REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1177 OF 2006

DAVID N. NYAMU...PLAINTIFF

VERSUS

INSURANCE TRAINING & EDUCATION TRUST REGISTERED TRUSTEES.........1ST DEFENDANT

J. K. NDUNGU...2ND DEFENDANT

JUDGEMENT

Coram: Mwera J.

Ashitiva for plaintiff

Thuku for defendant

Court clerk Njoroge

On 9.11.2006 the plaintiff filed the suit herein. He claimed that he was employed by the 1st defendant as its finance controller on agreed terms w.e.f. 10/2/1997 at a consolidated salary of sh. 81,000/= per month. At the time of termination of his services he was drawing sh. 337,010/= per month plus other benefits. The plaintiff worked with honesty and diligence. His position was permanent with the retirement age fixed at 55 years. His services could only be terminated before the retirement age in the event of misconduct, fraud or dishonesty. But then in breach of all these the 1st defendant did unlawfully terminate the plaintiff's services w.e.f 31.8.06 through a letter addressed to him by the 2nd defendant, on the pretext that that was due to a major restructuring of the 1st defendant. The plaintiff, nonetheless, saw that only as a pretext; the 1st defendant had intended to get rid of the plaintiff on no explained reasons, some 5 years and 11 months before the retirement age. To him, all this was evidenced by the compulsory leave he was ordered to take – a feature not provided for in the contract of employment. The plaintiff termed termination of his services as malicious because he was still fit to serve up to the age of retirement. The plaintiff should instead have been declared redundant and paid his severance benefits. By the way he was laid off, the 1st defendant avoided paying these. His services were prematurely terminated at age 49 causing him humiliation and inconvenience.

It was added that the plaintiff was condemned without being heard when what was termed compulsory leave was imposed on him followed by termination of services in a way not provided for in the contract of

service. Having been so unlawfully removed from the service the plaintiff claimed from the defendants the following:

i) damages for wrongful termination of services
ii)
iii)
iv)

ii)
v)
vi)
vii)
viii)
ix)
loss of earnings for the remaining period before retirement – 5 months and 11 months – sh. 27,914,663/=

iii) medical insurance cover sh. 493,693/=

iv) pension fund – sh. 2,402,881/=

v) annual leave entitlement – sh. 2,367,660

vi) unpaid medical claims – sh. 64,257/=

vii) excess handing over hours – sh. 31,162/=

In total the plaintiff claimed sh. 33,273,721/= as special damages plus costs and interest.

The defendants' defence admitted the contract of employment but denied that such was to run up to retirement at age 55. It was averred that the termination of the plaintiff's services on 31.8.06 was as per the contract of service and not unlawful. The defendants further denied that the plaintiff was entitled to loss of earnings and/or lost years. That the plaintiff was advised of the reason for the termination of his services and his benefits were fully paid including 30 days salary in lieu of notice. Nothing more was owed. It was further denied that the plaintiff was entitled to general damages or any of the heads above (ii) to (vii). No loss or damage was suffered by the plaintiff.

Then a counter-claim followed. By it the defendant claimed a total of sh. 1,916,389.28 made up by way of

a) Loans – sh. 1,058,562.98/=

b) Salary advances – sh. 398,118.30/=

c) Car loan Guaranteed – sh. 459,708/=HisHh

During trial item (c), car loan, was dropped on the grounds to be gathered from the evidence below.

The plaintiff replied to the defence joining issue with the defendants and in essence repeating what he had pleaded in the plaint. The reason for termination of his services was, "major restructuring" of the 1st

defendant. He was not paid any terminal benefits except a refund of his contributions to the pension fund – not from the 1st defendant.

In reply (defence?) to the counter – claim it was averred that the plaintiff did not at any time borrow a lump sum of sh. 1058, 562/98. He had made inquires in writing about this sum without success. That the salary advances had different terms attached to them which the plaintiff did not breach. As for the car loan, the plaintiff borrowed a loan from NIC Bank Ltd which he serviced directly – not through the defendants. That at one point by a letter dated 2.11.06 the 1st defendant demanded a total of sh. 1,674,412/= as contrasted with sh. 1,916,389/98 in the counterclaim. With all this, the plaintiff concluded that the defendants' claim was without merit.

In reply to the defence to the counterclaim the defendants contended that on 1.9.05, they advanced a loan of sh. 1,367,088/86 to the plaintiff of which sh. 1058,562/98 was still owing. Details had been supplied and that sh. 1,916,389/28 is what the plaintiff owed as at the time his services were terminated. Eight (8) agreed issued were then filed for determination.

The plaintiff (PW1) stepped into the witness box placed before the court his bundle of documents (Exh. P1) and proceeded to testify that he was employed by the 1st defendant as per a letter dated 30.1.97 (Exh. P1 – 12) at a consolidated salary of sh. 81,000/=. Therein it was provided that the employment could end on his 55th birthday. The salary was reviewed annually until by the time his services were terminated – 31.8.06, it stood at sh. 391,510/= pm. By that 31.8.06 the plaintiff was yet to attain the retirement age of 55 years. The termination was on an unclear basis and not according to the letter of appointment. As per the letter of appointment, the plaintiff was to give the employer (the 1st defendant) 30 days notice to terminate services or resign. In lieu he could pay a month's pay. Such a facility or course was not open to the employer. The letter of employment provided that the employer would terminate the services if the plaintiff willfully disobeyed its orders or he was party to a fraud, guilty of gross misconduct or he was of dishonourable conduct. Before the termination, the plaintiff was ordered to go on compulsory leave (Exh P1-18) on 14.7.06. No reason was given. The appointment letter did not contain such kind of leave. Then by a letter of 31.08.06 (Exh P1-79) the plaintiff's services were terminated on the ground that the 1st defendant was undergoing restructuring. He was paid a salary for one month in lieu of notice. The 2nd defendant signed this letter. The plaintiff was not aware of any restructuring going on except in the 1st defendant's board (Exh. P1-15 to 52), where he was a secretary and not a member. The plaintiff testified that he was not given any money or credit for any advances or loans. The staff or management was not involved in the structuring of the board. And that because the board chairman's statement (Exh P1 – 55) did not contain something on staff restructuring, the termination of the plaintiff's employment was a deliberate move to get him out. He had worked with devotion and good conduct all along (Exh P1 – 53, 54) and that had been appreciated and recognised. He had been given allowances for entertainment, airtime, club membership on that account. His letter of termination, though not styled dismissal, did not allude to any disobedience to the employer or involvement in fraud. The plaintiff produced his payslips (Exh. P1-83 to 85).

Beginning with the medical benefits ((iii) above), the court heard that from medical insurance scheme, the 1st defendant moved to run an internal cover w.e.f 2005, where an employee was supposed to lodge claims. The plaintiff lodged his claims (Exh. P1-92 to 100) but no refund was made. Then he was fired.

On being sent home, the plaintiff challenged that through his lawyers on 21.9.06 (Exh P1. 81) demanding some entitlements. The 1st defendant responded (Exh P1-87) on 2.11.06 that no payments were due to the plaintiff. Instead he owed it sh. 1,674,412/=.

Moving to salary advances, ((b) in counter claim) the plaintiff admitted having some but claimed that they were recovered via the payroll. As for the car loan (c) in counterclaim) the court heard that that

claim was misplaced because he himself serviced the NIC Bank loan, although it had been guaranteed by the 1st defendant.

Regarding loans ((a) counter claim), the plaintiff said that these were being recovered through the payroll. He expected the 1st defendant to furnish him with statements of balances and require their repayment. Such statements were never given to the plaintiff. Only the total sum was put before him to pay.

As for one month salary in lieu of notice the plaintiff claimed that it was deducted but not credited anywhere.

And when the plaintiff inquired from the 1st defendant on 7.11.06 (Exh P1-90) about his alleged indebtedness there was no response. He conceded that some of the loans advanced to him attracted 10% interest and that would be indicated on payment vouchers or authority to pay these loans.

The plaintiff was given an indefinite compulsory leave then fired and so he sought for awards as prayed including annual leave not taken ((iv) in plaint) in 2006. Then for excess handing – over hours

((vii), plaint), he had spent these hours while his services had been terminated – 19 hours in all.

In cross examination the plaintiff maintained that he, not the employer, had the right under the contract of employment (Exh P1-12) to terminate services by giving a notice of 30 days or paying salary in lieu. His employment was permanent and could not be terminated until he got to his 55th birthday.

On leave, the court heard that it could be granted or refused by the employer, if duty so demanded. He had 25 days of leave in 2006 and none classified as compulsory. He sought lost earnings to cover the time he would have worked before he could retire. He believed that his termination of services was prompted by malice because the 2nd defendant signed the letter to terminate. For this, he claimed general damages. The plaintiff accused the 2nd defendant of conspiring with other board members to terminate his services. Perhaps it is pertinent to note that the plaint contained no particulars of malice or conspiracy. Neither was evidence advanced in that regard.

Then referring to the defendants' bundle of documents, which later formed Exh. D1, the plaintiff agreed that he was given loans on his application dated 30.7.04 and a further one of sh. 450,000/= on 25.8.04. By 1.9.05 he owed sh. 1,021,426/= then he took a further loan of sh. 492,411/=. On 9.1.06 the plaintiff took a salary advance for one month and sh. 75,000/= loan on 26.1.06. Sh. 112,500/= a salary advance was granted on 5.4.06. He got paid by ICEA a sum of sh. 963,094/= - his pension contribution.

Moving to the defendants' bundle filed in court on 13.8.07 (Exh. D1), the plaintiff admitted that a statement of account as at 1.9.06 was received by him, showing a loan balance of sh. 1,058,562/=. He was not sure he got a mobile phone advance of sh. 45,000/=. He admitted a salary advance of sh. 337,000/= but was not sure how it was recovered to leave a balance of sh. 279,117/=. He got some sh. 75,000/= for (purchase of) study materials but he was not sure of its recovery. He had the same story for a salary advance of sh. 112,000/= - disbursed but not sure of recovery. Then that as at 25.8.05 the plaintiff owed the 1st defendant 1,513,838/=. He admitted that as at 1.9.06 he owed sh. 1,058,562/28, but he disputed salary and other advances amounting to sh. 396,118/30. He repaid the NIC loan himself. Looking at the repayment schedules presented, the court heard that they were all with the 1st defendant. Deductions were done through the payroll. He got copies; but the 1st defendant did not give him the break-down. At this point the court was minded to ask: Was the plaintiff not the Finance Controller of all these book-keeping and accounts affairs of the 1st defendant? Cross-examination continued.

On the issue of restructuring of the 1st defendant, the plaintiff pleaded redundancy. He did not know

whether his job still existed after he left. The court heard that the plaintiffs pension contribution (iiv) in the plaint) was paid when he attained the age of 50 years. So what he was now claiming was the portion the 1st defendant could have paid for the 5 years and 11 months he had to go before retiring. The medical claims ((iii), plaint) which could not be reimbursed after termination, all other claims were consequent upon termination.

In reexamination the plaintiff repeated that he sued the 2nd defendant on account of malice. He assigned no reason in the letter of termination which he signed or no reason was given for the compulsory leave. There were medical bills which accrued before termination. They were not reimbursed and he had leave balance of 25 days in 2006. Both were not paid for. The plaintiff was not given an opportunity to be heard on his firing. He owned up to the loan aspect in the statement of account and disputed the rest. And that the loan of 9.1.06 was given to him without interest – a salary advance of sh. 337,010. The 1st defendant should not claim interest. At this point Mr. Thuku for the defendants interjected that they were claiming in regard to recovery of loans – not salary advances with interest and the plaintiff stressed that only loans attracted interest – not salary advances. He had therefore questioned that bit only. That closed the plaintiff's case.

Lydia Thithi Ng'ang'a, the Trust Secretary of the 1st defendant (DW1), an advocate of the High Court of 15 years has been employed for 2 years. Her duties included coordinating the business of the Trust, meetings, documentation and board meetings and execution of board decisions. DW1 also gave legal advice to the Trust (Exh D1-2 to 11).   She was familiar with the present case. She produced bundles of documents (Exh D1, 2) to refer to. The 2nd defendant was the chairman of the 1st defendant since 2005. The plaintiff was an employee of the 1st defendant w.ef 10.2.97. His letter of appointment Exh (P1-1 to 3) was signed by a Mr. Murage, the then chairman. The consolidated salary given to the plaintiff was sh. 81,000/= per month. He was also entitled to annual leave, to be applied for 3 weeks before start and to be granted at the discretion of the chairman. The letter of employment referred to Termination/Resignation. While resignation was for the employee, termination was the option of the employer with each side giving 30 days notice or a month salary in lieu of such notice. Retirement was at age 55. The plaintiff accepted all the terms on appointment, by duly signing. He was the financial controller in matters of the budget, income, expenditure and overall in approving payments.

The trust is operated by a board which constitutes itself in committees exercising delegated powers: in finance, development, academic affairs etc. The trust's mandate is to establish and operate an institute to train for the insurance industry. So it set up the College of Insurance on that account. The college is run by a board of trustees. The duties to run the college include hiring staff. The chairman of the board of trustees is its sole executive and he signs letters on its behalf. He sees to the implementation of board's decisions. So acts done on behalf of the Trust shall not have attachment to individual/or be personal to the trustees. The plaintiff's employment ended on 31.8.06 (Exh. D1-6), by a letter of termination. He was given salary for 30 days in lieu of notice. This was not a question of leaving employment on redundancy, because even after that the post he held remained and somebody later filled it. That was clarified by a letter of 2.11.06 (Exh. D1 – 10), to his lawyers M/s Kimondo & Co. Advocates. The letter of termination was signed by the 2nd defendant as chairman and one charged with executing the board's decisions. The letter of termination was copied to related persons and office bearer of the Trust (Exh P1 – 79). All trustees were involved in the decision to terminate and it was proper to do so. The 2nd defendant did not act beyond his powers with the Trust. The board had sanctioned the termination which was lawful and as per the terms of the contract. So there was no malice on the part of the 2nd defendant when he signed the letter of termination. It was in order for the 2nd defendant to sign the letter of 14.7.06 (Exh P1 – 80), sending the plaintiff on compulsory leave because the letter of appointment mandated that the chairman had the discretion to grant annual leave. The letter of termination (Exh D1 – 6) took into account any outstanding advances/loans owed by the plaintiff. After computation, the terminal benefits were applied to the liabilities owed. That left a balance due. As a member of the Pension Scheme with ICEA the plaintiff got his pension contribution (Exh D1 – 17) sh. 963,094/=. He signed for the cheque. Then the witness went over the loans and advances the plaintiff

asked for and got with interest e.g. on 30.7.04 – sh. 350,000/= salary advance to be repaid over 12 months at 10% interest. It was disbursed. (Exh. D2 – 1, 2). Then he asked for a loan of sh. 450,000/= (Exh D2 – 3) to be consolidated with the loan of sh. 350,000/=. It too was disbursed (Exh. D2 – 5). The total loan came to sh. 800,000/= repayable over 3 years at 10% interest. On 15/8/05 the plaintiff asked for sh. 492,411/90 (Exh D2 – 6). So as at 1.9.05 he owed a total of sh. 1,021,426/60. With the latest loan a grand total came to sh. 1,513,835/= - all consolidated. They were repayable over 3 years at 10% interest and at sh. 48,848/= per month.

All these loans were approved on 26.8.04 (Exh D2 – 3).

A further sh. 492,411/90 was approved and paid on 1.9.05 (Exh D2 – 8) to Cooperative Insurance Co. Ltd where the plaintiff had a housing loan.

On 9.1.06 the plaintiff asked for and was given a salary advance sh. 337,010/= (Exh D2- 9) paid by cheque no 0638804. He got an advance of sh. 75,000/= on 26.1.06 (Exh D2 – 11) to be recovered over 12 months. He took it by voucher (Exh. D2 – 12). On 5/4/06 the plaintiff asked for sh. 112,500/= (Exh D2 – 13). It was approved and paid (Exh. D2 – 14). All these sums were not fully repaid as at the time of termination and a statement of account (Exh D1 – 5) on loans, reflected all that (1) – sh. 1058,563/98 as at 1.9.06 as follows:

(2) (a) Mobile phone – balance – sh. 7,814/62

(b) Study Advance of balance sh. 279,117/06 sh. 337,010/=

(c) Salary Advance of sh – 38 433/20 75,000/=

(d) Salary Advance sh. 112,500/= - sh. 72 753/20

(3) TOTAL SH. 1,456,681/28

As for the car loan, the plaintiff had serviced that himself and so the defendants do not claim it. It was not recovered from the plaintiff. So he owes sh. 1,456,681/28.

DW1 told the court that in fact at time of the termination of the services of the plaintiff, leave days due to him were 33 – not 25. And they were all paid for along with the salary in lieu of notice. (Exh D2 – 15) – for salary sh. 241,977/= and for leave sh. 259,498/=. On 6.6.10 the plaintiff was informed (Exh D 1-7). Dues were applied to the outstanding liabilities. The balance of liabilities was given to the plaintiff to settle on 2.11.06 (Exh. D1 – 8). So as at the time of trial the defendants were demanding sh. 1,916,389/28 from the plaintiff. But after deducting the car loan, salary in lieu of notice and leave payment, the net stands at sh. 1,414,498/35, plus interest at 10%.

Reacting to the claim for medical claims, the court heard that such became due for a refund where the staff spent upfront and then availed receipts. The plaintiff did not forward the medical bills (Exh P1 – 92 to 100) for refund before termination. All sh. 14 088/= is not payable now.

Sh. 27.9 m – in salaries that should have been earned to retirement cannot be paid. The plaintiff was not

in employment. Pension over the same period can similarly not be paid. There was nothing for what was called handing-over hours either. The plaintiff left office immediately. All the information the plaintiff desired was sent to him (Exh D1 – 7, 8). And as the financial manager he was aware of his liabilities.

In cross examination, the court heard that the witness based her evidence on the records. As for the board's minutes they were in the book not produced in court.

Granting leave was in the discretion of the chairman who could as well term it compulsory. The plaintiff accumulated leave days before his services were terminated. He was on compulsory leave as his case was up for review – either for termination or continuing in employment. DW1 was not sure whether the plaintiff was involved in that review. As at 31.8.01 (Exh P1 – 79) the college was undergoing some restructuring. There were changes in the board. A consultant had been hired to advise on this. The plaintiff's position was not affected on that account and somebody else took it up.

Interest rates applied earlier were applied to subsequent loans without necessarily noting on the approvals.

Salary advance of 30/7/04 (Exh D2 – 1) was approved at 10% so was the staff loan of 25/8/04 (Exh D 2-3) all down the line (Exh D2 – 6, 7). Those in Exh. D2 – 9, 11 did not mention interest. But that such an omission could be garnered from the computation sheets. The termination letter was followed with a demand to repay the loans and a statement of account was rendered (Exh D1 – 5, 6, 8) setting out terminal dues against what was owed. Medical bills paid were reimbursed on presentation. Without presentation such bills were not paid.

During DW1's employment with the 1st defendant she perused the records and discussed such matters as this with the employer. The plaintiff's termination of services was not because of restructuring but based entirely on the letter of appointment.

It was clarified that the accounts section prepared the computation charging where interest was involved and leaving it where it was not chargeable. The result was given to the plaintiff, the 1st defendant's financial manager, who knew all the material involved. And with that the trial closed. Both submitted initially and also added supplements.

The plaintiff's side went over the pleadings, the evidence and took particular interest in the letter of appointment ***vis a vis*** the letter of termination. It was stressed that there was no provision for **compulsory leave** on which the plaintiff was first sent before termination. He was told that his case was being reviewed yet that did not take place. He was then fired for the reason that the College of Insurance was undergoing major restructuring – not a term in the letter of appointment. The plaintiff was entitled to remain in employment until his 55th birthday. That ***was a guaranteed*** as opposed to **fixed term** contract. So he was entitled to benefits – salary & allowances up to that age. His termination was unprocedural and therefore wrongful. The 1st defendant had no right to terminate the employment – only the plaintiff had.

Even as no particulars of malice were pleaded, the court was urged to find that the plaintiff's employment was prompted by such. That this was borne out by the tenor of the letter of termination and the statement of account regarding the alleged plaintiff's indebtedness e.g. where no interest was imposed, the liabilities claimed carried it. The plaintiff was fired without being heard first. And that the 2nd defendant did not testify here.

Coming to the counter-claim, it was the plaintiff's view that no evidence was led to prove it. And that on his own the plaintiff:

"……… was candid and admitted owing sh. 1,456,681/28……,"

and that had he been provided with clarification or a correct break – down he could have moved to pay that sum. The plaintiff sought this court's decision on this sum to have the same offset against the award it would be minded to grant the plaintiff. He should get his special damages plus general damages for wrongful dismissal, costs and interest. Several cases were cited.

Similarly the defendants on their part reviewed the pleadings and the evidence in this case. On the issue of whether the employment was permanent and only ending at the plaintiffs 55th birthday, the court was urged to find that that was not so because the letter of appointment provided for Resignation or Termination of employment. That provision could not permit the plaintiff to bring the contract to an end as well as making his employment permanent – up to 55 years of age. Staying in employment up to that age could not be guaranteed because one could as well die earlier. The contract could only end at age 55 barring other natural consequences. Accordingly, either party had the right to end the contract before the plaintiff attained his 55th birthday. And under the Employment Act no. 11 of 2007 section 35 (1) the 1st defendant had the statutory right to terminate the plaintiff's services. As the plaintiff could, so could the 1st defendant terminate services by giving a month's notice in writing (or pay salary in lieu.)

That was a reciprocal right which had to be implied (**see Central Bank of Kenya** Vs **Nkabu [2002]** 1 EA 34).

The 1st defendant exercised its right when it paid a month salary in lieu of notice. So the termination was lawful. It opted not to give a month's notice.

The board of the 1st defendant had the power and the mandate to terminate the plaintiff's services. It did so and copied the letter to its committee heads and other office bearers. There was no complaint about the termination. Because either party could terminate the contract herein on giving notice of one month or paying one month's salary in lieu of notice, application of rules of natural justice did not come into play unless they were specifically provided for in the contract (see ***Koech*** Vs ***African Highland*** & ***Produce Co. Ltd*** & ***An***r ***[2006]*** 2 EA 148.

The court heard that the termination was not due to restructuring but the contract was the basis of firing the plaintiff. Even after he left, the vacancy remained. The action was not taken due to retrenchment or redundancy. There was no malice or bad faith involved.

On special damages of sh. 33,273, 721/=, this did not lie. No wrong was done against the plaintiff and he had no proof of how that class of damages was incurred. It was speculative in the sense that the plaintiff pleaded that he would have earned that sum unless his employment was alleged wrongfully ended. As for general damages, those cannot be awarded in the event of breach of contract of employment.

In the supplementary submission of the plaintiff, he insisted that the clause of termination/resignation in the letter of appointment by giving notice did not avail the defendants – only he had it.

As to the reference to the Employment Act no. 11 of 2007 by the defendants especially section 35 the

court was urged to note that this suit was filed before that law. The **Central Bank** and the **Koech Cases** were said to be distinguishable. The plaintiff insisted that his contract was for a fixed term – ending on his 55th birthday. And that malice was inferred from the defendants' conduct. It should be compensated with general damages.

The court was told that the plaintiff pleaded special damages. He produced oral and documentary evidence e.g. medical bills etc to prove the claim. And all the defendants' cases cited were deemed inapplicable here. That the defendants' submissions were meant to confuse the court and muddle up issues. And with that an additional case of ***Gad David Ojinodo*** Vs ***Prof. Nimrod Bwibo*** & **20 Ors** KSM CA. 336/05 (C.A.) was cited to support the plaintiff's case. However that did not silence the defendants.

In their reply to the plaintiff's submission it was denied that the plaintiff had a fixed term contract. Such specified the time within which the contract would run or a certain task to be performed and a further case of ***Kenya Revenue Authority*** Vs ***Menginya Salim Murgani*** NRI C.A. 108/09 (C.A.) was cited. Then the defendants proceeded to distinguish the plaintiff's authorities. With all the foregoing, the court rose to consider its decision.

Guided by the 8 agreed issues, the court's decision on the said issues, individually or combined, takes this path.

ISSUE 1 – Whether the plaintiff's employment was permanent and fixed until the retirement age:

The plaintiff was employed with the 1st defendant on the terms spelt out in the letter of appointment dated 30.1.97. He would work unless he died or was dismissed, until his 55th birthday. But during the period of employment, there was a clause for resigning from or terminating the employment. Such employment cannot be seen to mean that the plaintiff could have remained with the 1st defendant despite any other circumstance, until age 55. It was not a contract of fixed term e.g. during specified period or on accomplishing a given task.

ISSUE 2 - Whether termination of Employment was procedural or otherwise:

The plaintiff's employment was ended by what was termed as a termination. The letter was so headed and dated 3.8.06. This was repeated to the plaintiff's lawyers M/s Kimondo & Co. Advocate on 2.11.06.

One of the terms of employment was Resignation or Termination of Employment. It was in error for the plaintiff to claim that that was for him alone and not available to be invoked, if need be, by the 1st defendant. That would run contrary to principles applicable in the labour industry. Labour is sold and accepted as a commodity. Both sides should refuse to give it (resignation) or decline to use it (termination). A contract has two or more parties and generally none should derive more benefits from it than the other.

In the present case this court is minded to hold, and abundance of authorities bear it out, that both employer and employee enjoy the facility to end employment. It would be the plaintiff wishing to resign from or terminate his services with the 1st defendant by giving a 30 – day notice or pay one month salary in lieu. Vice versa for the 1st who could not resign but could only terminate the plaintiff's employment. It did so and paid one month's salary in lieu. That was proper and in order.

It did that by its board taking the decision as it was entitled to do. It had the mandate to do that. This was not the act of the 2nd defendant, whom the court was told was not only the board's chairman but he was also its executive officer. Not only is it a principle in the labour relations to use this facility to terminate services but it also resides in labour law statutes, whether before this suit was brought or later.

ISSUE 3 - Whether the termination was because of "the major restructuring|" of the 1st defendant. The proper basis laid out in the letter of termination should be:

“……….. it has been found necessary to dispense with your services.”

True, restructuring was going on in the Trust and the College of Insurance but the court heard that the restructuring as at the time of the termination was in the board where the plaintiff was not a member. And that his own job was not affected. It remained and even after the plaintiff left, somebody else filled it. He claimed that his leaving amounted to a redundancy or in other terms a retrenchment. That was not the case, if the job he held remained even to date. The plaintiff’s services were terminated as per the contract of employment.

ISSUE 4: Whether the termination was out of malice or intended to get rid of the plaintiff:

First, as alluded to earlier, particulars of malice were not set out in the plaint as per the Civil Procedure Rules. They were not brought out in evidence either. The plaintiff simply believed that his leaving was underlain with malice and he seemed to attribute it to the 2nd defendant. Or that he was sent on compulsory leave, a thing that did not exist etc. It was added in the submission that malice could be imputed from the conduct of the defendants. But there was no demonstration of this e.g. by way of bad blood running between the litigants before this incident. Instead the plaintiff testified that he was recognized and commended for his good service in the past. This claim could not hold.

ISSUE 5: If the termination was unlawful and contrary to the principles of natural justice: The court has earlier found that the termination herein was in accordance with the letter of appointment. There was no malice involved. The act was not unilateral or ***ultra vires***. The board exercised its mandate. And this court subscribes to the decision in the ***Koech*** case that where a contract of employment provides that either party may terminate the same, or that can be implied to be, by giving the other notice or salary in lieu thereof, none of the parties is obliged to assign any reason for terminating the contract so long as he gave the requisite notice or paid the salary in lieu of notice. Besides, it is sound to adopt the position that unless there existed specific provisions for the application of rules of natural justice in a contract of employment, those rules are irrelevant in a case of termination of services and any alleged breach of the rules could not found a cause of action.

ISSUE 6: Whether the defendants powers/prerogatives amounted to bias against the plaintiff: This court does not think so (see Issues 4, 5 above).

ISSUE 7: Full compensation for the remaining period: The plaintiff is not entitled to this. His services were properly terminated. He was paid one month’s salary as provided. In cases of termination of services, general damages do not lie even if the plaintiff claims that he was embarrassed and he suffered mental anguish. These do not form a basis to consider damages. Damages are only based on the terms agreed upon and here it is in money terms. If the notice to terminate was not given, the court has to look at the contract of employment. In absence of this the court can look at the general statutory provisions or the practice in place eg. plucking a number of months from the air and computing the monetary loss using the regular pay as the basis. The plaintiff was paid his 30 days pay. He was not in employment by guarantee until he attained the age of 55. So he cannot justifiably claim pay and pension contribution from the employer for what he called the “remaining time”. He did not deserve it. The plaintiff was not inclined to claim under this heading in any way.

And while still at it, it is not disputed that he was paid for days of leave due to him. The employer paid him for 33 days even as he claimed for 25 days only.

He did not present his paid medical bills, while he was still in employment, now that he held onto them until he was out of it. Perhaps, if the employer chooses to indulge him. It is not an entitlement any more.

Before moving to ISSUE 8 - Costs of the suit, the court should address other claims put up by the plaintiff. The pension scheme operators paid him his contribution and the employer paid its bit when he attained the age of 50 years. It was not demonstrated what was meant by the medical insurance cover and so not much need be said about it. And it was not proved by evidence that the plaintiff put in Excess

Handing – Over Hours. His letter stated that his services had been dispensed with immediate effect. So in sum the plaintiff's suit is dismissed totally.

Turning to the counterclaim, the court is satisfied that after the plaintiff's dues were applied to his liabilities, he was left with a balance to pay. This had been made up of advances, loans, etc which he applied for and got. He was the overall finance manager with the defendant and so this court could not believe him when he claimed that the was not given this or that statement, break-down or even told of the process and format of computing what he owed with or without interest. Then what was he doing there all along? The plaintiff here sounded less than credible. Either he had the information/material or his employer made it available to him. And DW1 told the court that in the working out of the dues and liabilities of the plaintiff, in the accounts section which he headed or fell under his portfolio, interest was calculated on the loans/advances where it was applicable and excluded where it was not as the case warranted. Then he admitted that he owed sh. 1,456,681/28 at the end of the whole thing. This sounded candid, no doubt.

ISSUE 8 Costs: At the end of the day, the suit is dismissed with costs. And the counter-claim succeeds with costs and interest.

Judgement delivered on 4.7.11.

J. W. MWERA

JUDGE