REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 165 of 2007

NAVINCHANDRA BHARMAL SHAH.....PLAINTIFF

VERSUS

MUKESH MANVBHAI PATEL
VIJAY PARSOORAM PATEL
PRAFULCHANDRA CHANDUBHAI PATEL
Sued as Trustees of
PREMIER ACADEMY CHARITABLE TRUST.....DEFENDANTS

JUDGMENT

The plaintiff moved to this court, vide a plaint dated 19th day of February 2007, and filed the same date. It was subsequently amended on the 19th day of May 2008 and filed on the 28th day of May 2008. The salient features of the same are as follows:-

- There is in place a trust deed dated 27th February 1989 and amended on 27th February 2002, between premier club and the 1st, 2nd and 3rd defendants by virtue of which a charitable trust known as "premier Academy" whereby the plaintiff was appointed as the chief operations officer of the Academy.
- The said contract contained terms and conditions binding both sides.
- The contract period as provided for in the said document is for a period of "two years" renewable at the lapse of each contract, subject to satisfaction of both parties.
- The plaintiff herein reported to work on 4th June 2006 in accordance with the terms of the contract.
- The said engagement was brought to an end abruptly by the defendants wrongful action whereby on 14th September 2006, they served onto the plaintiff a letter purporting wrongfully and in breach of the terms of the said contract to terminate the said employment with the defendant under the said contract with effect from 1st October 2006.
- Prior to taking up of the said employment with the defendants, the plaintiff was in the employment of Arya Samaji Education board since April 2002, which employment he left to join the defendant's employment for better prospects.
- As at the time he came to court, the plaintiff had made attempts to secure employment even at a lower salary but had not secured one.

- It is the plaintiffs assertion that, as a result of the afore mentioned defendants' wrongful action, the plaintiff has suffered loss and damages which he claims from the defendant which loss and damages is particularized in the same paragraph 7 of the plaint.
- It is further their assertion, that by reason of the defendants above complained of action, the plaintiff suffered mental anguish and social ridicule which affected his reputation, peace of mind, and general well being for which the plaintiff claims general damages.
- Notice of intention was duly given but the defendants declined to make amends hence these proceedings in respect of which the reliefs sought out in paragraph 11 of the amended plaint are prayed for.

The defendant responded to the said claim vide a defence dated 17th April 2007, and filed on 18th April 2007, which was not amended to correspond to the amended plaint. The salient features of the same are as follows:

-Concede that a contract was made between the plaintiff and the defendants, where by the defendants appointed the plaintiff as the chief operating officer.

-Dispute that, the contract was to last the entire 2 two years.

- Provision exists for the termination of the contract by failing to renew the contract.
- Provision exists for either party to terminate the contract by giving 3 months notice of intention to terminate the contract of employment.
- By reason of what has been stated above, the defendant contends that they were entitled to bring the contract to an end in the manner done.
- By reason of what has been stated above, the defendant deny that the defendants termination of the plaintiffs employment was wrongful or in breach of the said contract, the same having been terminated in accordance with the terms therein, namely by paying the plaintiff three months salary in lieu of notice.
- Contend that by reason of what has been stated above the defendant is not responsible for the plaintiff's inability to secure employment since his dismissal.
- According to them, what the plaintiff is entitled to is what they offered him and not what he is claiming.

There is a reply to defence dated 30th day of April 2007 and filed the same date. Of importance is a stressing by the plaintiff that the contract was to run for the full length of 2 years, that he is entitled to recover damages, loss and damage, denied the contents of paragraph 2, 4, 6,7 and 8 of the defence and reiterated the content of paragraph 6, 7, 8 and 9 of the plaint.

It is on record that the plaint was subsequently amended limited to the amount of quantified claimed.

On adduction of evidence the plaintiff tendered two witnesses, while the defence tendered one. The sum total of the same in a summary form since most of the factual aspect of it has a common agreement is as follows:

- The plaintiff was in gainful employment as at the time he was approached to shift camp to the defendant's institution. He was in the employment of Arya Samaji Educational board.
- It is common ground that PW 2 Jasumali Mahindra Patel was secretary to the defendant institution BOT. She was allegedly mandated to head hunt for a C.O.O (Chief Operation Officer). She knew PW1 who had been her head teacher at Jain Primary School. She knew him as a sincere, hard working, dedicated and principled man who fitted the caliber of the C.O.O, they were looking for Armed with the mandate of BOT, she PW2 approached the plaintiff and inquired from him if he would be interested in joining their establishment. PW2 introduced PW1 to BOT members and after due deliberations PW1 and a contract concluded

being made. agreed to join the defendant institution and the institution agreed to hire the services of PW1.

- Upon the afore said agreement, PW1 agreed to become the C.O.O of the defendant. He had been informed that he would be in charge of secondary, primary, Kinder garten and administration.
- Upon acceptance of employment by the defendant's institution, he asked for two months within which to seek release from the previous employer which was allowed.
- It is PW1s' evidence as supported by PW2 that indeed he reported to the defendants' institution for deployment on 1/6/2006 but since it was a holiday followed by a week end, the next working day was 4/6/2006. and he did report on this day.
- It is PW1s evidence that after reporting for duty, he was introduced to the BOT, some teachers or administration, held a meeting with trustees. As soon as he commenced duties, the trustees gave him three assignments namely to prepare a documentation on the following.

(a) Possibility of starting evening computer and business studies.

(b) GCE

(c) Advanced college of GCE."

PW1 was to finish the report within three months as shown by the content of exhibit 2. He completed the exercise before the requisite three months lapsed as shown by exhibit 2. The documentation was to cover 1B programme as well.

- It is PW1's evidence that upon submission of the said report, the secretary to the board of trustees was required to convene a meeting to have the report discussed but the said secretary who turned out to be DW 1 never called such a meeting.
- It is PW1s testimony that he continued with performance of his duties and was due to be introduced to the secondary section, when on 14/09/2006 he received a letter under the head of secretary of the Board of Trustees terminating his employment.
- It is PW1s evidence as confirmed by PW2 that the Board of Trustees acted on its own without consultation of the BOT. PW2 has knowledge that the BOT tried to raise the issue with the Board of Trustees in a meeting but it never materialized.
- Upon failing to secure the intervention of the BOT, PW1 had no alternative but to quit the defendant's employment.
- Efforts were made by him to secure another employment which yielded no fruits till 19/2/2007 as shown by content of exhibits 8, 9, 10, 11, 12, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.
- He secured employment with the Asian Foundation on 19/2/2007 and started work on 1/3/2007 at a salary of 80,000.00 down from 200,000.00.
- The plaintiff became aggrieved at the mistreatment received because he suffered loss enumerated in the amended plaint. He also suffered emotionally because he was highly respected, had good command of respect from the social welfare bodies that he had worked with. He was held in high esteem, highly respected in his own community and other communities. Went through psychological trauma as he had a difficult time explaining to people what had happened. He also under went personal tomentation and a state of anxiety as a result of the defendants tarnishing his name.
- He felt generally aggrieved and issued a demand notice before filing the suit.

When cross examined, PW1 reiterated the content of the plaint and evidence in chief and then stressed the following points:-

- Concedes it is the trustees who addressed the deployment letter to him.
- Exhibit I is the only contract signed by him.
- Concedes from the content of the Trust deed, the Board of Trustees exercised supervisory role over the BOT But only came to see the deed after termination.

- Concedes the contract contained a termination clause whereby either side could bring the contract to an end by paying the other 3 months salary in lieu of notice or give three months notice.
- Concedes although the BOT was shocked, it did not manage to reverse the termination.
- Agrees that the contract was to last for only two years and renewal was subject to satisfactory performance. But to him the contract was to last for 2 years.

When cross examined, PW2 confirmed that the BOT did not write the letter of employment or termination. But the understanding was that the contract would last the full length of two years. PW2 has knowledge that the old trustees, hired the plaintiff, but the new trustees terminated his employment. Confirmed that the BOT was disappointed with the trustees action of terminating the plaintiffs employed but did not succeed in discussing the issue with the Board of Trustees as they avoided the meeting with the BOT.

The sum total of the defences evidence through DW1 is that they had no problem with the BOT employing PW1 in the manner it did, nor with the terms. But maintains that the BOT creation of the post of C.O.O which was non existent then was subject to approval by the board of trustees. Though the said letter of offer was adopted by the Board of Trustees, but was subject to confirmation by the Board of Trustees, and the plaintiff was dully informed of this arrangement on several occasions. They trustees did no wrong as all that they did was to exercise their right of termination under clause 2, and 7 of the letter of offer and no wrong was committed by then. Him DW1 only acted on instructions of the Board of Trustees. Does not agree that the offer of employment was to last the full 2 years. Concedes he had no previous experience as a trustee before. Concedes that the BOT had no knowledge of the writing of the termination letter as the were not consulted.

At the close of the evidence, parties filed written submissions. The plaintiffs counsel stressed the following:

- Plaintiff had previously been employed by Arya Samaj Education board before he was head hunted by the defendant institution through PW2 on behalf of the BOT.
- Both the BOT and BOT approved the recruitment in meetings held both separately and jointly.
- The letter of offer stipulated a minimum period of two years on the basis of which notice to terminate the plaintiff's previous employment was given and accepted and he accepted and took up the new appointment on 5/6/2006.
- PW1 was given 3 assignments which he completed even before the requisite period. That each party filed own issues but according to the plaintiffs counsel the following are the common issues:

(i) Whether this was a contract of employment for a fixed term of a minimum of two years or could it be terminated by either party by giving the other a three month notice of its intentions to do so.

(ii) Whether the purported letter of termination dated 14th September 2006 was a valid letter of termination of the plaintiffs service in compliance with the terms of the plaintiffs contract with the Academy.

In moving to assist the court in its resolution of the dispute, the court was urged to take note of the following:

(a) The evidence on record demonstrates that BOT literally decided to terminate the services of the plaintiff without consultation with the BOT which appears to demonstrate that there could have been a tussle between the BOT and BOT.

(b) DW1 allegedly stated that there was no post of C.O.O before the same was created by the BOT. The same was supposed to be sanctioned by the BOT.

(c) DW1 agreed that the letter of recruitment was done by the BOT. BOT saw it, approved the content and then allowed it

to be dispatched to PW1. The BOT thus approved the appointment.

(d) DW1 continued that there was nothing wrong with BOT appointing PW1 in the manner it did and the BOT were comfortable with the appointment.

(e) By BOT admitting through DW1, that they had written to the plaintiff that they wanted to deal with him directly, which is proof that they knew the content of the letter of offer before the same was handed over to the plaintiff.

(f) DW1 purports to have acted under clause 7 when he issued the letter of termination.

(g) No reasons for termination were given either in the letter or through the testimony of DW1.

(h) Proper construction of clause 7 is to the effect that the contract was to run for at least 2 years and issue of 3 months notice could only come at the end of the 2 years period. This construction is confirmed by the content of clause 2 which reads:-

" *for a minimum period of 2 years which does not tie up with the issue of giving three months notice."*

(i) It is their contention that three months notice could only apply where there is breach of contract during the subsistence of the 2 year period.

(j) By the use of the word *"each"* denotes a separate contract at the end of each 2 year contract.

(k) The court, is urged to hold that the issue of the termination clause was only raised by the defence to cover up their breach of the contract more so when DW1 concedes that a termination of the contract was to be effected by a failure to renew after the said two years.

(l) Contend that by reason of what has been stated above, the two years stipulation was in effect a fixed term, stipulation and condition of the contract, further demonstrated by the use of the words "*notice of intention"* to terminate. This interpretation or construction of the clause is the proper one because the fixed terms would have no meaning if the parties were terminated at any time and for whatever reason even where there was no breach of contract by giving 3 months notice.

(m) The defence cannot hide under the trust deed because the same trust deed, will draw a distinction between the management of the trust, fund on the one hand and the management of premier Academy entrusted to the BOT and afortori, that was the right arm to deal with termination and dismissal of employees of premier Academy. Right to conduct affairs of the Academy only where the BOT conducts its affairs and activities in a manner inconsistent with the rules and regulations.

(n) They content that since BOT was entrusted with the running of the Academy, it is the BOT which had the mandate to terminate employees and as such the BOT's action was unlawful.

(o) The court, is invited to hold that termination does not hold because the same was not sanctioned by the BOT, rules of natural justice were breached as the plaintiff was not heard on the matter before his services were terminated.

(p) The court is invited to hold that the termination of the plaintiffs employment was unfair and unlawful because:

- The plaintiff was enticed by a senior position of the defendant to leave his employment, he was only employed for 12 weeks of the 2 years he had been contracted, the plaintiff could not have contemplated taking up a job where he knew he could be dismissed only after three months, there is no dispute that the plaintiff had performed his duties diligently and honestly, the plaintiff was a man of advanced years and only reasonable persons would have appreciated that would be difficult for him to find alternative employment.

On damages, the plaintiffs counsel submitted thus:

- The position in law is that contracts for a fixed term have to run the full length, irrespective of the presence of the termination clause, save for gross breach of the contract by the parties. Where such is the position, termination by resort to the termination clause amounts to a wrongful dismissal, in such a situation the amount of damages to be awarded should be such as to compensate the party and restore him to a position which would have existed had the termination not occurred, that is the value of the notice if the contract was terminable by notice and amount earned up to the end of the term, if the contract had been for a fixed term.
- The court is also invited to factor in lost on salary increment (increases).
- In addition to loss of salary, the court should also factor in loss of other benefits.

The defence on the other hand urged the court to take note of the following when assessing the evidence:-

(1) The post of C.O.O to which the plaintiff had been merely created by the BOT, and although it was supposed to be cleared by the BOT no clearance was given, but despite the said non clearance the court, is invited to go by the evidence of DW1 that the BOT was comfortable with the creation of the new post.

(2) The said post of C.O.O was offered to the plaintiff on the basis of certain terms normally:

(a) The contract would be for a minimum period of 2 years.

(b) Renewal of the same at the end of each contract year would be subject to satisfaction of both sides.

(c) The notice period for purposes of termination by either of the parties is three months.

(3) When clause 2 and 7 are read and construed together, they do not carry the implication that the life of the contract could not come to an end before the expiry of 2 years. Neither does it presuppose that the contract could not be terminated before the expiry of the 2 years.

(4) The court, is invited to note that the plaintiff argued that he had read through the contract and signed it of his own volition without any coercion or undue pressure, exerted on him. Having read, understood and consented to the content of the contract, cannot be heard to say that the termination clause was not to have any effect.

(5) Assert that to them the correct position is that the contract was for two years but the same could be terminated by either party giving the other three months notice.

(6) The proper construction of the contract documents leaves no doubt that the plaintiff was to work directly under the BOT and the plaintiff never expressed unwillingness to work under the BOT.

(7) Proper construction of the Trust deed reveals that the BOT is superior to the BOT because BOT works under its directions or as demonstrated by the content of clause 4, which means that the BOT does not need to consult the BOT in the execution of its mandate under the BOT. It is the BOT which need to consult the BOT in the execution of its mandate. This being the case, the BOT did not need to consult the BOT on the issue of the termination of the plaintiffs contract.

(8) The court, is invited to take note of the content of exhibit 47 whose content reveals that upon termination, the plaintiffs entitlement in terms of terminal benefits were worked out and he was to pick up the same but he declined the offer.

The plaintiffs counsel put in a reply to the defence submissions and then stressed the following points.

- Defence submission demonstrate that the plaintiff was properly appointed to the post of the C.O.O by the BOT.
- Proper construction of the contract document reveals that the contract document reveals that the contract was to run for at least two years.
- As regard the working relationship between the BOT and BOT the plaintiff was not to concern himself with the internal workings of the two.

On case law, the plaintiffs counsel referred the court to the case of BONIFACE M.KABAKA VERSUS M.O MUGASIA AND KENYA RAILWAYS NAIROBI HCC 625 OF 1997 decided by Osiemo J on the 28th day of March 2006. The summary of the facts is that *"the plaintiff was dismissed for being absent from duty for 7 days without permission".* At page 5 of the judgment the 5th paragraph *"that the court had found that the plaintiff was wrongfully dismissed from his employment and that the defendants had argued that should the court, find that the plaintiff was wrongfully dismissed, then the court, should rule that all that the plaintiff was entitled to was one months salary in lieu of notice.*

At page 6 line 3 from the bottom, the learned judge made the following observations:- *" An employee dismissed in breach of contract of employment cannot chose to treat the contract as subsisting and sue for an account of profits which he would have earned to the end of the contractual period. He must sue for damages for the wrongful dismissal and must of course mitigate those damages so far as he reasonably can".*

At page 7 of the judgment the learned judge quoted with approval the case of DENMARK PRODUCTIONS LTD VERSUS BUSCO BEE PRODUCTIONS (1968) 3 AER 513 inter alia thus:-

" It is clear beyond argument that a wrongfully dismissed employee cannot sue for his salary or wages as such, but only for damages.---- such an employee cannot assert that he still retains his employment under the contract.---- If a servant is dismissed and excluded from his employment.--- the relationship of master and servant has been broken, albeit wrongfully by one side alone"--- I do not think it follows from the nature of the status of master and servant, or principal and agent that the contract of service or the contract of agency has been terminated by the wrongful act of the master or principal. What has been terminated is only the status or relationship. So in the result, the servant cannot sue indebt for his wages which he is wrongfully deprived of the opportunity to earn for his fringe benefits such as the house which he had right to occupy as part of his employment. As the relationship of master and servant is gone, the servant can not claim the reward for service no longer rendering."

The case of JAMES KOSKEI CHIRCHIR VERSUS CHAIRMAN BOARD OF GOVERNORS ELDORET POLYTECHNIC ELDORET HCCCA NO 32 OF 2003 decided by Gacheche and Dulu JJ on the 16th day of June 2005. At page 5 of the judgment line 4 from the bottom the learned judges had this to say:- *"having found the procedure to dismiss him was not proper, and in view of the above finding, he would be entitled to three months salary in liew of notice which is Kshs 30,615.00 and not to any other sums as he was not able to specially prove them. Likewise his claim for loss of further earnings was not proven on a balance of probability.*

The case of APOLLO RICHARD OLUOCH VERSUS KENYA NATIONAL LIBRARY SERVICES NAIROBI HCCC NO 1299/1990 decided by Mbito J as he then was on the 28th day of September 1996. At page 5 of the judgment line 7 from the top the learned judge as he then was had this to say:- *" In the instant case, it is observed that the plaintiff had spent all his life time in the employment of defendant. He was 52 years at the time his chosen carrier was abruptly brought to an end. At such an advanced age, it is not easy for one to get an alternative employment especially in specialized fields of librarianship at such a high level. Under the provision of S-15(1) (a) of*

Trade Disputes, the court there under can award compensation of up to 12 months salary. I am not aware of the maximum period which this court, can award in respect of reasonable notice. In the aforesaid case of CPC the court of appeal upheld 15 months although Muli J thought 12 months were more appropriate on my part and having regard to the circumstances under which the plaintiffs services were terminated, herein, including the aborted prosecution which would have further made it difficult for the plaintiff to mitigate his losses, by looking for alternative employment, an onward of 20 months salary would be reasonable.--- As for entertainment allowance, I find that if the plaintiff's employment had not been wrongfully determined, he would have received it until lawfully discharged. I therefore award to him the entertainment allowance as from the date of interdiction to the date of dismissal.—

As I have found that the plaintiff was wrongfully dismissed, he is entitled to the defendants contribution. Also award compensation for leave days earned, and leave days he would have earned if he had remained on employment for 20 months of reasonable notice".

The cases of BBC VERSUS LOANNOU (1975) QB71 AND DIXON VERSUS BBC (1979) 2 AER 112 whose gist of the holdings is that *"although a contract for a stated period was determinable by either party giving notice within that period, it was a contract for a fixed term".*

The case of ROSE MBULA OJWANG T/A FAIDA 2002 CATERERS VERSUS BARAKA APPAREL EPZ (K) LTD MILIMANI COMMERCIAL COURT HCC NO 682 OF 2003 decided by Mary Kasango J on the 9th day of December 2004. At page 2 line 3 from the bottom, the learned judge made the following observation: *" In a case such as this one, where a party successfully proves breach of contract, the courts' function is to place the innocent party as far as money can do it in as good a situation as if the contract had been performed. I am satisfied that the plaintiff is entitled to be compensated for the remainder period of the contract."*

The case of MUGHAI VERSUS LAKNER TECHS LTD (2002) 1 KLR 191 decided by Ringera J as he then was, where it was held inter alia that:-

(1) The plaintiffs employment with the defendant was on the basis of a letter of employment.

(ii) A written contract cannot be varied or superseded by an oral contract.

(2) The termination of the plaintiffs employment was unlawful as he was not given notice of termination or paid salary in lieu of such notice as required by the employment contract.

(3) The measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment is terminable by notice or from the period of dismissal up to the time the contract would have ended if the employment was on a fixed term basis.

(4) General damages for unlawful dismissal was not available and there was no scope for a consideration of the plaintiffs mental anguish or injury to feelings and pride in the assessment of such damages.-----

The defence on the other hand referred the court, to the case of HELLEN MAKENA VERSUS STANDARD CHARTERED BANK LTD NAIROBI MILIMANI COMMERCIAL COURT CIVIL CASE NUMBER 2897 OF 1997 decided by Onyango Otieno as he then was now JA on the 28th day of July 1999. At page 18 of the judgment line 7 from the bottom, the learned judge made the following observations:-

" Permanent employment or employment on permanent and pensionable terms does not connote irremovability.--- rights due to an employee like leave, medical benefits, housing and such like other rights are rights still in employment. The moment one cases to be an employee, apart from those rights which have already acrueved they remain in check and not claimable in law by a dismissed employee."

At page 19 the learned judge among others quoted with approval the case of RIFT VALLEY TEXTILES LIMITED VERSUS EDWARD ONYANGO ONGANDA CIVIL APPEAL NO 27 OF 1922 and then went on to state thus:-

" In both cases, the law spelt out is that: The contract of employment between the Appellant and the Respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely to pay the other party for the notice period. In our view, even though the Respondents dismissal was unlawful, he had been paid all that he was entitled to be paid under the terms of his contract, with the appellant".

The case of WANJOHI VERSUS MITCHELL COTT KENYA LTD (2002) 2KLR 462 decided by Waki J as he then was (now JA) where it was held inter alia that:-

"(2) The law on general damages for wrongful dismissal is well settled. Such damages 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. General damages are not receivable.

(3) The payments in lieu of notice made to the plaintiff should be based on the basic salary only and not the total sum of basic salary plus benefits as they are set out separately and are not part of the salary. Further more in this particular case the letter of offer clearly distinguished between the salary and allowance as one package and benefits as another package.

- The case of MUGHAI VERSUS LAKMER TECHS LTD (2002) 1 KLR 191 decided by Ringera J as he then was, whose content is already on record as the same was cited by the plaintiffs counsel as well.

In response to the case law relied upon by the defence, learned counsel for the plaintiff submitted that the case law relied upon by the defence is distinguishable from the facts of this case, because in the cited cases, there was no fixed term of employment stipulated in the contract of employment on the one hand, and on the other hand they contend that the termination of the plaintiffs contract was not in accordance with the terms of the contract.

- Maintain that the wrongful termination of the plaintiffs contract deprived the plaintiff of the right to earn the benefits accruing with the salary and he is entitled to compensation.

- The plaintiff abandoned the claim for mental anguish and ridicule and any case law touching on the same has no relevance to the plaintiffs case.

In addition to case law cited by both sides, the court would like to draw inspiration from own sourced case law relevant to the subject. There is the case of HABIB ZURUCH FINANCE (K) LTD VERSUS MUTHOGA AND ANOTHER (2002) EA 81, a court of appeal decision, in this jurisdiction, in which the law lords of the Court of Appeal held inter alia that *"general damages cannot be awarded for a breach of contract because damages arising from a breach of contract are usually quantifiable and are not at large".*

There is also a decision by a court of concurrent jurisdiction decided by Ojwang J on the 22nd day of September 2008, in the case of NENGINYA SALIM MURGANI VERSUS KENYA REVENUE AUTHORITY NAIROBI HCC NO 1139 OF 2002. The case law on the subject is reviewed at page 28 of the said judgment. The applicable guiding principles are set out at page 29 and these are:-

(i) That where termination of a contract of employment is shown to have been unlawful or wrongful, the remedy is to compensate the employee with payment in lieu of notice.

(ii) That where in the contract of employment, the notice period is not specified, the court, is to award the equivalent of payment for a reasonable period of time.

(iii) That compensation or award of damages should not be such that its effect would amount to ordering reinstatement of the employee in his former employment to the employers detriment.

(iv) That once the employer loses confidence in an employee, the employee should not be forced on the employer.

(v) That there is a distinction to be drawn in the law of employment between an office holder and a mere servant.

At page 37 line 4 from the bottom, the learned judge made the following observations. *"It is clear that the plaintiffs employment was terminated with scant regard for the binding rules of natural justice and it is clear that the defendant as it fell into that impropriety either knew or ought to have known that serious employment and career damage with consequential losses, would be occasioned to the plaintiff---"*

At page 38, the learned judge quoted with approval the case of GEOFFREY MUGUNA MBUNGUA VERSUS THE ATTORNEY GENERAL NAIROBI HCC NO 3472 OF 1994 thus:- *" It is a distortion of the quality of public service, when self interested individuals take over the process of service, Jettis on the law to the winds, and impose their subjective inclinations on the delivery process."*

Then at page 39 line 1 from the top still went on:- *" in the instant case, senior officers at the Kenya Revenue Authority did not do as the law required. They had no transparent cause which can be exposed to scrutiny, but they were intent on ridding the public establishment where they serve of the plaintiff they knew he would suffer damage and loss, they cared not. They disposed of him, he indeed suffered loss. So these officers in effect converted the public institution where they work into appointment at their own disposal. This is the classic case of misfeasance in the public office, and by it, they caused damage and loss to the plaintiff. The plaintiff is therefore entitled to damages."*

The case of **GAD DAVID OJUANDO VERSUS PRO. NIMROD BWIBO (CHAIRMAN MASENO UNIVERSITY COUNCILS**

(2) PROF F.N. ONYANGO (VICE CHANCELLOR MASENO UNIVERSITY.

(3) MASENO UNIVERSITY, KISUMU COURT OF APPEAL 336 OF 2005. decided by the Court of Appeal at Kisumu on the 24th day of December 2007.

At page 12 of the judgment line 13, from the bottom, the law lords of the Court of Appeal had this to say:-

"*Notice sent to members of staff of the university has led us to agree with the learned judge that the retirement of the appellant was in flagrant violation of his rights as an employee of the university and that in retiring him the university had acted recklessly and in wanton breach and disregard of the Act:* (At page 13 line 5 from the top):-

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

At page 16 line 6 from the bottom, the law lords went on to say:- *"Having on our own assessed the evidence on record, we are satisfied that the appellant was illegally ejected from office in utter disregard of the Act and before his due retirement age and in the process he was denied his benefits and consequently had thereby suffered damages.*

We accordingly dismiss the notice of cross appeal. In the result and for the foregoing reasons we allow this appeal. For avoidance of doubt we declare that the compulsory retirement age of the applicant is 5 years of age. Further the applicant shall be paid all arrears of

salary and all other benefits as specified under the Regulations and the Act and as shall be assessed and determined by the superior court----"

Each party filed own issues. For purposes of the record those filed by the plaintiffs are as follows:-

(1) Did the plaintiff and defendant enter into a contract dated 11th March 2006?

(2) Did the plaintiff report for work on 4th June 2006 in accordance with the terms of the contract?

(3) Did the defendant terminate the plaintiffs employment on 14th September 2006 wrongfully and in breach of the terms of the contract dated 11th March 2006.

(4) As a result of a wrongful termination of the contract did the plaintiff suffer damages as set out in paragraph 10 of the plaint?

(5) As a result of wrongful termination of the contract did the plaintiff suffer mental anguish and social ridicule which affected his social reputation, peace of mind and general well being?

(6) Was the defendant entitled to terminate the contract dated 11th March 2006 within the full term of two years or after the completion of the term?

(7) Is the plaintiff entitled to the costs of this suit?

These were condensed into two in their submissions namely:-

(1) Whether the contract subject of these proceedings is a fixed term contract?

(2) Whether the same was unlawfully terminated?

Where as those fielded by the defendants are as follows:

(1) Did the contract entered into between the plaintiff and the defendant and dated 11th March 2006 provide for a fixed minimum term of two years, or was the term subject to termination by either party giving three months notice?

(2) Was the termination of the contract by the defendant dated the 14th day of September, 2006 in accordance with the contract between the plaintiff and the defendant or was it in breach thereof?

(3) Is the plaintiff entitled to damages as claimed in paragraph 7 of the plaint and paragraph (e) of the prayers?

(4) Is the plaintiff additionally entitled to general damages as claimed in paragraph 8 of the plaint?

(5) Which party will be responsible for costs?

Due consideration has been made by this court of the rival set of issues presented by the parties, and the same considered in the light of the evidence adduced by both sides, as well as submissions, and the court tends to agree with the two issues summarized by the plaintiffs counsel, in their submissions as forming the central of the issues for determination herein. There are:-

(1) Whether the contract entered into herein between the plaintiff and the defendants is a fixed term contract and should be construed as such?

(2) Whether the said contract was unlawfully terminated. The court will proceed to add its own namely:-

(3) Whether the plaintiff has suffered any loss or damage to the extend claimed?

(4) Whether the plaintiff mitigated the said damages.

(5) What are the final orders herein?

(6) Which party is to bear costs of these proceedings?

Issue number 1 and 2 borrowed from the plaintiff's counsel is inter twined and as such, it is better to consider them concurrently. When these two issues are considered in the light of the evidence on the record, it is clear that there are certain facts which are not in dispute and these are:-

(1) The Plaintiffs held himself by P.W.2 with a view to having him fill up the newly created posts of the C.O.O. Chief Operating Officer at the premier academy. P.W.2 gave testimony that she had worked with the plaintiff elsewhere and had known him as a conscious, dedicated, upright and efficient administrator. A man of high intergrity and according to her he was the right person for the post. It is P.W.2 undisputed evidence that she had the blessing of the B.O.G. on this exercise. The negotiations that followed were between the plaintiff and the B.O.G. The acceptance was signed to the B.O.G. informally by the plaintiff through PW.2.

According to her he was the right person for the post. It is PW2s undisputed evidence that she had the blessing of the BOT in his exercise. The negotiations that followed were between the plaintiff and the BOT. The acceptance was signified to the BOT informally by the plaintiff through PW2.

(2). The informal discussion yielded a contract produced to court as exhibit 1. It is dated 11th day of March 2006 and addressed to the plaintiff and signed by two board members, namely, SaIlesh Patel AND Kivit.N. Patel. The plaintiff signified acceptance of the same by endorsing at the bottom.

(3) Upon signifying acceptance of the new offer, the plaintiff sought 2 months grace period to seek release from his former employer which was allowed. The plaintiff was eventually released from his former employment and accordingly reported to the defendants for deployment.

(4) It is on record that as at this point in time, the plaintiff had not been appraised of the entity he was to pledge his loyalty to. It is on record that all along he believed that his supervisor was the BOT, the party which had signed his letter of offer. He only came to learn of the BOTS (Board of Trustees supervisory role when he started receiving assignments from them. It is PW1s firm belief, that this was the position was fortified by the last sentence in the letter of offer which read:- *" You shall be reporting to the board of governors of the school and any instructions to you shall be from the Board of Governors."*

(5) The contract document produced as exhibit 1 had several clauses but those that have featured prominently in these proceedings are two, namely, clause 2 and clause 7. These read:- " **Clause 2: that the contract will be for a minimum period of 2 years renewal at the lapse of each contract subject to satisfaction of both parties. Clause 7: That a notice period shall be three months on either side to terminate the employment."**

(6) It is common ground that the termination letter was produced as exhibit 47. It is common ground that the same was not authored by the BOT but by one Vijay P.Patel secretary to the BOT. The content reads:-

" *September 14, 2006*

Mr. Navicahndra Bharmalshah.

P.O Box 1404

NAIROBI

Dear Sir.

RE: YOUR CONTRACT WITH PREMIER ACADEMY

We regret to inform you that at a recent Trustees meeting, it was unanimously decided that your contract with premier Academy be terminated with effect from 1st October 2006. You will however not need to attend effective immediately.

By a copy of this letter, the Administrator has been instructed to prepare your terminal Dues which will be forwarded to you in due course. This will of course include three months salary in lieu of notice and whatever is due up to 30th September 2006. Please ensure that you hand over all school property and files in your possession to the administrator on receipt of this letter.

Yours sincerely

Vijay P. Patel

C.C Chairman Board of Governors.

The administrator premier Academy."

(i) A reading of the content does not reveal that there was consultation between the BOG and the BOT regarding the said termination. Infact this was confirmed by the testimony of PW2 and DW1 both in their examination in chief and cross examination that there was no such consultation a fact which lead to the BOG trying to fix a meeting between the BOG and BOT to try and resolve the matter amicably in favour of the plaintiff. It is on record that the BOT was opposed to the move and wanted the letter rescinded but the BOT were adamant and did not revisit the issue.

(7) It is evident from the same content that, there is no revealation as to the reasons for the termination being given. None was also disclosed in the evidence of DW1.

(8) By reason of the contract document exhibit 1 being authoured by the BOG, and the termination document exhibit 47 being authored by the BOT, issue arose which of the two entitles ought to have taken the action. It is on record that both sides agreed that the relationship between the two parties is merely an administrative arrangement, a matter which will not affect their liability to plaintiff if he succeeds.

The documents governing this relationship were produced to this court, as exhibit 42 being the constitution for premier club, and 43, the trust deed. The same have been perused and the portion relevant to this judgment are set out here under:- "

Exhibit 42. constitution clause "2" objects of the club is to function as a private members club and in pursuance of this object, the club, shall maintain a club house in Nairobi to use by its members.

(ii) The club shall provide facilities and amenities to promote and encourage sporting, recreational social, cultural, religious and educational activities.

(iii) The club shall be non-political. Exhibit 43. Trust deed clause 3(a) The trustees shall apply the trust fund and all income thereof, for each charitable purposes and objects as determined from time to time by the founder, but the trustees are hereby expressly instructed that the establishment of the Trust is solely for the purposes of the relief of the poverty or distress of the residents of Kenya or for the advancement of religion in general and for advancement of Education.

(b) **And to manage and administer the affairs of Premier Academy S Rimad Rajchandra Institute herein after called "Premier Academy" where the context so admits.**

Clause 4 Trustees:

m) The trustees may sue on behalf of the Trust Fund under the instructions of the Board of Governors at the cost and sole responsibility of the Trust for which they will not be held personally liable at all.

(q) The Trustees shall appoint a board of governors comprising twenty members of which the chairman or the vice chairman and the Attorney, General Secretary, Assistant General secretary of the Founder would be Ex-officio members with the School Administrator and

School teacher's representatives. Their eligibility and tenure of office would solely be determined by the trustees.

(r) The Trustees are empowered to formulate the rules and regulations of the Academy for the Board of Governors to manage the Academy."

(9) It is common ground that the rules and regulations governing the transactions of the two institutions were not exhibited to show which powers were donated to the BOG by the BOT and which ones were reserved by the BOT in relation to the hiring and firing of staff.

(10) The observation in number 9 above notwithstanding, it is evident that the issue of the approach, hiring and acceptance to be hired of the plaintiff by the defendant was procedurally done to the satisfaction of both sides. There is in place minutes of Board of Governors meeting with board of Trustees held on January 2006 at Premier Academy at 2.30 p.m produced in evidence as exhibit 44. Agenda No. 7 and 8 thereof reads:-

Agenda 7: To have a CEO in place. SVP informed that a person had been identified for this post and if the Trustees approved for him to be employed, an interview can be arranged in the coming week. As mentioned earlier in the meeting, this new position would go along way in the management of the academy. The appointed person would be in charge of all the four sections and deal directly with BOG. The trustees will also Liaise with the BOG. This in turn will open the door for a learner BOT. (AP mentioned that this would be a (step or move) in the right direction. RMP informed that he knew the identified person personally and recommended him highly. KNP mentioned that the appointee would be in charge of the Academics and teaching staff and administration except for certain matters relating to Finance which PTP would carry on as usual. It would be an ongoing process with further steps to be taken in future. The time for change had come and action needs to be taken.

Agenda 8: Head hunting as soon as possible."

(11) The central theme in exhibit 44 is that, the joint meeting between the BOG and BOT was duly informed about the impending likelihood of the person to be brought on board. It is also clear that both sides agreed that he would be supervised by the BOT. It is evident that the plaintiff was already known to some of the members present in that meeting, who spoke highly of him and infact recommended him. It follows that what followed later by PW2 may have just been a formality.

(12) It follows therefore that when the BOG issued exhibit 1, they were doing so within the mandate donated to them by the joint BOG and BOT meeting. This is not outside the trust deed because although the trust deed talked of rules and regulations, it did not specify their form and style. Therefore instruction pursuant to minutes of a joint meeting signifying consensus is sufficient authority to B0G.to have acted in the manner they and more so when the BOT raised no objection to exhibit 1.

(13) It is common grounds that the plaintiff was duly head hunted, went through an interview, found fit, entered the employment which he accepted. Upon arrival, he was introduced to both the BOT and BOT. He assumed office in June 2006 though the contract was signed in March 2006, because he needed to be released from his former employer

(14) It is common ground that the plaintiff reported to the defendants in June 2006 and after undergoing the formalities he settled down to work. There is undisputed testimony that he played his role up to the required expectations and even beyond evidenced, by the fact that all assignments given him by both the BOT and BOT were fulfilled before time lines set, evidenced by production of exhibits 2-7, which were not disputed by the defendants.

(15) It is common ground that there is no single communication from the defendant to the plaintiff pointing out any shortcomings in the discharge of his duties. Neither was any pointed out in the termination letter exhibit 43.

(16) It is also common ground that no communication moved from the defendant to the plaintiff informing him of the move the defendant was just about to take, the and seek his views on the same, that is give him a right to be heard.

(i) It is also evident from the record that the BOT did not even inform the BOT of the move they were about to take and have the issue of termination discussed in a joint meeting on the same footing as when they discussed the issue of his employment vide exhibit 44.

(ii) It is on record that the move was not taken well by the BOT who embarked on a move to have the decision of the BOT reversed but the BOT was adamant.

(iii) It was admitted by the BOT through DW1 that they were comfortable with hiring of the plaintiff by the BOT, and have not ascribed any fault on the plaintiff. They just acted within the contract.

It is common ground that each side has relied on case law already set out herein. The said case law, has been presented on two fronts namely:-

(a) Those providing guide lines to the effect that in fixed term contracts the non- defaulting party is entitled to the benefit of the entire contracted consideration upon termination.

(b) There are those on the other hand which have provided guidelines to the effect that an employment contract is a special contract. That even in instances where there is an element of permanency in the contract whether for a definite or indefinite period there is a right bestowed on either side to bring that contract to an end by following instructions as regards the issuance of the requisite notice to end the contract. Where the notice is not provided, for then reasonable notice would surfice either agreed upon by the parties as in the event of any disagreement or, the same can be fixed by the court.

Further that in this second category, the only damages that such wronged employee would be entitled to would be the value of the notice, plus any other dues accrued to him/her before the termination. Further that either party need not assign reasons for the termination. And where it is evident that an employer or employee no longer requires the services of the other, it is not the business of the court, to insist that the relationship still subsists or order it to be restored.

There is a 3rd category of cases one of them being a decision of a court of concurrent jurisdiction, and another one by the court of appeal, where by the courts have ruled that the days when employer with impunity enjoyed the right to trample on an employees right of employment at the pain of ability to pay the notice value are over. These demonstrate that in instances where there is flagrant violations of an employee's rights by the employer there is jurisdiction to order full compensation for the remainder of the contract period but this would depend on the circumstances of each case.

It is against the afore set out background information set out in number 1-17 above that this court, has been asked to determine the central issues in controversy herein. The central issues in controversy are whether the contract subject of these proceedings namely exhibit 1 is a fixed term contract or an ordinary employment contract.

(iv) Whether this contract was unlawfully brought to an end?

(v) Whether this unlawful termination is attributable to the fault of the defendant.?

(vi) Whether the defendant was within his contractual rights to take action in the manner taken.

Due consideration has been made by this court, of the afore set out central issues for determination herein, and the same considered in the light of the content of the above set out facts forming common ground and also in the light of principles of case law relied upon by either side and the court proceeds to make the following findings on the same:-

It is not in dispute that prior to joining the defendant, the plaintiff had had a distinctive career as an administrator with various institutions evidenced by the production of exhibits 49 (a-i). Indeed as asserted by him, he was held in high esteem by those other institutions. He was given commendations. It is this commendation that featured in agenda 7 and 8 in the minutes of the joint BOG/BOT meeting of January 2006 when the go ahead was given to head hunt for the plaintiff.

As at the time, the plaintiff was in gainful employment. He was comfortable but was persuaded by PW2 that he was headed for better employment prospects. He was interviewed and was found to fit the caliber of the person they were head hunting for to assume the newly created post of CEO/COO.

It is on record that the plaintiff duly reported to work assigned duties which he fulfilled before time lines set. According to him, he was efficient and knowledgeable in the discharge of his duties, having brought on board his rich past vast experience. He says this has been confirmed by the fact that no fault was attributed to him as being the reason for the termination. He further alleges that he was not given a chance of being heard before any action was taken affecting his employment. Neither was the issue taken up with those who were to supervise him. It is his stand and that of his counsel that the circumstances displayed herein demonstrate unlawful termination in utter breach of the rules of natural justice, and the same should not be allowed to stand. However since the matter relates to an employment contract and there is no way the court can force the plaintiff on to a reluctant employer, the best the court, can do is to make the defendant pay for the consequences of the defendants unlawful conduct by ordering them to pay for the remainder of the contract period.

The court has been invited to take note of the fact that the plaintiff's tour at the defendants employment hardly lasted three months. This was shortly after the plaintiff had given up a comfortable employment for what he believed to be better employment prospects, which turned out to be almost employment suicide demonstrated by the fact that upon termination he had to make frantic efforts to secure another employment which he only managed to secure after along time.

In contrast, there is the defence conduct of moving on their own volition to head hunt for the plaintiff's which move had been duly approved by the joint meeting of the BOG and BOT vide the minutes of January 2006 exhibit 44. Vide the said minutes, the plaintiff was answerable to the BOG, but the BOT in the absence of regulation to say they could not do so also had direct contract with the plaintiff. The defendants were well aware that the plaintiff had lived up to their expectations by completing assigned roles before the time set, signifying that he was efficient. The defence departed from their previous conduct of seeking views from BOG and the plaintiff before action was taken against him. This pas conduct was the fact that PW2 talked to the plaintiff before he was head hunted, upon being head hunted, he was invited for an interview and his opinion sought on the terms of the contract which he signified his views by accepting the offer of employees. The defendant has not given any justification as to why this conduct was not followed at the time of termination.

Allegation of the post having been created by the BOT without the blessing of the BOT holds no water as exhibit 44 ousts that assertion. If at all as DW1 put it, the BOT decided along the lines not to maintain the post then, the BOT should have followed the same path it did when creating the post as per content of exhibit 44. This would have enabled the BOT to get an input not only from the BOT but the plaintiff as well . In any case, this is not a reason for the termination as the same is not reflected in the termination letter, the defence filed or the testimony of DW1.

The only probable inference that can be drawn from the conduct of the defendant is that the BOT took advantage of its advantageous

position as employer and then chose to trample upon and violate the rights of the plaintiff with impunity at the pain of ability to pay the value of the notice. The plaintiff was therefore entitled to complain in the circumstances of this case in the manner complained.

Having ruled that he plaintiff was entitled to complain, the court, has to determine under what principles of applicable case law is that grievance to be redressed. Is it under the fixed term contract principles or under the reasonable notice principles. To answer this, court, has to construe the two clauses relied upon namely clause 2 and 7 of exhibit 1. These state:- **"Clause 2 that the contract will be for a minimum period of 2 years renewal at the lapse of each contract subject to satisfaction of both parties.**

Clause 7: That a notice period shall be three months on either side to terminate the employment."

A reading of the said clauses has been made by this court, and in this court's opinion, the following questions have arisen for determination:

(i) What are the central commands in both clauses and to whom are they directed.

(ii) Which of the two clauses is the core and which one is the auxiliary clause.

(iii) What is the proper construction of this clauses.

Due construction of the said clauses has been made by this court, in the light of the own framed questions and the court proceeds to make the following findings on the same:-

(i) The central command in clause 2 is the word **"Minimum"** where as that in clause 7 is the word "shall" meaning mandatory. The addressees of those commands are the contracting parties.

(ii) The core clause is clause 2 where as clause 7 is the auxiliary clause.

When these two findings are considered together, it means that in order for clause 2 to hold clause 7 has to be ousted. Like wise in order for clause 7 to hold clause 2 has to be ousted. In this courts' opinion, clause 7 can only be ousted if it can be demonstrated hat the word **"minimum"** was inserted in clause 2 for cosmetic value.

This court, has considered this, and finds that neither party has asserted that this word was inserted for cosmetic value. This means that parties meant and intended the said contract to run for 2 years with an option to either side to renew.

Having ruled so, it means that the court, has to determine then at what stage was the provisions of clause 7 to be called into play herein. The court, has given serious consideration to this fact, and in this courts honest view, and considering the principles of case law on the subject and also considering the nature of the contractual relationship namely that of an employer and employee, a finding that clause 7 was only available to the parties at the close of the 2 (two) year period could not be right. The proper construction would be a finding that considering the nature of the relationship of the contracting parties, being that of an employer and employee, in a fixed term contract, either party had two options as to when to invoke the notice clause, namely three months to the expiry of the fixed term thus signifying a desire to renew or not to renew upon expiry. There is also a venue to invoke the same during the pendence of the expiry. This being the case, then it means that the same standard that the court, is usually called to apply when determining whether the termination is lawful or not applies. Likewise the same standard that the court applies to determine whether the damages payable are to be in line with the notice value or not is the same standard that the court has to apply when determining whether the compensations awardable would follow the fixed term route or the notice value route.

Due consideration has been made by this court, of this rival arguments and the same considered in the light of the evidence adduced,

observations on the said evidence by this court, and applied the principles of law applicable to the same facts and the court, is of the opinion that the circumstances displayed herein go to demonstrate that the fixed term contract route is the one to be applied herein for the following reasons:-

(1) The plaintiff was head hunted and lured to leave his job for better employment prospects with the defendant.

(2) The issue of head hunting the plaintiff was procedurally embarked on and approved by a joint meeting of he BOG and BOT.

(3) There after the plaintiff was duly interviewed and terms of employment set, accepted and then deployed.

(4) Exhibit 44 specified clearly that the plaintiff was to be supervised by the BOG, which minutes gave the BOG authority to issue exhibit 1, the contract of employment.

(5) There are no other minutes of joint meeting of the BOG and BOT to reverse their stand in exhibit 44.

(6) It is on record that the plaintiff reported and performed tasks assigned him before the time lines, meaning that the plaintiffs work was without blemish. This is fortified by the fact that no justified reason was given for the termination either in the termination letter or in evidence.

(7) It is on record that the BOT refused to hold a joint meeting to discuss the issue or even listen to the plaintiff or the BOG for that matter.

(8) The defendant's conduct therefore displays breach of the rules of natural justice. The defendant took advantage of his advantageous position to flout the plaintiffs right to employment with impunity.

(9) The circumstances of the case herein fall into the category of those persuasive circumstances echoed by Ojwang J in the case of NENGINYA SALIM MURGANI (SUPRA), that **"days when employers trampled upon employees rights with impunity, at he pain of ability to pay the notice value are long gone where an employer has been shown to have flagrantly violated an employees right to employment is dully bound to meet the consequences of those violations beyond the notice value".** This court does not therefore hesitate to find that it falls squarely into the stand taken by the Court of Appeal in the case of GAD DAVID OJUANDO VERSUS PROF NIMROD BWIBO AND 2 OTHERS (SUPRA) whose central theme in the opinion of this court is that:-**"Where a termination is in violation of the rights of the employee, the same will not be protected.** The employer runs the risk of compensating the employee beyond the value of the notice in this case and then the law lords went ahead to compensate the employee for the five years cut-short from his employment beyond the notice value.

For the above reasons the court upholds the plaintiffs stand for a right to be compensated for the reminder of the contract period cut short.

Having established the right to compensation, the court proceeds to determine whether the plaintiff mitigated his damages in line with the laid down principles on the subject which have now become trite that a party suffering an injury is duty bound to mitigate his loss. The yardstick of what such a party is expected to do has been set by the Court of Appeal in the case of AFRICAN HIGHLAND PRODUCE LTD VERSUS KISORIO (2001) 1KLR 171.

In this case the law lords of the Court of Appeal provided the following guide lines namely:-

"*(1) It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained. Consequent upon the wrongful act in respect of which he sues. He should not claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or trust, and he is then bound to act as best as he may not only in his own interests but also in those of the defendant.*

(2)The plaintiff is under no obligation to injure himself in his character, his business, or his property, reduce the damages payable by a wrong doer. He need not spend money to enable him to minimize the damages or embark on litigation.

(17) The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law but one of fact in the circumstances of each particular case the burden of proof being on the defendant.

Applying the above principles on mitigation of damages to the facts of this case, the court is satisfied that the plaintiff has discharged that burden for the following reasons:-

(i) immediately upon receipt of the termination letter, he put in a protest vide exhibit 46 dated 24th September 2009. The complaint raised was that according to the minutes of the BOG and BOT and those of the BOG produced as ehxiht 44 and 45 him plaintiff was supposed to be under the supervision and answerable to the BOG and since the termination letter had been signed by Vijay P. Patel on behalf of the BOT, there appeared to have been an error committed and asked the BOG to take action.

(ii) The plaintiff thereafter engaged in serious discussion with the BOG expressing surprise as they had not been consulted. Him plaintiff jointly with the BOG tried to engage the BOT on the issue but the BOT declined to discuss the issue a fact admitted by DW1. This was an opportunity given to the defendant to give the plaintiff an opportunity to be heard and for the defence to explain the real reason behind the termination but the BOT declined displaying conduct of impunity.

(iii) Upon realizing that his pleas fell on deaf ears, he instructed his lawyers to issue a demand notice to the defendant exhibit 40. A reading of the said content lays out clearly, the plaintiffs view of the proper construction of the said contract, consequences of ay anticipated breach. The defendant remained defiant as no response to the same has been displayed by both sides.

(iv) Indeed there is in place exhibit D1 emanating from the trustees dated July 7, 2006 signed by Mukesh M. Patel as chairman and Vijay P Patel as secretary of the BOT and addressed to the BOG, which in this courts opinion does not operate to shield the BOT for the following reasons (9) The minutes in which the said decision had been taken have not been exhibited to confirm that indeed such a decision was ever taken.

(b) The correspondence cannot operate to oust the authority given vide the minutes first of the joint meeting of the BOG and BOT exhibit 44 and that of the BOG exhibit 45. A proper mode of reversing the stand in exhibit 44 and 45 would have been another decision taken in a meeting and minutes of the same exhibited minutes.

(v) Upon realizing that his pleas had fallen on the defendants deaf ears, the plaintiff embarked on a humiliating and demeaning path of job hunting whose earliest communication is dated 16th October 2006, a month after termination and 19th May 2007, up to a period of three months after the suit had been filed. These correspondence were produced as exhibit 8 – 39.

All the above activities go along way to demonstrate existence of sufficient proof that the plaintiff took steps in mitigation of his loss or damage as soon as the loss was occasioned to him, which efforts have not been denied by the defence.

Having established that the plaintiff discharged his obligation to mitigate loss and or damage, the court proceeds to assess damages as hereunder:-

(a) Specials:- due consideration has been made of exhibit 1 the contract of employment, 43 the termination letter, exhibit 8-39, job hunting documents, exhibit 50 (a) – (h) 51 and 52 being the letter of subsequent employment and subsequent pay

slips and compared the content with the working of the same in paragraph 7 of the amended plaint, and the court is satisfied that the correct figure of Kshs 3,416,00/- was arrived at, and the court allows the same.

The plaintiff has asked the court to allow interest from the period prior to the filing of the suit. This court, has judicial notice of the fact that it is now trite that interest is awarded at the discretion of the court. Due consideration has been made by this court, of the said issue of interest, and the court is satisfied that in view of the fact that he plaintiff has been fully compensated for the remainder of the contract period, after termination, and considering the fact that he had not earned this money as at the time of termination, but was due to earn the same, ordering payment of interest to be paid from termination, that is the period prior to the filing of this suit, would be too punitive as the court would be compensating the plaintiff on loss of interest on money he had not earned but was yet to earn as subsequent any as the contract period progressed. It is fair and just to both sides that interest be ordered to run from the date of filing of the suit and it is so ordered.

As for loss of increment on the salary, the court agrees that had the contract not been brought to an abrupt end by the unprocedural and unlawful termination, the plaintiff would have earned the increment. He is entitled to recover the same. However it is clear that neither the contract nor the evidence offers any guide lines on how the court can go about this. For this reason, the court, has no alternative but to apply the general standard principles when assessing damages at large. These are:-

(1) Such damages should not be too low or too high.

(2) They should be commensurate to the loss.

(3) They are assessed as a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.

The reason for the assessment is that the plaintiff was bound to earn the same, had the contract of employment not been unprocedurally and unlawfully brought to an end. The judicious exercise of the same is to the effect that Kshs 20,000.00 being 10,000 for each year to have been worked would be adequate compensation. Interest on this assessed amount will run from the date of judgment till payment in full.

For the reasons given in the assessment judgment be and is hereby entered in favour of the plaintiff along the following lines:-

1. Special damages Kshs 3,416.000.00
2. For the reasons given in the assessment, interest on (a) will be at the court rates from the date of filing suit till payment in full.
3. Kshs 20,000.00 being Kshs 10,000.00 for each year that the plaintiff would have continued in employment as covering percentage increment.
4. Interest on the amount assessed in c above will be at court rates and will run from the date of judgment.
5. The plaintiff will have costs of the suit.

Dated, Read and delivered at Nairobi this 12th day of March 2010.

R.N.NAMBUYE

JUDGE

12/3/2010

Nambuye J

Court clerk Ojijo

Anil Joshi for plaintiff – present

Makori for the defendants – present.