



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2416 of 1993**

**EDWARD M. MUNGAI.....PLAINTIFF**

**VERSUS**

**UNIVERSITY OF NAIROBI.....DEFENDANT**

**JUDGMENT**

The Plaintiff was employed by the Defendant as Administrative Assistant on 1<sup>st</sup> July 1980. His letter of appointment contained terms of service which provided that he was employed on permanent and pensionable terms and his retirement age was 60 years. The terms of employment contained a termination clause which provided as follows:

**“After confirmation in the service of the University on completion of probation following on first appointment, services may be terminated at any time by either party giving THE other three months written notice of intention to terminate the appointment or alternatively by either party paying the other three months’ salary in lieu of notice.”**

The terms also provided that the Plaintiff would be removed from employment without notice if, among others, he carried out his duties in a manner amounting to gross inefficiency, committed conduct of scandalous or disgraceful nature rendering the Plaintiff unfit to hold office or if the Plaintiff absented himself from his place of work without permission for seven consecutive days. The Plaintiff was also entitled to inter alia housing allowance, traveling allowance, medical benefits as well as annual leave.

There is no doubt that the Plaintiff performed his duties satisfactorily with the result that he gained promotions and he had attained the grade of Personnel Officer II at the time of his exit on 3<sup>rd</sup> September 1990 when his employment was terminated. On termination he was given three months salary in lieu of notice.

The Plaintiff felt that the termination of his appointment was wrongful and unfair and as a result he had suffered loss and damage.

Particulars were enumerated as follows:-

- (i) Loss of earning and or earning capacity from 3<sup>rd</sup> September 1990 to date of retirement in the year 2006 amounting to Sh. 3,535,468/=
- (ii) Loss of future earnings from date of judgment to date of retirement. Retirement benefits of Sh.519,452/= being employer’s contribution and Shs. 1,306,430/= being the amount of the pensionable

emoluments. Additional pension earnings after retirement for at least ten (10) years.

(iii) Leave and House allowance from 3<sup>rd</sup> September 1990 till date of retirement amounting to Sh 2,667,100/=.

(iv) Other benefits applicable to staff of his rank.

(v) Others to be stated at the trial.

The Plaintiff sought judgment amounting to Shs. 7,838,450 as enumerated above; General damages for wrongful termination of employment and/or dismissal and for loss of future earnings capacity costs and interest.

The Defendant on being served with summons filed a defence in which he denied the Plaintiff's claim and maintained that the Plaintiff's employment was lawfully terminated by giving him three months notice in lieu of notice.

It is not disputed that the Plaintiff was employed by the Defendant on 1<sup>st</sup> July 1998 as an Administrative Assistant and rose in the ranks until he became Personnel Officer II in the Defendant's employment. His employment was abruptly brought to an end on 3<sup>rd</sup> September 1990 when he received a letter terminating his services.

There was no evidence to suggest that the Plaintiff's performance in the Defendant's employment was in any way unsatisfactory.

On the morning of 22<sup>nd</sup> November 1989, he received a letter of suspension from duty citing three charges namely – conducting himself in a disgraceful manner – neglecting duties in 1988/89, and undermining one of his superiors, the integrity effectiveness and due conduct of the Defendant's administration.

He was informed that his case would be placed before the Staff Disciplinary Committee for consideration and that the date, venue and time for the same would be notified to the Plaintiff in due cause. He was also asked to submit his written defence if he so wished within two weeks from the letter thereto.

The Plaintiff wrote on 10<sup>th</sup> May 1990 responding to the letter aforesaid and denied the allegations against him and expressed his willingness to appear before the staff Disciplinary Committee to defend himself. But while waiting to be informed of the date and venue of the disciplinary committee he received a letter on 3<sup>rd</sup> September 1990 terminating his employment.

On my evaluation of the evidence by both the Plaintiff and the Defendant I find that the Plaintiff's termination of his employment on the grounds advanced by the Defendant was certainly unlawful. Having come to that conclusion the next issue before me is that of award of damages.

The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause.

In the case of **Kenya Oilfield services Ltd vs Peter Njoroge CA No 124 of 1985** the Court of Appeal faced with a similar situation had this to say:-

**“where the employer and the employee enter into a service contract which stipulates a termination clause or notice to terminate the employment and following the unlawful termination of such service contract there in the breach of that contract and the measure of compensation or indemnity or general or special damages, call them what you may, is the loss the employee would incur during the stipulated period of the termination clause or notice.”**

Where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been correct.

See **Alfred Githinji vs Mumias Sugar Co. Ltd Civil Appeal No 194 of 1991.**

Again the law is quite clear that where a notice period in a contract of employment as was the case here, then an employer needs not assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Where a servant is wrongfully dismissed from his employment the damages for dismissal cannot include compensation for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. See **Ombanya v. Gaily & Roberts 1974 EA 22.** The next issue is whether the Plaintiff is entitled in law to any of the benefits and/or emoluments claimed as set out in the Plaint. As a retiree he would not be entitled to any such claims apart from his normal monthly retirement benefits.

The Court of Appeal was faced with a similar situation in the case of **Edward Otieno v. Kenya Ports Authority CA No 120 of 1977.** In that case Otieno's contract of employment was terminated at the age of 51 years while he was supposed to retire at 55 years. He filed a suit against Kenya Ports Authority claiming loss of salary, pension medical allowance, house allowance leave allowance, mileage allowance, telephone allowance and security service until retirement. **The Court of Appeal held that to pay the Plaintiff his full salary and other emoluments till he attains the age of 55, as he claimed, would on proper analysis, be tantamount as if he was being reinstated to his employment, to which he is not entitled.**

In view of the foregoing in my judgment the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause or notice to terminate the employment which is 3 months. The Plaintiff having been paid three months salary in lieu of notice, he is not entitled to anything more except his unpaid salary to the date of termination and his terminal benefits which has already been paid or awaiting collection.

Accordingly for the reasons stated above the Plaintiff's claim fails and consequently the suit is dismissed with costs.

Dated and delivered at Nairobi this 24<sup>th</sup> day of September 2008.

**J. L. A. OSIEMO**

**JUDGE**