Oilfield vs. Njoroge** (supra). The case of **Ndungu Boro vs. Peter Njuguna**, on the other hand, does not relate to employment matters.

On redundancy, it is submitted that the plaintiff's contract was terminated in accordance with the terms of employment and therefore his attempts to extrapolate and speculate as regards the circumstances of his exit is misguided and unwarranted having agreed that his employer could terminate his contract without reasons. Whatever steps the defendant took after the termination of the plaintiff's employment, it is submitted, cannot vary the contract. It is further submitted that the plaintiff's responsibilities continued in existence after he left and that the losses suffered by the defendant had nothing to do with the decision to terminate the plaintiff' contract. The changes that took place after the plaintiff's employment was terminated cannot vary the terms of employment between the parties herein. Accordingly, it is submitted that the contract was terminated in accordance with the terms of the contract and not because the plaintiff was declared redundant and is therefore not entitled to severance pay. Hence the provisions of the Trade Disputes Act do not apply and relying on **Koech vs. African Highlands and Produce Company Limited and Another** (Supra) it is submitted that the defendant was not obliged to assign any reason for the termination. It follows, in the defendant's view, that the provisions of section 16A of the Employment Act are inapplicable. With respect to the deductions, it is submitted that the same have not been disputed.

As the plaintiff was bound by the terms of employment, it is contended that he is not entitled to the reliefs sought. On the authorities of **Central Bank of Kenya vs. Nkabu [2000] LLR (Supra)**, **Barclays Bank of Kenya Ltd vs. Njau [2006] 2 EA 15** and **Githinji vs. Mumias Sugar Co. Ltd [1994] LLR 1373,** it is contended that the plaintiff is not entitled to payment *in lieu* of the notice beyond the period set out in his contract of employment, that damages cannot be computed beyond the notice period in the contract and that in cases of termination, the damages suffered are the wages for the period during which normal notice would have been correct. Since the plaintiff has been paid 3 months' salary *in lieu* of notice that is all he is entitled to.

In conclusion it is submitted that since the plaintiff has failed to discharge the burden on him by proving his case the suit ought to be dismissed with costs.

I have considered the evidence, the issues raised, the submissions as well as the authorities cited. I must express my gratitude to both Counsel. I obtained much help from their research and industry and for the interesting and persuasive submissions they made. If I have not found it possible to refer to and deal with all of them, it is not out of lack of appreciation for their efforts but due to sheer overwhelming weight of their number.

Two sets of issues were filed by each of the parties. However in my considered view the following are the issues for determination:

1. **Whether the termination of the plaintiff's employment was as a result of redundancy or simple termination of a contract.**

2. **What are the consequences of the termination?**

3. **What constitute salary for purposes of termination and whether benefits and allowances constitute salary?**

4. **Whether the plaintiff was paid his entitlements in terms of the terms of the employment.**

5. **Whether the plaintiff is entitled to the reliefs claimed in the amended plaint.**

6. **Who should bear the costs of the suit.**

I now wish to deal with issue number 1 one and that is w**hether the termination of the plaintiff's employment was as a result of redundancy or simple termination of a contract.**

The plaintiff's case is that he was declared redundant while the defendant's position is that this was a normal termination. In **Johnson Kimuu Karani vs. EA Portland Cement Company Ltd Nairobi (Milimani) HCCC No. 1808 of 1999 Waweru, J** reiterated the provisions of section 2 of the aforesaid Trade Disputes Act when he stated:

"Severance pay is payable to an employee who is declared redundant at the rate of not less than 15 days' pay for each completed year of service and redundancy is the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job, or occupation and loss of employment due to Kenyanization of a business; but does not include any such loss of employment by a domestic servant".

In **Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others [1999] 2 EA 245** the Court of Appeal of Tanzania had this to say:

"Dictionaries are not to be taken as authoritative exponents of the meaning of word used in Act of Parliament, but it is well known rule of Court of law, that words should be used in their ordinary sense…For the purpose of employer and employee relationship termination, a redundancy situation arises where there has been a cessation of business, for which the employee was employed by his employer, or such business has disappeared, either generally, or in the place where the employee was employed, or where there has been a cessation, or diminution of the requirement of business for work of a particular kind…Redundancy occurs when an employee is dismissed because an employer has closed his business or the business is closed in the place, the employee works, or when the employer nolonger requires such employees, or has reduced requirement for employees to carry out work of a particular kind, and there is no suitable alternative employment".

In support of his contention the plaintiff has relied on the fact that the defendant's business was going through financial upheavals and it was necessary to reduce staff hence the need to abolish the plaintiff's position. That the defendant's financial position was not very healthy is not in dispute as the same is admitted in paragraph 5 of the defence to amended

plaint. To prove that the defendant was reducing its staff the plaintiff has relied on the circular dated 10th December 2001 in which it was indicated inter alia that:

"Stores and Engineering Divisions are to be merged to become the Supplies and Services Division with effect from 1st January 2002".

The phrase employed by the Trade Disputes Act is "**services of an employee are superfluous".** Can it therefore be said that at the time of the termination of the plaintiff's employment vide the letter dated 8th December 2001 effective on the same date, the services of the plaintiff were superfluous? That may be so. However, from the contents of the said circular, it cannot be said that that was the position since the merger was due to take place on first January 2002 and in any case the plaintiff admitted that the said circular came after he received his termination. The plaintiff also testified that before he left the employment a meeting was held between him and a representative of the defendant at which the issue of severance pay was broached. He, however, admitted that no concrete agreement was reached at that meeting (a meeting whose existence was cast in serious doubts as he admitted that he had no evidence of such event) as the defendant informed him that they would revert to him. He further testified that he was informed that he was to loose his job and was to be paid 3 months' salary *in lieu* of notice amounting to Kshs. 166,108.00 and that after discussion an agreement was arrived at which agreement was confirmed in the letter produced as exhibit 4. In that letter, it is clear that the defendant was giving the plaintiff three months' notice and that the outstanding loan of Kshs. 254,917.00 would be come due on the effective date. Going by his own evidence, it is clear that the issue of redundancy did not arise. Whereas he stated that after he left employment, no one was appointed Stores and Procurement Manager, he conceded that Mr. Kariuki took over the operations of the store and further admitted in cross-examination that after his termination his duties continued being carried out. It is therefore clear, going by the plaintiff's own evidence that his office was not abolished on termination. Merger alone does not in my view connote abolition of a position. It may simply be as a result of organisation of an institution. It is worth noting that in the same circular Horticulture East and West were also amalgamated into one. In my view, it would not be strictly correct to conclude that one of the Horticultures was thereby abolished.

In the letter of termination produced as exhibit 4, apart from reference to the letter of appointment, no specific reasons were stated for the said termination. In Mukawa Hotels Holding Ltd vs. Beat Koch Civil Appeal No. 191 of 2005 the Court of Appeal was of the view that

"A notice of termination of employment must of necessity be categorical and certain. It should not be capable of more than one interpretation. The purpose of a termination notice is to warn the party receiving the notice of the impending change so that he or she may prepare for the impending change. It is a requirement intended to obviate surprise and sudden hardship for instance in the case of an employee he would need to look for alternative employment so that at the end of the notice he might not find himself without income, in the case of the employer he or it might want to look for a replacement…Whether or not a notice given is intended to terminate employment is a question of fact. The intention of the party giving the notice must of necessity be gathered from the language of the notice".

In my view, unless a contrary intention is manifested in the letter of termination, the Court should not speculate as to the real intentions behind the said termination. As was held by the Court of Appeal in **Rift Valley Textiles Ltd vs. Edward Onyango Oganda Civil Appeal No. 27 of 1992 (Cak) [1990-1994] EA 526,** where a notice period is provided in the contract of employment, then an employer need not assign any reason for giving the notice to terminate the contract. In fact this term was expressly contained in clause 10 of the terms and conditions of service which formed part of the terms of the contract wherein it was expressly stated that the defendant could terminate the employment "***without necessarily assigning reasons thereto***".

In the foregoing premises it is my finding and I so hold that the plaintiff's cessation of employment with the defendant was not as a result of redundancy but as a result of the termination of contract of service.

I now proceed to determine the issue number 2 which deals with **the consequences of the termination.** In **Dalmas B Ogoye vs. KNTC Ltd. Civil Appeal No. 125 of 1996[1995-1998] 2 EA 265**the Court of Appeal held that "since the appellant's appointment was unlawfully terminated, the only damages he is entitled to in law is the amount he would have been paid if his employment had been brought to an end in the manner stipulated in his contract of service and no more". In the case of **Barclays Bank of Kenya Ltd vs. Njau [2006] 2 EA 15**, the Court of Appeal held that where the contract of employment embodies notice period, then damages to a person dismissed unlawfully is to be worked out on the basis of the notice period. It follows that the plaintiff's entitlements on termination is to be made with reference to the letter of appointment.

In the letter of appointment dated 25th June 1992 and produced as plaintiff's exhibit 1, the general terms and conditions applicable to the appointment were incorporated. The said general terms were produced as plaintiff's exhibit 2 and clause 10 thereof stated as follows:

1. **Basic salary K£9000 per annum**

2. **Education Allowance: K£288 per annum**

3. **35 days leave, including Saturdays and Sundays but excluding Public Holidays, will accrue per annum. On taking leave you will be paid a leave allowance of K£400 and a leave travel allowance of k£525 per annum.**

4. **On satisfactory completion of your probation you will become eligible for a Datsun 1200 pick up on the company vehicle Loan Scheme which provides for a grant of 60% of the value of the vehicle from the Company and a 40% repayable by the employee over a period of 60 months. On taking delivery of the vehicle you will be paid a vehicle running allowance of Kshs. 7,200/= per month and you will receive a fuel allowance of 150 litres per month . While on probation, you will be entitled to claim for vehicle running allowance Shs. 7,200/= per month and receive a fuel allowance of 150 litres per month provided you will be using your private vehicle on Company business.**

To answer the issue number two, damages for wrongful dismissal are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with the terms by giving either the proper notice or salary *in lieu* thereof. In fact in his own evidence in chief the plaintiff testified that "if I had been given 3 months' notice I would have been paid in full. I declined because they were paying me on basic salary. They were not fair because my salary was basic pay plus allowances".

I must, however, mention that where a statute stipulates certain conditions to be followed before an employee's employment can be terminated as was the case in **Obengele's Case**, to terminate the employment without following the laid down procedure would render the termination illegal. I am, however, reluctant to apply the provisions of the Employment Act No. 11 of 2007 to the circumstances of this case where the termination took place in 2001 long before the said legislation came into force.

Having determined issue number 2 the next issue for determination is **what constitutes salary for the purposes of termination**. According to the plaintiff, salary is not only the basic salary but encompasses the benefits that accrue from the employment. The plaintiff's argument which in my respectful view is not totally misplaced is that if he were to keep his employment for the said period of three months instead of pay *in lieu*, he would not only be entitled to the basic salary but to the benefits as well. In other words by paying salary *in lieu* of notice and opting not to pay the benefits, the plaintiff would be losing some of the entitlements under the employment contract. For the defence it is argued that the said benefits are only enjoyable by a person in employment and do not accrue to a person whose employment has been terminated.

With the advent of free market economy or *laissez faire* doctrine, came the hypothesis that contracting parties were free to bargain on equal strengths. Hence the law gave no undue advantage to either though in most cases the reality is that an employee has no much say when it comes to the terms of the contract. The law hence requires that where an employment contact is terminable by notice the terms of the notice apply to both parties. The importance of giving a notice was underscored in A publication of the ILO during its 82nd Session of 1995, entitled ***"Protection Against Unjustified Dismissal"*** where the Committee of Experts in their report at paragraph 247 page 92 stated as follows:

"The purpose of the period of notice is to mitigate the consequences of termination of employment, and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice; the worker must therefore be entitled to compensation *in lieu* of notice.

Such compensation should correspond to the remuneration the worker would have received during the period of notice if it had been observed"

Where a notice as opposed to payment *in lieu* thereof is given this poses little difficulty. However, in cases where payment *in lieu* of notice is to be made the issue of benefits and allowances that accrue as a result of the relationship comes into focus. In **Obengele's Case (Supra)** the Court of Appeal expressed itself as follows:

"But before dealing with that issue, we think we should first consider whether in a case where a person has been wrongly retired or dismissed, the measure of damages should include loss of house allowance, telephone facility, travelling allowance and other related benefits normally enjoyed by staff while still in employment. These benefits are paid to serving employees not as payment to service 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 and there would 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 remunerative. For instance for what reason will say, a payment for transport to and from work be made, if the officer is not going to work? Or why would an officer demand telephone facilities if he is not using the same for the benefit of the employer. Not being remunerative these allowances save for housing which we will talk about later were improperly included in the computation. There are, in some cases allowances which are remunerative in nature. No evidence was adduced by the respondent to show that any of these allowances he claimed save house allowance were remunerative in nature. In absence of such evidence it is our view that the trial court had no proper basis for awarding the same to the respondent…We set aside the awards on loss of telephone facilities, loss of annual leave, loss of insurance cover and loss of travelling warrants".

In **Wanjohi vs. Mitchell Cotts Kenya Ltd [2002] 2 KLR** 462 **Waki, J** (as he then was) held:

"With respect to the figure applicable the starting point is once again the contract signed between the parties. The letter of offer of employment clearly distinguished between "salary and allowances" as one package and "benefits" as another package, although both accrued monthly. House allowance was not payable. The plaintiff was not entitled to it after his employment had been terminated. The contract document is clear that in default of notice either party would give to the other three months' pay. House allowance cannot be regarded as part of pay since it is not payable for services rendered but as a means of providing an employee with accommodation for himself while he works for that employer, in order to make him comfortable. There is no provision in the contract document for the payment of house allowance *in lieu* of notice. …The benefits were paid as a means of providing the employee with a more comfortable environment to discharge his duties and they ceased with the termination of employment. There was clear provision in the termination clause that it is the "salary" which would be paid *in lieu* of notice and both parties have defined what salary entails in the agreed facts.

The plaintiff's contention is that the benefits enjoyed by him were not merely facilitative but were remunerative and cites the fact that the same were taxable as proof that they were remunerative.

In my respectful view the mere fact that the allowances were taxable does not necessarily make them remunerative. The plaintiff admitted that the benefits were non-cash benefits. They were payable by the defendant directly. According to the terms and conditions of service, the plaintiff was entitled to free housing, one indoor servant and gardener, free firewood and lighting, leave allowance, travel allowance, education allowance. According to the plaintiff his salary, based on the payslip was Kshs. 166,108.00 which should have been the basis of calculating what was due to him. From the payslip produced, unlike in the case of **Obengele** where there was a provision for housing allowance, in the instant case, free housing was provided. The mere fact that the value thereof was assessed for purposes of taxation does not, in my view, translate it to remunerative benefit. It was in my view a facilitative benefit and pursuant to the said authority, should not be taken into account in calculating what was due to the plaintiff. Similarly the other benefits apart from the education allowance were also facilitative since they were free non-cash benefits. See **Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai. 20 of 1994.**

In **Johnson Kimuu Karani vs. EA Portland Cement Company Ltd (Supra)** the learned Judge also expressed himself thus:

"House, car and gardener's allowances are paid to an employee on account of him/her being in actual employment and since they are allowances attaching upon the employment, once an employee is nolonger in employment, however terminated, he/she should not get these allowances as it would amount to unjust enrichment… With regard to benefits and relief on tax, these accrue when an employee is paying tax and since the plaintiff's employment was terminated he has not been paying tax on his salary and other emoluments, it would be unjust enrichment if he were to be paid benefits and relief on tax when he has not paid tax for the five years he has not been earning salary and emoluments"

Consequently the answer to issue number three is that the salary for purposes of termination, save for education allowance, was exclusive of the other non-cash benefits and allowances.

The fourth issue is **whether the defendant was paid his entitlements in terms of the contract**. Apart from the plaintiff's complaint of the failure by the defendant to consider the said benefits, I did not hear him complain that the calculation of his benefits was incorrect. That being the position I find that the calculation of the plaintiff's dues under his terms of employment cannot be faulted. It is however, admitted that the plaintiff has not collected Kshs. 7,092.75. However, that sum was offered and available for payment. Save for the fact that the plaintiff declined to collect his dues, the payment due to the plaintiff was properly computed.

Is the plaintiff entitled to the prayers sought in the plaint? Having made the foregoing findings, it is my view, and I so hold, that the plaintiff's termination was not null and void. I further find that the plaintiff is not entitled to the special damages for wrongful termination as particularised in paragraphs 8, 8B, 9 and 10 of the plaint.

With respect to the issue of costs, taking into account the circumstances of this case, it would, in my view be unjust to penalise the plaintiff in costs. Whereas the general rule is that costs follow the event, taking into account the relationship between the parties herein, it is my considered view that this is an appropriate case in which each party should bear own costs. I so order.

For avoidance of doubt the plaintiff is free to collect the sum of Kshs. Kshs. 7,092.75. due to him from the defendant.

In the foregoing premises, the plaintiff's case fails and is dismissed but, in the circumstances of this case, with no order as to costs.

Judgment read, signed and delivered in court this 11th day of June 2012.

G.V. ODUNGA

JUDGE
In the presence of:

Mr. Mburugu for Mr. Obura for Plaintiff

Ms. Aluvale for Mrs Wetende for Defendant