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

Civil Case 157 of 2002

MARY WAKWABUBI WAFULA…….....…….…….PLAINTIFF

VERSUS

BRITISH AIRWAYS PLC……...……..DEFENDANT

J U D G M E N T

On the face of it, the matter before me appears to be another run- of-the-mill dispute between a master/servant or employer/employee which could easily be determined on the basis of the express terms of the contract between the parties and on the principles applicable in such relationships, a lot about which has been said by the courts for centuries. However, for reasons that will become apparent as I analyse the pleadings, the evidence, submissions of counsel and the authorities cited before me, it became a hotly contested and protracted trial which lasted several days. Two counsel appeared for each side with the plaintiff's advocates **M/s Shapley Barret & Co** instructing Mr Oyatsi to lead the assault, and **M/s Mugos-Ogamba & co**, instructing Mr Kiage to lead the defence.

The facts…….

The salient facts are not complex and may be related succinctly:

Mary Gorreti Wakwabubi-Wafula (hereinafter "**Mary**" or "**the plaintiff")** was employed by M/S **British Airways plc** (hereinafter "**BA"** or "**the defendant")** on 1st April, 1989 as a Customer Service Assistant. The contract of employment is contained in a letter addressed to her by BA on that date which is at the epicenter of this litigation and will shortly be examined more closely. For the next 11 years until December 2000, Mary had a successful tenure as a BA employee rising through the ranks to the heavy responsibility of the Airport Delivery Manager. On 20th December 2000 however, she was suddenly recalled from her annual leave which was starting the same day, for a meeting with the Human Resources Manager, the Customer Service Manager and the Country Commercial Manager on 21/12/2000. In that meeting several allegations were made against her, which again form a central part of this litigation and will be examined more closely, and on the same day Mary tendered a letter of resignation from BA. She also returned all BA property hitherto in her possession. Her resignation was accepted on 22/12/2000 and BA was set to pay the terminal benefits due to her. On receiving the letter accepting her resignation,

Mary apparently had a change of mind and so, wrote to BA on Christmas day, 25/12/2000 withdrawing her letter of resignation, which she said was forced on her through " *intense pressure and immense duress"*. Instead she lodged a lengthy appeal on 31/12/2000 to BA's General Manager, East and Central Africa and Indian Ocean Islands against what she called "*unprocedural termination of her services"*. The letter of appeal was copied to the Director of Customer Service and Operations, the Service Delivery Manager, Africa and the General Manager Africa, and Indian Ocean Islands, all of whom were based at BA Offices in Heathrow, London. The appeal was however rejected on 05/01/2001 by letter communicated to Mary through the Country Commercial Manager. BA, London also wrote on 10/01/2001 expressing the opinion that the matter of resignation be dealt with by BA's Kenya Management. On reaching a dead- end on her appeal, Mary came before this court on 08/05/2001 and sued BA.

The pleadings…….

From the 32 paragraph plaint filed on 8/5/2001, one discerns at least six causes of action either pleaded in succession or in the alternative as follows:-

(A) Breach of express terms and conditions of the contract of employment entered into on 01/04/89 and subsequent amendments made thereto.

(B) Breach of an implied term of trust between the employer and employee.

The pleadings relating to those two causes of action are in paragraphs 4 to 13 of the plaint, to wit:

"(4) The terms of the said contract were contained

firstly, in the said written contract and subsequent amendments thereto and secondly, in the implied terms.

(5) It was an implied term in the said contract of employment that the defendant as employer would not without reasonable and proper cause conduct itself in a manner likely to damage the relationship of trust between the plaintiff and the defendant, and thereby affect the plaintiff's future employment prospects within its organization or elsewhere.

(6) Accordingly, it was agreed that in order to maintain the said relationship of trust and confidence between the parties, the performance of the said contract would be regulated by the terms and conditions stipulated in the said written contract and the Defendant's staff regulations issued or published from time to time in its staff manuals.

(7) The said regulations stipulate, inter alia, the rules to be followed by the staff in the discharge of their duties, work related offences, the disciplinary procedure to be followed in case of misconduct and the termination of the contract, etc.

(8) The Plaintiff states that between April 1989 upto

December 2000, and in the performance of her duties under the said contract, she served the Defendant with dedication and distinction rising from the position of Customer Service Assistant with a monthly salary of Kshs, 3,801/- plus house allowance of Kshs.710/- to the position of Airport Delivery Manager earning a monthly salary of Kshs, 115,864.35 with other benefits totaling Kshs, 174,520.60

(9) In recognition of her outstanding performance under the said contract, the Defendant on 27th July 2000 nominated the Plaintiff to undergo the Graduate Development Program In International Leadership which is a course of training that was due to take place for a period of thirty-six (36) months in Waterside, London in the United kingdom and upon the completion of which the Plaintiff's skills would improve and earn her promotion and other benefits.

(10) In breach of the said implied terms of the contract,

the defendant in complete disregard of the said laid down regulations and procedure, and without any proper cause recalled the Plaintiff from leave on 21st December 2000 and convened an ad-hoc meeting where it leveled false charges against the Plaintiff and instantly found her guilty of having engaged herself over a period of time in illegal or criminal activities of sending illegal immigrants on the defendant's scheduled flights to London in the United Kingdom while on duty.

(II) The Plaintiff was ambushed by the said proceedings and denied an opportunity to defend herself in the manner prescribed in the defendant's said regulations. In the premises, the said proceedings were null and void.

(12) Further, the Plaintiff states that all the said allegations were false and malicious as the Defendant well knew.

(13)In addition, the plaintiff states that at all material times prior to the said date, the Defendant had promoted the Plaintiff, issued certificates or testimonials of achievement or excellence to her and nominated the Plaintiff for further training as stated above. All these actions were taken by the Defendant in recognition of the Plaintiff's good performance in her contract of employment and the Defendant is in the premises estopped by its said conduct from alleging that the Plaintiff had during the said period of time engaged in the said criminal activities with its knowledge."

(C) Wrongful procurement and inducement through undue influence to tender resignation. The relevant pleading is covered under paragraphs 14-20, to wit:-

"**(14) The Defendant at the said ad hoc meeting wrongfully**

procured and induced the Plaintiff into tendering her resignation from employment with the threat that if she did not resign she would be dismissed and would thereby lose all her terminal benefits and future prospects of securing a job in the airline industry.

(15) The Plaintiff was thereby induced to tender her

purported resignation on the said date by the undue influence of the Defendant, under its direction or coercion and pursuant to its threats but without due consideration for the effect of what the Plaintiff was doing.

(16)On 25th December 2000, after recovering from the said

shock and within the twenty-eight (28) days period stipulated in the said defendant's regulations, the Plaintiff served notice on the defendant stating that the said purported resignation was not voluntary and was invalid having been procured by duress under the said circumstances and she invoked her right to appeal against the defendant's said unlawful conduct.

(17)In terms of the defendant's said regulations, the

defendant was bound to convey its decision on the said appeal within seven (7) days of receipt of the appeal.

(18)In further breach of the said regulations, the Defendant

conveyed its decision rejecting the said appeal and maintaining that the plaintiff had resigned by a letter posted on 23rd January, 2001 which it purported to backdate to 5th January, 2001 in an attempt to comply with the said regulations.

(19)The Plaintiff further states that contrary to the said

allegations that the Defendant had voluntarily resigned from her employment and consistent with the Plaintiff's assertion that her services were illegally terminated, the Defendant wrote a letter to the Plaintiff on 10th January 2001 giving her notice of her terminal dues which included payment of one month's salary in lieu of notice.

(20) The Plaintiff states that the defendant is estopped by its

said conduct form alleging that the Plaintiff voluntarily resigned from her employment under the said contract."

(D) False and fraudulent warranties and misrepresentations.

The pleadings are in paragraphs 21-24:

"**(21) Further and/or in the alternative, the Plaintiff states**

that in order to induce the Plaintiff to enter into the said contract, the Defendant represented or warranted to the Plaintiff that the defendant would act honestly as an employer in the performance of the said contract and that its actions would be regulated by the terms or rules contained in the said contract and staff manuals.

(22) The said warranties and representations were contained in the said contract and the various staff manuals or regulations issued by the Defendant to the Plaintiff.

(23) Acting on the faith and truth of the said representations and warranties, and induced thereby, the Plaintiff entered into the said contract and has worked for the Defendant with devotion, dedication and distinction with the intention of building a career for herself in the Defendant's organization.

(24) The Plaintiff has since discovered that the Defendant

made the said representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false."

(E) Deprivation of freedom of movement after Visa withdrawal by

the British High Commission which is pleaded in paragraphs

25 and 26.

(F) Loss of future employment in the airline industry as pleaded in paragraph 28.

As a result of all those breaches and other transgressions by the defendant, the plaintiff sought special damages in the sum of Kshs. 126,156,421.64 particularised as follows:

"**(a) Loss of salary……..Kshs. 90,404,447.96**

(b) Loss of pension rights……..…..Kshs. 9,040,444.80

(c) Loss of promised benefits of

(i) allowances……....Kshs 16,347,496.88

(ii) medical treatment or cover…… Kshs. 5,225,625.00

(iii) unclaimed awards and allowances upto December 2000…….…..…Kshs. 138,407.00

(iv) a course of training in graduate development Programme approximate…Kshs. 5,000,000.00

Total Kshs.126,156,421.64

She also sought:-

"**(b) (General) Damages for fraud, misrepresentation and breach of warranties, loss of reputation and restriction of movement.**

(c) A declaration that the Plaintiff in terms of the Defendant's Staff Travel Manual currently in operation is entitled to

(i) unlimited right to travel on the Defendant's aircraft to any destination within the Defendant's network and to pay only 10% of the fare with her nominees.

(ii) A free annual ticket with her nominees to any destination within the Defendant's network.

(c) Costs

(d) Interest."

In response to those pleadings, the defendant filed an equally lengthy and detailed defence admitting that there was a written contract of service stipulating express terms of service but asserting that it was never in breach of those terms and acted honestly and in strict accordance with its obligations as an employer under the contract. The defendant further asserted strongly that there were no implied terms capable of being imported into the contract. As to the pleading in paragraphs 10,11 and 12 the defendant stated:

"**Save that the defendant did invite the plaintiff to a meeting at the defendants' offices on the 21st of December 2000, the defendant denies the contents of paragraphs 10, 11, and 12 of the plaintiff and puts the plaintiff to strict proof thereof."**

All other allegations were denied including the plaintiff's monthly salary, entitlement to the defendant's Graduate Development Programme, the application of the doctrine of estoppel, undue influence or other procurement of the letter of resignation, termination of services (lawful or otherwise), false or any representations amounting to fraud, withdrawal of visa, any financial loss as particularized or at all, and tarnishing of the plaintiff's image to other prospective employers. The plaint, it is contended, discloses no cause of action, is scandalous, frivolous and vexatious.

The Issues…….

Counsel on both sides agreed on and filed some 27 issues which I will shortly answer from the evidence on record. The issues are as follows:-

1 Where were the terms of the contract referred to in the Plaint contained?

2 Were there any implied terms to the said contract?

3 Did the contract warrant the implication of any items (sic) (terms?)

4 Did the contract of employment pleaded in the plaint create a relationship of trust between the plaintiff and the defendant?

5 Was there an implied term in the said contract that the defendant would not without reasonable and proper cause conduct itself in a manner likely to damage the said relationship of

trust and thereby affect the plaintiff's future employment prospects within the Organisation or elsewhere?

6 Did the plaintiff in her employment serve the defendant with dedication and distinction as alleged in paragraphs 8 of the plaint?

7 Was the plaintiff's salary together with benefits at the time of termination of her services Kshs. 174,520.60cts or Kshs.133,627/-?

8 Was the plaintiff nominated to undertake or undergo the graduate development Programme in International Leadership as pleaded in paragraph 9 of the plaint?

9 Was the plaintiff entitled to a promotion and other benefits upon completion of the graduate Development Program?

10 On the facts of this case, is the plaintiff entitled to lay any claim against the defendant in law for her failure to attend the said programme?

11 Was the meeting of 21st December 2000 convened properly in terms of the regulations and procedures laid down in the plaintiff's contract of employment?

12 Did the defendant at the said meeting level the charges against the plaintiff pleaded in paragraph 10 of the plaint?

13 If so, was the plaintiff given the opportunity to defend herself?

14 Were the said charges false and malicious?

15 Does the doctrine of estoppel apply to this case as pleaded in paragraph 13 of the plaint?

16 Did the plaintiff tender her resignation to the defendant under duress or undue influence of the defendant?

17 Was the said resignation valid?

18 Was the plaintiff's contract of employment properly terminated?

19 Was the defendant's payment to the plaintiff of one month salary and terminal benefits consistent with the defendant's allegation that the plaintiff resigned from employments voluntarily?

20 Is the defendant estopped by its said conduct from maintaining that the plaintiff resigned from the said employment voluntarily?

21 (i) Did the defendant make representations or

warranties to the plaintiff as pleaded in paragraphs 21 and 22 of the plaint?

(ii) If so, did the plaintiff act on the faith and truth of the said warranties or was she induced by the said warranties in accepting to work for the defendant?

22 Were the said representations false and untrue or made fraudulently or recklessly as pleaded in paragraph 24 of the plaint?

23 Did the defendant communicate the plaintiff's termination of employment and the reasons for it to the British High Commission in Kenya or the British Authorities?

24 Was the restriction placed on the plaintiff to enter the United Kingdom caused by or a direct consequence f the defendant's trust-destroying conduct?

25 Has the plaintiff suffered the loss pleaded in paragraph 27 of the plaint and is the defendant liable to compensate her for the loss?

26 Is the defendant liable to the plaintiff for the additional general damages claimed for fraud, misrepresentation and breach warranties, loss of reputation and restriction of her movement?

27 Which party is liable to pay the costs of this suit?

The Evidence…….

The evidence on record came from two witnesses only, one from each side. Mary testified orally and was cross examined at length and she produced a large bundle of documents relevant to the pleadings. From BA, there was **Mr Sammy Onono** (Onono) who was the Area Human Resource Manager for East and North Africa.

From the pleadings and oral evidence, some facts were either not traversed, or not denied, others were expressly admitted, and yet others were generally undisputed. I need not therefore belabour such facts with detailed analysis. In my assessment, the following facts are in that category;-

- The plaintiff was employed under a written contract of service dated 1st April 1989. Clause 4 of the contract provided:-

"4.1 Your employment with British Airways (including your

initial appointment and any subsequent appointment)

will be subject to the following conditions:-

4.1.1. Your employment will be governed at all times by Kenya Employment Regulations of British Airways now in force and applicable to your particular employment. These Regulations may be seen on request and will be deemed to be incorporated in this contact.

4.1.2. You will be required to join British Airways Pension Fund and Life Insurance Scheme with effect from 1st April, and you will also be required to join British Airways Medical Expenses Insurance Scheme, details of which are enclosed. A proposal Form for the Medical Scheme is also enclosed, which, when completed, should be returned to this office.

4.1.3. Without prejudice to any other rights of termination of the parties under this contract, either party may terminate this agreement at any time by giving to the other one month's notice in writing."

- The termination period of notice that applied to senior staff, which was the plaintiff's category level as at December 2000 was **three months**. Executive regulation No. 28, (2) & (3) which forms part of the contract provides, as far as is relevant:

(2)……

"**Employment of permanent staff may be terminated by either British Airways or the employee giving to the other TWO (2) months' notice in writing or otherwise by the payment of either party of TWO (2) months pay in lieu of notice. Permanent Employees who do not give the required two months notice will not be entitled to payment in respect of work completed during that period unless British Airways has agreed to forego the period of notice."**

(3) Permanent staff in the 'E' scales and above are governed by 2 above except that the period of notice to be given is THREE (3) months"

- All other things being equal, the plaintiff, who was aged 36 when she joined BA, would have worked up to the retirement age of 60 years as provided for under executive regulation 23.
- The plaintiff's basic salary as at December, 2000 was Shs.106,955 and the gross pay inclusive of transport was Shs.133,627.
- Executive regulation No.6 provided for the procedure relating to discipline of an employee for misconduct which was not serious enough to warrant dismissal or termination of employment. Before such action is taken the employee must have had an opportunity of presenting her/his case in a hearing before the Management. After three warnings on disciplinary matters, the employee would be dismissed.
- Executive regulation 7 provided for dismissal of an employee for serious offences or repetition of less serious offences. There would be no dismissal for a first offence except in cases of gross misconduct, defined as an act or omission prejudicial to the good name, efficiency or interests of British Airways.

- A dismissed employee shall be paid up to the day of dismissal.
- There were no disciplinary proceedings conducted under regulation 6.
- There was no dismissal of the plaintiff under regulation 7.
- During the 11 years the plaintiff worked for the defendant she was an excellent worker who earned numerous commendations and rewards from the defendant, some passengers, and the Airport Authority, for her work. Accordingly, she rose from a relatively junior position of Customer Service Assistant to a Manager and benefited immensely from the defendant's training and career development programs.
- The defendant extended similar commendations and training facilities to other deserving employees as a general motivation policy.
- British Airways was a good employer and having worked for them would be a high selling point in the job market.
- The plaintiff was paid her salary for December 2000 when she proceeded on leave on 20/12/00. Her net terminal benefits were calculated on 10/01/2000 inclusive of one month's notice payment of Shs. 133,627.

- The plaintiff wrote and delivered a letter of resignation on 21/12/2000.
- The letter of resignation was acknowledged on 22/10/2000 and the resignation was accepted.
- The plaintiff wrote to the defendants on 25/12/2000 (delivered on 27/12/2000) withdrawing her letter of resignation. There was no response to that letter despite a reminder.
- The plaintiff wrote on 31/12/2000 (delivered on 02/01/2001) appealing to higher authority in BA against "termination of Services". The appeal was rejected by letter dated 05/01/2001 (posted on 22/01/2001 and received by the plaintiff on 23/01/2001).

- The plaintiff had an existing 5- year Visa to travel to Britain but it was suspended by the British High Commission on 02/01/2001. The plaintiff did not respond to an invitation by the High Commission to call on them for further discussion on the matter.
- The plaintiff, during the pendency of this case on 03/04/2002, wrote some 11 letters on the same day seeking employment from various Hotels, Airlines and other organizations in Kenya. She also wrote two letters on 05/04/2002 seeking employment from the two mobile service providers in Kenya (Exh 76). The letters were not written in response to any job advertisement and the plaintiff was not aware why there was no response to any of those applications.

- The pension fund relating to the defendant's employees was operated by ALICO.
- Staff travel rebates offered by the defendant were discretionary and not contractual.

The disputed facts, as I see them, arise from the evidence tendered on both sides in relation to three broad areas:-

(1) Implied terms of the contract.

(2) Circumstances surrounding termination of the contract.

(3) Consequential loss, both financial and personal, after termination of employment.

The first broad area, I think, is more of a legal, rather than factual, consideration. I will consider the relevant law presently. Mary however pleaded and testified that she expected that BA would conduct itself in a manner that was not likely to damage their relationship of trust and confidence between them. She trusted that as she kept her part of the bargain to be a faithful and diligent employee, BA would comply with the stipulations of the written contract to the letter. There were clear stipulations relating to the discipline of employees, the issuance of warnings and dismissal in serious cases. In all cases there was a stipulation that the employee be given sufficient opportunity to present her case before a properly organized Management forum. Contrary to such expectations, three representatives of BA in Kenya, took it upon themselves to ambush and bully Mary into tendering a purported resignation. She was on her first day of lawful leave when she was suddenly recalled to BA offices without giving her any agenda for the meeting. There she met her immediate boss, **Kola Olayinka,** the Area Service Delivery Manager, **Ian Petrie**, the Country Commercial Delivery Manager at the time, and **Sammy Onono**, then the Area People Organizations and Support executive. Within a span of 15 minutes or so, she had been told how the company had lost confidence in her because of alleged heavy fines imposed on the Airline as a result of her participation, facilitation or abetment of activities of illegal immigrants. She was given two options, either to resign forthwith or be sacked. She was not physically ejected from the office but was ordered to walk out with a straight face as if nothing had happened. A letter of commendation would follow if she resigned but she would lose all benefits if she was sacked. Her denials and requests for substantiation of the allegations fell on deaf ears. Ian Petrie demanded return of all BA property and Identity Cards forthwith and would not hear any pleas that the rules of procedure be followed. Not even a plea of innocence made by Mary to the General Manager, **Niel Steffan,** soon after, would elicit a reconsideration of the matter. He too demanded return of BA property. In the end, despite the contention that there was a resignation, BA calculated and paid terminal dues inclusive of one months' salary in lieu of notice. According to Mary, such conduct by BA officials completely undermined the trust and confidence, the expectation and understanding, that ought to exist between an employer and employee.

The other aspect of trust and confidence, which I understood Mary to testify on, was that in fact BA was in the business of ferrying illegal immigrants to Britain. As such, any honest employee would be justified in leaving their employment, even by resignation, and that would be tantamount to constructive unlawful termination of the employment contract. Such conduct adversely affected her future employment prospects.

Mary testified that it was the duty of every airline, including BA, to ensure that its passengers carried proper travel documents before disembarking and entering a foreign country. The policy, in the case of passengers traveling to Britain without valid documents, was that the airline itself would be considered to be engaging in illegal activities and heavy fines of up to £2000 would be imposed on the airline. Mary was aware of this and she did, in her supervisory role as a Manager, ensure, as far as she could, that there were no illegal immigrants ferried in the airline. She gave examples where she had, for many years, succeeded in thwarting such attempts by passengers and was commended for it by BA. But that was before January, 2000. BA was apparently not happy with Mary for her persistent efforts to clean up the illegal immigrants vice.

In that month Mary apprehended a passenger who had boarded the plane under the pretext that he was British although he was a Pakistani. She removed the person from the plane and reported the matter to

her boss, Kola Olayinka, for further investigations to be carried out. Instead of receiving a commendation as she always had, Mary was served with a warning letter on 05/02/2000 reprimanding her. The warning itself was in contravention of the executive regulation 6. On 13/12/2000, only one week before termination of her services, Mary apprehended another passenger with a blacklisted Italian ticket who had already boarded the aircraft. Again she reported to her boss Kola Olayinka after handing over the case to Kenya Immigration Authorities. The response she received was the summoning on 20/12/2000 and the subsequent pressure exerted on her to leave employment. Such conduct again persuaded Mary that BA was encouraging illegal activities in the airline business and was acting fraudulently in shifting the blame to her. To cap it all, the very fact that BA admitted that it was paying numerous heavy penalties for illegal immigrants discovered in the United Kingdom was itself proof that it was heavily engaged in that illegal business.

The line taken by the defendant in respect of the alleged implied terms was simple. It was that the written terms form the contract between the parties and there was no ambiguity or other reason to infer or imply other terms. The written contract contained nothing about trust and confidence. There was nothing in the contract that forced the Airline to keep Mary working with it until the age of 55 or 60. Either party could terminate the contract at any time and Mary did so, without any threats of dismissal or at all. Upon acceptance of the resignation, there was nothing more BA could do but to pay the terminal benefits due to the employee. As it was a voluntary resignation, it could not be withdrawn after acceptance. Nor could there be an appeal against own resignation under the regulations. In tendering her resignation, Mary pre-empted the application of the contractual procedure for disciplinary actions or dismissals and BA cannot therefore be accused of breach of such terms.

As for illegal Immigrants, Mr Onono (DW1) for BA disclosed that there were on-going investigations owing to the huge number of immigration fines imposed on BA. The majority of those incidents happened when Mary was the duty manager at the Airport. At no time ever did BA use Mary to facilitate illegal Immigrants to Britain and it never condoned such activities.

The disputed facts in respect of the second broad category emanates from the pleading and evidence by Mary that she did not voluntarily resign but rather, her services were unlawfully terminated by BA. Until the 20/12/2000, Mary was at peace with her employer who had just approved her leave. Then a cryptic one line letter suddenly brought her back to the office the following day. It simply said:

"**You are required to attend an urgent meeting tomorrow 21/12/2000 at 10.00hrs in the office of Ian Petrie CCM Kenya"**

The author was Sammy Onono (DW1) who was part of the meeting and must have known the agenda for the meeting but did not inform Mary. Mary testified that the agenda was an imputation against her of criminal activities which were detrimental to BA. That would be either a disciplinary matter or one that warranted dismissal under the terms of her employment, but the laid down procedures in that respect were not followed. She testified that her oral protestations against the accusations and the procedures adopted were ignored. Then followed her letter of "resignation" which she says was forced on her. She went into some length about the accusations leveled against her in the meeting which accusations she denied and explained. She pleaded her innocence and called for thorough investigations to be carried out. The response to that letter however, totally ignored the lengthy reference to what was discussed in the meeting. It simply accepted the resignation and told Mary about her terminal dues. Then Mary shot back with her withdrawal letter (25/12/2000) accusing the BA officers at the meeting, thus:

"**As you are aware you put me under intense pressure and immense duress giving me no time to arrive at a reasonable conclusion".**

She told them it was a "**forced resignation"**. The officers said nothing in response to those accusations. Nor was any mention made at any stage about the more elaborate letter of appeal (31/12/2000) narrating at length what transpired at the meeting on 21/12/2000 and explaining Mary's 11 year involvement with illegal Immigrant cases and her role in preventing their occurrence. Then came specific pleadings in her plaint where in three paragraphs, 10, 11 and 12 (reproduced above), Mary related what transpired at the

meeting on 21/12/2000 and pleaded a breach of procedural regulations. Again the response to that pleading was as cryptic as previous responses, or total lack of them, to Mary's protestations that there were imputations of criminal activities which she was innocent of but were not investigated. The response is also reproduced above in paragraph 11 of the defence. Only the fact of the meeting was admitted in that defence and no traverse was made of the other allegations of fact. During her evidence in chief Mary repeated the same facts, and the expectation was that she would be cross-examined on the veracity of her claims about what transpired in the meeting of 21/12/2000. Instead it was put to her that there were no written documents accusing her of any wrong doing, and that she voluntarily tendered her resignation in a huff when she learned that BA no longer had confidence in her. It was Onono in his evidence who confirmed that indeed the meeting of 21/12/2000 was for:

"**Inquiring into allegations that the company had been getting a huge number of immigration fines at the Airport. The plaintiff was called because according to her line Manager (Kola Olayinka) the majority of incidents were during her duty as manager at the Airport. She denied knowledge of what was happening"**

Beyond that confirmation however, Onono denied that Mary was forced to resign. He denied the correctness of Mary's account of what transpired in the meeting of 21/12/2000. It was a voluntary resignation, he said, which was accepted, and that was the end of the matter. In cross-examination however, Onono admitted that the accusations leveled against Mary amounted to serious misconduct, indeed criminal, and ordinarily the employee would be called in a full disciplinary forum to account for her actions. That stage was not reached however, in Onono's view, because Mary resigned. In the end, he stated:

"**I do not consider Mary's letter of 21/12/2000 as a voluntary resignation. An involuntary resignation is also a proper resignation."**

The last broad area of **disputed facts** is on consequential loss. That, of course, would only arise if liability was unheld in the first place and if the principles of the law applicable so dictate. Nonetheless, Mary testified and submitted various documents in respect of the financial losses pleaded. She wanted to be paid fully without working for the remaining 23 years until she attained the retirement age of 60. She gave evidence on the Graduate Development Programme offered by the airline, but in the end she admitted that her application to join that programme was not successful. The claim of loss of unlimited right to travel on BA aircraft to any destination turned out, by admission, not to be a right but a privilege. The reasons for suspension of Mary's Visa were never established since Mary did not respond to an invitation by the British High Commission for further discussions. Mary admitted that there was no support for the allegations that BA informed the British High Commission and other Airlines that she was involved in illegal activities. Finally there was no pleading relating defamation.

I will now examine the law before answering the issues posed above.

The Law…….

A fundamental concession was made by Mr Oyatsi on the outset of his submissions, that the plaintiff's claim was not for breach of a termination clause of an employment contract. One party in an employment contract cannot impose himself on the other and the law has always been clear that where there has been an unlawful termination of employment, the remedy available is the recovery of damages in form of emoluments payable for the notice period. That was indeed the case for the defendant, even assuming in the end, that BA wrongfully caused termination of the employment. The first line of defence, of course, was that this was a case of the employee herself terminating the contract.

The principle summarized above was stated by the House of Lords a long time ago in a case which has since been cited with approval and has been applied in our highest Court. It was **Addis v Gramophone Company [1909] A.C. 488**, where the plaintiff had been dismissed from his employment in a harsh and humiliating manner. Lord Loreburn L.C. put it this way:-

"**To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905 and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case……**

If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

There is no dispute, and therefore I will not delve into a lengthy discourse on how the principle has been applied in our courts. Suffice it to say that it has been applied in recent decisions of the Court of Appeal, for example, in **Kenya Ports Authority v Edward Otieno** Civil Appeal No 120/97 (ur) where the employee who had been prematurely retired claimed general damages for shock and distress and also sought special damages for loss of salary, medical allowance, housing allowance, leave allowance, mileage claim, telephone allowance services. The Court held that "*where a contract of service includes a period of termination of the employment the damages suffered are the wages for the period during which his normal notice would have been correct"*. It continued:-

"**We find that Mr. Otieno was not entitled in law to any of the benefits and/or emoluments claimed as above set out. As a retiree he would not be entitled to any such claims apart from his normal monthly retirement benefits. As was held by the learned Judge:-**

" **I also consider 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 re-instated to his employment, to which he is not entitled."**

We fully agree. Furthermore, in our view, Mr Otieno was no longer entitled to these claimed allowances since they are to be enjoyed by those in actual employement."

The Court of Appeal in that decision applied an earlier decision in **Rift Valley Textiles Ltd vs Edward Onyango Oganda Civil Appeal No 27/92(UR)** where the High Court awarded an employee who was summarily dismissed, twelve months' gross salary as general damages in addition to the three months' salary in lieu of notice already paid. The Court stated:-

"**We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. 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"**

So that, if I found that the plaintiff's employment was wrongfully terminated, all the law allows her to recover would be the indemnity covered by her contract of employment since, "*no account should be taken for the injured feelings of the employee by the nature of termination of his employment nor that the termination thereof renders it difficult for the employee to obtain alternative employment* – see **Kenya Outfield Services Ltd v Peter Njoroge Civil Appeal No.124/85 (UR).**

However, Mr Oyatsi puts forward a fundamental dimension to the claim. I will let him speak for himself:-

"**the main issue is whether the defendant conducted itself towards the plaintiff in the performance of the contract in such manner as to breach the trust and confidence term in the contract of employment and thereby adversely affecting the plaintiff in her future prospects. It relates to issue**

No.2 The other issues flow from it"

And after clarifying that the claim was not for breach of a termination clause of employment contract where the law is clear, Mr Oyatsi continued:-

"**This case is different. It is based on the fact that the defendant has conducted itself in a manner that literally ruins the plaintiff. The basis of the claim is Malik V Bank of credit and Commerce International S.A (in liquidation) [1997] 3 All ER 1."**

In sum the plaintiff does not merely claim damages due to the manner and nature of dismissal but on the basis of an implied term of the contract of employment which is separate and independent of the termination of the contract of employment. We must now therefore examine **the Malik case** (supra), a decision of the House of Lords which is the basis of such claim.

The Malik case…..

The brief facts can be taken from the headnote:

"**The two appellants were long-serving employees of a bank which collapsed as the result of a massive and notorious fraud perpetrated by those controlling the bank. The appellants were unaware of and had no part in the fraud. After the bank went into liquidation the appellants were made redundant by the liquidators and thereafter they found difficulty in obtaining employment in the banking field because of their association with the bank. The appellants lodged a claim in the liquidation for "stigma compensation" arising out of the fact that they had been put at a disadvantage in the employment market. The appellants appealed to the court against the liquidators' rejection of their claim, contending that it was an implied term of their contracts of employment that an employer would not conduct his business in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The Judge held on the trial of a preliminary issue that a claim for stigma compensation did not disclose a reasonable cause of action or a sustainable claim for damages because the term contended for could not be implied in a contract of employment as it was not part of that contract that the employer should prepare an employee for employment with future employers or that he should ensure that employees weren't put at a disadvantage in the employment market in the event of their employment being terminated. On appeal, the Court of Appeal held that although the employees had an arguable case that there had been a breach of the implied mutual obligation of trust and confidence the employees had no remedy as damages were not recoverable in contract for damage to or loss of existing reputation except in certain limited situations which did not apply. The Court of Appeal accordingly dismissed the appeal. The appellants appealed to the House of Lords. The liquidators contended that injury to reputation was protected by the law of defamation, that the implied obligation of trust and confidence was not breached if the employer's dishonest behaviour was directed at defrauding third parties, not the employees, and that the employee had to have been aware of such conduct while he was an employee.**

It was held, reversing the Court of Appeal:-

"**1 In appropriate cases damages could in**

principle be awarded for loss of reputation caused by breach of contract. Furthermore, provided a relevant breach of contract was established and the requirements of causation, remoteness and mitigation were satisfied, financial loss in respect of damage to reputation caused by breach of contract could be recovered for breach of contract of employment

2 An employer was under an implied obligation that he would not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, and an employer who breached the trust and confidence term would be liable if he thereby caused continuing financial

loss of a nature that was reasonably foreseeable. Thus, if it was reasonably foreseeable that conduct in breach of the trust and confidence term would prejudicially affect employees' future employment prospects and loss of that type was sustained in consequence of a breach, then in principle, damages in respect of the loss would be recoverable. The trust-destroying conduct need not be directed at the employee, either individually or as part of a group, in order to attract liability, nor was it necessary that the employee must have been aware of the employer's trust-destroying conduct while he was an employee.

3 Since the bank had promised, in an implied term, not to conduct dishonest or corrupt business the promised benefit being employment by an honest employer which benefit did not materialize the appellants were entitled to damages if they proved that they were handicapped in the labour market in consequence of the bank's corruption."

Both Mr. Oyatsi and Mr. Kiage dwelt at length on the various speeches of the Law Lords in that decision to support their rival contentions, and I have considered their submissions. It must be said on the outset that the **Malik Case** was unique in that it did not arise from the actual trial in the lower courts but went up to the House of Lords on the basis of assumed but agreed facts to be applied to the preliminary issue of law raised by the parties. These assumed facts were that:

Ø The Bank operated in a corrupt and dishonest manner.

Ø The employees were innocent of any involvement.

Ø Following the collapse of the Bank, its corruption and dishonesty became widely known,

Ø The employees were at a handicap on the labour market because they were stigmatized.

Ø The employees suffered loss in consequence of the stigma.

Ø The contracts of employment contained an implied term to the effect that the Bank would not, without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer/employee.

It was on the basis of those facts that the House of Lords came to the conclusion, inter alia, that in a contract of employment, there is an implied obligation on an employer not to carry on a dishonest or corrupt business. If there is a breach of that obligation as a result of which an employees' future employment prospects are handicapped, damages may be recoverable for financial losses sustained. The facts in the case before me, however are a far cry from the assumed facts in the ***Malik case*** although Mr Oyatsi made a gallant attempt to assert that they were on all fours. For one, I do not make the finding that BA was conducting the nature of business BCCI was conducting on a day to day basis – that is, dishonestly and corruptly. The isolated cases of illegal immigrants ferried in the airline and discovered despite evident efforts at prevention do not characterize the airline as a thoroughly corrupt and dishonest business. Secondly, the Law Lords themselves were skeptical about the practical application of what they concluded was an entitlement of an employee in law. ***Lord Steyn*** concluded his speech as follows:-

"**the implied mutual obligation of trust and confidence applies only where there is no reasonable and proper cause for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation. Moreover, even if the employee can establish a breach of this obligation, it does not follow that he will be able to recover damages for injury to his employment prospects. The Law Commission has pointed out that loss of reputation is inherently difficult to prove:**

It is, therefore, improbable that many employees would be able to prove "stigma compensation". The limiting principles of causation, remoteness and mitigation present formidable practical obstacles to such claims succeeding. But difficulties of proof cannot alter the legal principles which

permit, in appropriate cases, such claims for financial loss caused by breach of contract being put forward for consideration."

Perhaps that is why Mr Oyatsi did not refer me to the sequel to the **Malik Case, BCCI v ALI & Others (No 2) [2002] 3 All ER 750** where several former employees of BCCI, encouraged by the House of Lords decision, filed their claims for compensation which claims were dismissed by the High Court. On appeal to the Court of Appeal, they contended that their financial loss should necessarily have been inferred from the evidence of corruption and the widespread publicity given to it, or failing that, from the evidence of the employees' failed job applications. It was held, inter alia, dismissing the appeal:

Ø The onus was on the claimant to prove on a balance of probabilities that the breach of the trust confidence term had caused the failure to obtain employment.

Ø Causation had to be proved and in a stigma case the defendant was entitled to subject the claims to a job-specific exercise.

The above decisions are of course purely persuasive and must be considered in the context of the special circumstances obtaining in Britain.

As a general proposition, I would agree with Mr Oyatsi that there is an implied term of trust and confidence in every contract of employment. It is only logical that if, as is a well established principle, the employee owes a duty of loyalty and faithfulness to the employer, then there must be a corresponding environment of trust and confidence between the two to enable the contract to be performed. Indeed when this proposition was put to Mr Onono, he readily accepted it. But as a principle of common law, it only emerged in the late 1970s and 1980s in response to a ***lacuna*** in British legislation which was put in place to address the ravages of common law principles restated in the **Addis Case** (supra). A machinery for safeguarding employees against unfair dismissal was put in place. That was in the Industrial Relations Act enacted in 1971, the Employment Rights Act 1996, and an Employment Appeal Tribunal to operationalize the Act. The principle therefore became an adjunct in unfair dismissal cases brought under those Acts.

As Lord Nicholls of Burkenhead stated in **Eastwood v Magnox Electric [2004] 3 All ER 991 at pg 996:-**

"**This term, implied as a legal incident of employment contracts, provides the means by which an employee who resigns in response to outrageous conduct by an employer may obtain redress. Such conduct is a breach of a fundamental term of the contract of employment, and an employee who accepts this breach as a repudiation of the contract by the employer is 'constructively' dismissed by the employer. The employee can, accordingly, make a complaint of unfair dismissal to an employment tribunal."**

Our **Employment, Act** (Cap 226 laws of Kenya) which was enacted in 1976 to "***consolidate, with amendment, the law relating to employment and for matters incidental thereto and connected therewith***", did not find it necessary then, nor has Parliament since then found it necessary, to address the ravages of the common law principles in the **Addis Case**. Evidently, the common law development in Britain has grown in tandem with Statute, and to that extent I would agree with Mr Kiage that the Court decisions flowing from that jurisdiction are coloured by their peculiar environment and are not applicable in our local circumstances. That includes The ***Malik case*** which is the basis of the plaintiff's claim. At all events, even if I had found it persuasive to apply that principle under the common law, it is my view that the plaintiff has not satisfied the restrictive circumstances within which the principle would apply.

The Issues……

I must now advert to the issues and answer them on the basis of my understanding of the law and the facts which I have attempted to analyze above.

ISSUE NO.1:

The terms of the contract of employment are contained in the letter of appointment dated 01/04/1989 which is reproduced in relevant parts in this judgment.

ISSUES NO 2, 3 & 4

These may be conveniently answered together. Other than the general propositions stated above those of honesty and faithfulness, trust and confidence - that must obtain between an employer and employee for their mutual benefit there was no actionable "**trust and Confidence"** implied term of the contract.

ISSUE NO 5

No. Even if there was, the plaintiff has not proved the assertion.

ISSUE NO 6

Yes

ISSUE NO 7

The salary was shs. 133,627

ISSUES NO 8,9, & 10

These may be answered together. There was no evidence of nomination by the defendant but there was an admitted application made by the plaintiff which was not successful. The Programme was non-contractual and therefore unenforceable. Consequently, it would be speculative to express a view on the chances of promotion.

ISSUES NO 11, 12, 13, 14 & 16

These relate to the meeting on 21/12/2000 and the circumstances leading to termination of the plaintiff's employment. They will be answered together.

The meeting was unduly couched in mystery by the defendants. They knew when they called the meeting that it was for interrogation of the plaintiff on allegations of illegal immigrants which was an issue that was prejudicial to the airline's reputation, efficiency or interests. They knew that under the contract between the airline and the plaintiff, the issue was expressly addressed and the procedure for resolving it spelt out. On the evidence, the procedure set out was not followed, under the pretext that it was pre-empted by a "resignation". There is no reference to "**Resignation"** in the contract between the parties. What is provided for is "**termination of the employment**" by either party upon giving requisite notices. It is in the letter of appointment and in executive regulation 28. The plaintiff did not terminate her services in accordance with those provisions. The document relied on as a "resignation" is therefore of no legal effect as it is outside the contractual terms. Nay, it is less than that. On the evidence, which I accept, it was extracted from the plaintiff in a most draconian manner. At short notice she was called out of her leave only to be confronted with a monster of hidden agenda – the agenda of sacking or forcing her

resignation from employment. At the meeting in oral representations, soon after the meeting in written letters, and in her pleadings, all of which are analysed above, the plaintiff persistently protested against the manner she was treated by the defendant's officials and invoked the written terms of the contract between the parties. Surprisingly the officials against whom those claims were made and the defendant, maintained studious silence and indeed deliberately avoided direct response to those accusations. I am satisfied that the truth on what transpired at the meeting on 21/12/2000 lies with the plaintiff. She was not given an opportunity to defend herself. There were unproven, and on the evidence, false or exaggerated allegations, made against her. There were threats made against her continued employment, and demands for surrender of airline property. In sum, she was treated badly, and contrary to procedure, by an employer who should have known better. There was no valid resignation.

ISSUE NO 18

No. The contract of employment was not properly terminated. On the contrary, it was wrongful.

ISSUE NO 19

No it was not. The payment of one month's salary and terminal benefit is not explicable under the terms of the contract between the parties.

ISSUE NO 20

In view of the answer to the proceeding issues, this issue does not arise.

ISSUES NO 21& 22

There was no representation or warranty as pleaded in paragraphs 21 & 22. The terms of the contract were express. There is no evidence that the plaintiff would not have taken up the employment if it was not for those express terms. There is no evidence of fraud in accordance with the particulars pleaded in the paragraph 24 of the plaint.

ISSUE NO 23 & 24

NO

ISSUE NO 25 & 26

In view of the principles of law analysed above, the particulars of loss pleaded in paragraph 27 of the plaint are incapable of grant. Nor, on the facts, are the general damages sought for fraud, misrepresentation breach of warranties, loss of reputation and restriction of movement in the sum of Shs 10 million.

Conclusion…….

My finding on the facts is that the plaintiff's employment with the defendant was wrongfully terminated. There is no doubt that the plaintiff feels that the manner of termination was most contumelious, coming as it did after 11 years of acknowledged exemplary services to the airline. She has suffered financial loss and will continue to do so until she fully mitigates it. But the law is very clear that the contract of employment cannot be enforced by specific performance, else it would be servitude. The law is also clear on what damages are payable to an employee whose services are terminated in whatever manner which is outside the contractual terms. It is the amount she would have been paid if the contract was lawfully terminated. On the facts she was entitled to three month's notice or payment of equivalent salary in lieu.

The monthly salary in my finding was shs.133,627. I give judgment accordingly for the sum of Shs.400,881 (133,627x3), in damages together with interest thereon at court rates from the date of filing suit until payment in full. The rest of the plaintiff's suit is dismissed.

Costs would normally follow the event unless the court for reasons stated, orders otherwise. Although the plaintiff has been unsuccessful in her main prayers, it is my view that her decision to seek the intervention of the court was provoked by the defendant's conduct which I have already found wanting. The defendant had nothing to lose if it had simply complied with the law and the terms of the contract of employment and terminated the plaintiff's services if it did not require them any longer. They should otherwise have had her prosecuted if they believed she had committed any actionable offence or offences against the airline. The defendant, I take judicial notice, is a reputable international airline and ought not to have unduly flexed its muscle, as it were, against a simple employee who had given it 11 years of acknowledged exemplary service. For those reasons, I decline to give an order for costs against the plaintiff. I order that the defendant shall pay costs on the sum of shs.400,881, judgment for which I have entered in favour of the plaintiff.

FINALLY……

It remains for me to make the following statements; Firstly, I thank both learned counsel Mr Oyatsi and Mr Kiage for their industry in research and for their erudite submissions. If I did not specifically refer to the authorities cited or the submissions made, it was not out of any disrespect or because I did not consider them. I also thank the parties for their patience. Secondly, this matter was mentioned before me on 30/11/05 in view of the delay in delivering the judgment. The delay was explained to both parties who were present and an option was given for having the matter heard de novo before another judge. The parties however opted to have the judgment written by me on the basis of the evidence already on record and I proceeded to give an order for delivery of judgment today. Thirdly this judgment is written pursuant to **section 64(4)** of the Constitution of Kenya.

Dated and delivered at Nairobi this 3rd day of February 2006.

P. N. WAKI

JUDGE OF APPEAL