



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 73 of 2001

DR R. VENKATASAMY.....PLAINTIFF

versus

MOI UNIVERSITY.....DEFENDANT

JUDGMENT

The plaintiff Dr R Venkatasamy filed a plaint against the defendant Moi University dated 12th April 2001, through M/s Machio Company Advocates. He averred in the plaint that he was employed by the defendant as a lecturer in the Department of Woods Science Technology on a two year renewable contract basis subject to the Regulations as set out in the terms of service for Academic, Senior Library and Administrative staff of Moi University, around 1990. His contract was extended from time to time until 17th February 2000. He averred in paragraph 6 of the plaint that in breach of the terms of service Academic, Senior Library and Administrative staff, the defendant, on termination of his contract failed to pay:

- (a) the plaintiff and his spouse the cost of free passage and permissible baggage charges for:-
 - (i) the two years contract inning from 5th May 1997 to 5th May 1999 and for
 - (ii) the nine months and 10 days contract running from 6th May 1999 to 17th May 2000.
 - (iii) Housing allowance for the period from 16th November 1999 to 17th February 2000.

He therefore prayed for judgment against the defendant for air passage for himself and his spouse, as claimed above, house allowance, as well as general damages and costs.

The defendant filed a defence dated 17th May 2001 through M/s Yano & Company Advocates, denying the allegations in the plaint and putting the plaintiff to strict proof thereof. The defence also averred that the plaint was defective and that the court did not have jurisdiction. The defendant in the defence also reserved its rights to make a counterclaim. The defendant subsequently filed a written statement of defence and counterclaim dated 16th June, 2001. In the counterclaim the defendant averred that:-

- Sometimes in or about 2nd January 1991, the plaintiff requested the defendant to pay on his behalf an amount of 3009.30 which the defendant duly paid on his behalf; and the same were payments of sea and freight charges of some goods (equipment). The plaintiff also between 1991 and the year 2000 requested for and obtained two (2) tickets, one for himself one ostensibly for his wife, and that, although provision

existed in the contract of employment for the plaintiff to be given one ticket for himself and also one for his spouse, the said spouse never came to Kenya and the defendant incurred expenses in air tickets for a person who never came to Kenya, at the plaintiffs instigation more and better particulars of which were within the plaintiffs knowledge.

- The said payment (for equipment) were effected on the basis that the plaintiffs would donate the said equipment to the defendant later, but that the plaintiff never honoured the said pledge to donate the items to the defendant.

The suit was heard before Hon. Justice Etyang at Eldoret and, in February, 2003, the Hon. Judge reserved judgment. However, before judgment was delivered, the file appears to have been misplaced and Justice Etyang ceased to be a judge at Eldoret. Parties initially agreed that the case should commence for hearing a fresh and the plaintiff partly testified before me. However, on 21st September, 2005, I was informed that the original file had been traced. Subsequently, the parties agreed under Order 17 Rule 10 of the Civil Procedure Rules, that I should proceed to deliver judgment on the basis of the evidence tendered and submissions made before Hon. Justice Etyang.

In support of his case, the plaintiff testified as PWI. He also called one other witness. The defence called one witness, who testified. After the close of the plaintiffs and defendant's case, both counsel for the parties made submissions to court, in support of their respective client's cases.

In brief, the evidence of PWI Dr. Rama Krishna Venkatasamy, the plaintiff, was that he was appointed by the defendant as a lecturer in the Department of Wood Science, Faculty of Forest Resources and Wildlife Management. Though the letter of appointment was dated 26th May 1989, and he accepted the offer by signing on 28th May 1989, the appointment was effective on 5th May 1990. He produced the letter as exhibit P1. In that letter, his home was described as "**278 Fawcett Road, Portsmouth Town England**". The appointment was for a term of two years renewable by mutual agreement. The salary was Kenya ? 5400 per annum.

After he took up his appointment, he signed a revised letter of appointment, on 7th August 1990 which he produced as exhibit P2. The revision in this letter was that the salary was adjusted to Kenya ?5940 per annum. His evidence was that in accordance with the letters of appointment, his appointment was subject to the Moi University Terms of Service for Academic, Senior Library and Administrative Staff' of which he produced the version of 1989 as exhibit P3. He sought to rely mainly of clause 10 of the terms of service, which covered travel arrangements between London and Moi University (Eldoret) for himself, his spouse and children, as well as for payment of baggage. It was his evidence that the money for travel and baggage was payable on his first appointment between his home town and Eldoret, and also at the end of the contract.

He testified that the first contract of service expired on 5th May 1992 and was renewed for three years upto 5th May 1995. He had no complaints on these two contracts of service. At the end of each of these two contracts of service the defendant paid for two return tickets, one for himself and one for his spouse: His contract of service was again renewed for a further term of two years from 5th May 1995 to 5th May 1997. He also had no complaint on this 3rd contract of service. The contract of service was renewed for a fourth term to the end of May 1999. At the end of this contract of service, he did not travel to England because he was not free to do so. Therefore he rescheduled his travel to the month of December 1999.

In the meantime, by a letter dated 12th April 1999 he applied for extension of his contract. Though he did not receive a letter of renewal of contract of service, he assumed that the contract of service had been renewed as he continued working and also continued receiving salary from the defendant. However, on 16th November 1999, he received a letter from the defendant informing him that the defendant had decided not to renew his contract of Service and that his last working day was the same 16th November, 1999. The same letter informed him that he would be paid three months in lieu of notice, in accordance with a clause 26A of the terms of service. That letter did not mention anything to do with payment for his travel expenses. He contended that the letter of 16th November 1999 did not state expressly that he was working on the same terms of service that applied to him previously. However his payment of salary (for

the extended period) were on the same terms of the previous contracts of service. He was also paid three months salary in lieu of notice. His complaints against the defendant were that:-

1. for the period of contract ending 5th May 1999 the defendant did not pay for his travel expenses in accordance with the terms of service.
2. at the end of the short term contract from 6th May 1999 to 17th February 2000, the defendant did not pay him his travel expenses. Instead he was issued with one air ticket on 31st May 2000. He therefore claims an air ticket for his wife as she was not required to be resident in Kenya to be entitled to air travel expenses.
3. he was paid three months salary in lieu of notice. However he was claiming three months house allowance in lieu of notice, which he had not been paid.
4. there was also a delay by the defendant up to May 2000 to finalize payments to him. The defendant also delayed in finalizing Income Tax and National Social Security Fund clearances. The plaintiff therefore asked the court to take these matters (of delays) into account in determining what the defendant should pay him.

In cross examination he denied that he had separated from his wife prior to 1989, He stated that, if he did not travel at the lapse of the 4th contract of service, he would not be entitled to payment for air travel. He did not travel to England at the end of the contract of service (ending 5th May 1999), because no air ticket were issued to him. He stated that he was born in Mauritius and used to travel there often. He denied using the defendant's miscellaneous credit orders with his wife to travel to Mauritius. He denied conniving with officials of Kenya

ys Ltd to cash the defendant's miscellaneous credit orders. He insisted that his contract of service was governed by the terms of service of July 1989 and not the 1st November, 1997 edition of the terms of service. He emphasized that his signature in August 1990 was to be bound by the terms of service of 1989. He was not aware of clause 10 of the terms of service dated 1st November, 1997. He contended that it was incorrect to say that he was only entitled to payment of three months salary in lieu of notice and not any other allowances. He denied running a business in Eldoret town. He could recall that he had requested the defendant to clear some equipments to be used in the Department of Wood Science and Technology. He intended to leave the equipment with the defendant. However, the defendant failed to pay for freight charges. The defendant only paid for storage charges. The defendant paid storage charges to Pickford Removal Ltd of UK and had not put any claims to him in respect of the materials. He admitted that he made a claim for payment for gynaecological expenses incurred by his wife, but the defendant refused to pay. He denied making any fraudulent claims.

The evidence of PW2 Chirchir Kipchumba was that he worked for Eldoret Travel Agency Ltd. He knew or was able to get published air travel rates. His evidence was that members of staff of Moi University Eldoret were their customers both for domestic and international flights. He knew that the cost for direct flights (one way) economy class ticket from Nairobi to London, inclusive of tax, was Kshs.51,265/=.

In cross examination he stated that they got the air ticket rates through the International Air Transport Association (IATA) computer network. He did not know how much a one - month duration ticket from Nairobi - London would cost, but it would be cheaper than one year open ticket. That was the close of the plaintiffs case.

The defence called one witness who was Odhiambo Onyango (DW1). His evidence was that he was a Senior Administrative Officer with Moi University. He knew the plaintiff since 1990. He testified that when the plaintiff joined the University in 1990, the terms of service applicable were those of 1989. When the plaintiff's services were terminated, there were new terms of service issued in November, 1997 which were applicable. The last contract of the plaintiff expired on 5th May 1999, though he continued working until November 1999. Since the contract of service of the plaintiff, which had expired in May 1999 was extended, he was not entitled to a two way air ticket for home leave. Clause 10 of Exhibit P1

provided that for expatriate staff on first appointment were entitled to one way air ticket for themselves and members of their families upto 5 adult dependants. Such expatriate staff were also entitled to a return air ticket for themselves and family for home leave between two contracts. The University did not pay money to the employee. It was his evidence that the plaintiff would not have been entitled to a return air ticket in 1999 because the University had not decided to renew his contract.

He testified also that the plaintiff gave the name of his wife, which was recorded in the file. However, the University did not have proof that the said wife was ever in Kenya or that she existed at all. In any event, the University did not have to pay for the plaintiff's wife, since she was not in Kenya.

After the plaintiff stopped working for the University in November 1999, he was given a one way air ticket to travel back home. He was also entitled to payment for the cost of his baggage transport to his home as well as gratuity of 30% of his annual salary, as well as three months salary in lieu of notice. The University was not obliged to pay the plaintiff housing allowance after the non-renewal of the contract.

He was aware that the plaintiff had made a claim for refund of medical expenses of Kshs.9,750/=, which was not paid by the University. This was because the University had an arrangement with a Dr. Muhia to attend to University staff, while the plaintiff went to a different doctor. In his opinion, if the plaintiff's claim for medical bills was genuine, then he would not have abandoned the same. He was not aware that plaintiff had been given any offers of employment in Kenya or elsewhere.

He was aware that the plaintiff intended to bring into Kenya some teaching aid equipment and there was correspondence between him and the University on this equipment. The University was to pay for freight of ?3009/30, which they paid. The plaintiff then claimed ?100 for the items and was refunded by the University. However, the subject computers and other teaching aids were not brought to Kenya.

On air tickets, he testified that though some air tickets were bought for the plaintiff's wife, she never came to Kenya. The plaintiff used to convert the air tickets to miscellaneous credit orders and use the same on private journeys which the University would not have paid for. Therefore the University was claiming for a refund of these expenses.

In cross-examination, he testified that the terms of service referred to in the letters of appointment and renewals of contracts of employment for the plaintiff are the terms of service of 1989. He agreed that the acceptance by the plaintiff constituted a contract of service. Even for the contract running up to 5th May 1999 the terms of service published in 1997 did not apply to the plaintiff. Even the letter of renewal of contract dated nth February 2000 for the period 6th May 1999 to 16th November 1999 applied the same terms and conditions of 1989, as there was no reference to the terms of 1997.

He conceded that there were delays in the University paying for air tickets. There was a delay in the plaintiff getting air tickets at the end of his contracts. He was aware that the plaintiff's address when he was employed, was Portsmouth, England. The plaintiff was entitled to unaccompanied baggage by air of 175 kilograms. The equipment that the plaintiff wanted to send to the University was not part of his employment contract.

He testified that though the plaintiff's contract was not based on the 1997 terms of service, the letter of termination (dated 16th November 1999) applied the 1997 terms of service. He also stated that, in accordance with the exhibit P3, there was no requirement that the plaintiff's wife had to be in Kenya before the plaintiff could be issued with two air tickets.

He also stated that the University had not requested the plaintiff to refund any money relating to air tickets issued to his wife.

In re-examination, he stated that it was necessary for the plaintiff to prove the existence of his wife and the marriage before he could be issued with air tickets to cover travel for the wife. The plaintiff did not report the presence of his wife in Kenya to the University or its agents for issuance of air tickets for her. Where a lecturer did not go home for leave, he forfeited the entitlement of air tickets at the expiry of 6

months from the commencement of leave. The value of air tickets was not convertible to cash. At the time of termination of service, the plaintiff was not entitled to home leave. That was the close of the defence case.

At the end of the case for the plaintiff and the defence, counsel for the parties made submissions. Mr. Machio for the plaintiff submitted that the plaintiff's appointment was in accordance with the terms of service dated 1st July 1989 (exhibit P3). The plaintiff accepted those terms. Thereafter, the contract of service was renewed from time to time on the same terms. However, the letter of termination of service dated 16th November, 1999 (exhibit P7) referred to clause 26(a) which did not exist in exhibit P3. That clause 26(a) is only found in the terms of service of 1st November 1977 (exhibit D1). The plaintiff was not bound by the terms of service in that document.

Under the terms of service of 1989, which were applicable to the plaintiff, the defendant was bound to provide the plaintiff and his spouse air tickets from Eldoret to his home in Portsmouth England. The defendant should also pay the plaintiff house allowance I lieu of the three months termination notice period. He contended that the defendant did not even pay the plaintiff the three months salary in lieu of termination notice. The defendant was also to have paid the plaintiff his gratuity.

By the conduct of the defendant, the plaintiff had been put to inconvenience and expense and was therefore entitled to general damages. He sought to rely on the case of CPC Industrial Products (K) Ltd vs Omweri Angima Civil Appeal No 197 of 1992 (unreported). He also relied on the High Court Case of Joseph Keriri & Joshua Gitau vs KCC Ltd - Eldoret HC Civil Case No. 62 of 1990 - where general damages of Kshs.200,000/- were awarded due to the manner in which the plaintiff's services were terminated through telephone. He further sought to rely on the case of Southern Highlands Tobacco Union Ltd - vs - David McQueen [1960] EA 490. He contended that in our present case the conduct of the defendant made the plaintiff unable to leave the country so as to mitigate damages by trying to get a job.

Mr. Machio also submitted that there was also a claim for loss of career which could not be quantified and was therefore a claim in general damages. He sought to rely on the case of E.A. Airways - vs - Knight [1975] EA 165.

Mr. Obwatinya for the defendant submitted that the case was on alleged breach of a contractual arrangement. Any payments to be made could only arise from the terms of the contract. He contended that there was no evidence of renewal of contract (after 5th May 1999) as the contract dated 12th April 1999 was never signed by the defendant, nor was there a letter of renewal. The plaintiff chose to continue to work without committing the defendant. The defendant could not therefore now be called upon to adhere to the terms of contract for a period when there was no contract in place.

On payment for air tickets, the plaintiff's wife did not reside in Kenya so she could not be given an air ticket. Any actual payment for air tickets which was done on account of the wife of the plaintiff was actually fraudulent.

The plaintiff was not entitled to general damages as this was a contractual matter.

He asked the court to find in favour of the defendant as pleaded in the counterclaim. The counterclaim would cover air tickets issued for the plaintiff's wife, as well a ?3009 which the plaintiff defrauded the defendant for equipment and sea freight for the equipment. He contended that the plaintiff was only entitled to three months salary in lieu of notice. He sought to rely on the case of Kenya Ports Authority - vs - Edward Otieno Civil Appeal No. 120 of 1997 (unreported) for damages payable in cases of breach of contract of employment.

I have considered the case, the evidence tendered and the submissions of both counsel for the parties. In my view the issues that require my determination are:-

1. whether there was a contract of service between the plaintiff and the defendant?

2. what were the terms of that contract of service?
3. whether the defendant breached the terms of contract of service as alleged?
4. Whether the plaintiff is entitled to the reliefs sought?
5. Whether the defendant is entitled to the counterclaim?
6. Who will bear the costs of the suit?

I now go to the first issue. Was there a contract of service between the plaintiff and the defendant? Evidence has been tendered and documents produced as exhibits.

There is no dispute that the plaintiff was offered a job by the respondent and he accepted the offer. He was initially sent a letter of appointment signed by the acting Chief Administrative Officer of the defendant dated 26.5.1989. The offer was for appointment for a term of two years as a lecturer in the Department of Wood Science and Technology Moi University from the date he would report for duty. He accepted this appointment by signing on 28th May 1989. This letter was produced as exhibit P1. It specifically states that the contract was renewable on mutual agreement. This letter was revised by another letter from the acting Chief Administrative Officer of the defendant dated 7th August 1990 which was produced as exhibit P2. The revision was the salary which changed from Kenya ₱5400 per annum to Kenya ₱5940 per annum. This contract of service for two years was renewed by a letter dated 5th May 1992. The renewal was for a period of 3 years from 5th May 1992. This letter was produced as exhibit P4. Another renewal was done vide letter dated 1st July 1997 for a period of two years from 8th May 1997. This letter was produced as exhibit P5.

Basically, it is agreed in the evidence of both the parties that there were renewable contracts of service entered into between the plaintiff and the defendant and that there was no break of service from the time that the plaintiff reported to work, up to 1999. However, the contracts of service were based on short term periods of two or three years contracts. When the contract was about to expire in May 1999, the plaintiff applied for renewal of contract for two years. He did not receive a response from the defendant on the due date for its renewal, which he put at 5th May 1999. He, however, continued working and the defendant continued to pay him up to November, 1999 when he was informed in a letter from the defendant dated 16.11.1999 that his request for renewal of contract for a further period of two years had not been approved. He was informed in the same letter that his last working day would be 16th November, 1999. This letter was produced as exhibit P7. Then a letter dated 8th February 2006 produced as exhibit P8 informed the plaintiff that his contract was renewed from 6th May 1999 to 16th November 1999. It also informed him that the terms of this contract renewal would be the same as the previous expired contracts of service.

From the evidence on record, it is my finding that, indeed, there was a contract of service between the plaintiff (as employee) and the defendant (as employer). There is no dispute on this between the plaintiff and the defendant. The said contract of service was on short contract terms of two and three years ending on 5th May 1999. There was also a renewal for a further period from 6th May 1999 to 16th November, 1999.

I now turn to the second issue. What were the terms of contract of service? According to the first letter of appointment of the plaintiff dated 26th May 1989 (exhibit P1), the terms of service were described as follows:-

“Your salary will be Kenya ₱5400 per annum in the salary scale II as shown in schedule II of the terms of service document. You will be eligible for subsidized housing, free medical treatment for yourself and your dependants in accordance with the regulations set out in the Terms of Service document which, together with this letter shall constitute the a contract of employment between yourself, and the University.”

The terms of service document is not identified or described in the letter of appointment. However, according to the evidence tendered for both the plaintiff and the defence, it is agreed that the terms of service document referred to was the document entitled Moi University Terms of Service for Academic, Senior Library and Administrative Staff dated 1st July 1989, which was produced in court as Exhibit P3. All the letters of renewal of contract of service refer to and apply the terms of service mentioned in the letter dated 29th May 1989. Though there were other terms of service made by the defendant in November 1997, and which the defendant's witness initially claimed to be applicable to the plaintiff, in cross examination he stated that the terms of service applicable to the plaintiff in terms of all the letters of appointment and renewals of appointment were those of July 1989. It was only the letter dated 16th November 1999, on termination of service, which referred to a clause 26(a) of the terms of service dated 1st November 1999.

I have perused that letter. It does not state that the terms of service of 1.11.1997 applied to the defendant. It is therefore my finding that the terms of service (revised edition) of the defendant dated 1.11.1997 did not apply to the plaintiff as the same were never communicated to him during his service, for him to agree to be bound by them or otherwise. It is therefore my finding that the terms of service of the defendant applicable to the plaintiff were those of 1st July 1989 and not those of 1st November, 1997.

I now turn to the third issue for determination. Did the defendant breach the terms of service between it and the plaintiff? According to paragraph 6 of the plaint the alleged breach of the defendant is averred as follows:-

"6. That in breach of the terms of service for Academic and Senior Library and Administrative staff the defendant failed:-

(a) to pay the plaintiff and his spouse the cost of free passage and permissible baggage charges for:-

(i) the two years contract running from 5th May 1997 to 5th May 1999 and for

(ii) the nine months and ten days contracting from 6th May 1999 to 17th February 2000.

(iii) to pay housing allowance for the period from 16th November 1999 to 17th February 2000.

In the reliefs sought from the court, the plaintiff claimed, in addition to the above items, general damages and costs. The defendant, in its defence and counterclaim dated 16th June, 2001 denied the allegations of breach of contract in paragraph 6 of the plaint and put the plaintiff to strict proof thereof.

The plaintiff and the witness for the defendant (DW1) testified in court. Though the plaintiff alleged breach of contract by the defendant, the defendant denied that it breached the terms of contract. If I understood the witness of the defendant well, he stated that the defendant did not pay for the cost of free passage of the plaintiff for the contract of service period running from 5th May 1997 to 5th May 1999 because the plaintiff did not take leave at the end of contract in May 1999. His contention was that the plaintiff was not entitled to the free passage, as he did not take leave. As for the renewal of contract from 6th May 1999 to 16th November 1999, the plaintiff was entitled to only a one way air ticket back home, which was processed, though a bit late. The witness also stated that the defendant did not pay for the cost of free passage for the spouse of the plaintiff since there was no evidential proof of the existence of that spouse, or a marriage, nor was there proof that that spouse had come to Kenya. As for housing allowance for the period 16th November 1999 to 17th February 2000 the defendant's witness's evidence was that the house allowance amount was not payable, in accordance with the terms of service. What was payable was merely three months basic salary in lieu of notice, and not house allowance.

The determination of the issue of the alleged breach of the terms of service by the defendant turns on the interpretation of the terms of the contract of service. The contracts of service of the plaintiff were entered into by way of letters, which were written by the defendant. I have already found that those letters applied the 1st July 1989 Terms and Conditions of Service, for Academic, Senior Library and Administrative Staff (terms of service). I have perused the said document on the terms of service. I have also considered the

evidence tendered before me in court. The allegations of breach of contract are in the plaint. They were listed in paragraph 6 of the plaint, which I have reproduced earlier in this judgment. From the evidence of both the plaintiff and the defendant, it is not disputed that there was a contract of service entered into between the plaintiff and the defendant from May 1997 to 5th May 1999. This is one of the contracts of service that the plaintiff claims a breach by the defendant.

It was a renewal from some three previous contracts of service on which there are no issues in dispute. It is not disputed that the plaintiff also continued working from 6th May 1999 to 16th November 1999, and was paid by the defendant on the same terms as previously. Though the plaintiff seems to suggest that the contract of employment extension from 6th May 1999 was upto 17th February 2000, it is my view that that is a wrong interpretation. The 17th February 2000, was approximately three months from 16th November 1999, for which the defendant would pay three months salary to the plaintiff in lieu of notice. It is my finding that to the extent that the defendant violated its terms and conditions of service edition of 1st July 1989 as applied to the plaintiff, then it was in breach of contract of service.

I now turn to the issue whether the plaintiff is entitled to the reliefs sought. I will start with the claim for free passage and baggage. Were the terms of contract regarding the plaintiffs and his spouse' free passage and permissible baggage charges breached by the defendant? The plaintiff was appointed from outside Kenya. That is agreed in the evidence both for the plaintiff and the defendant. His entitlement to free passage and baggage allowances is covered under Clause 11 of the 1st July 1989 terms of service (exhibit P3). The relevant part of Clause 11 provides:-

“11(b) staff appointed from outside Kenya, and who are non-Kenyans will be eligible for;

(i) on first appointment and on termination of appointment, the actual cost of free passage and also the actual cost of permissible baggage charges subject to the member of staff's entitlement as shown in Schedule IV(iii) of these terms.

(ii) On vacation after every three years:

- actual cost of free passage to his home.

- One way allowance of up to 20 kg excess baggage at accompanied baggage rate when the baggage allowance on the flight used to 20 KG.

The schedule IV(iii) which is referred to, provides for the details of entitlement of passage and baggage allowances on first appointment and termination of appointment for those staff appointed from outside Kenya. The levels are described as upto 5 adult Economy Air fares for passages; and 175 kg by air as unaccompanied luggage, or equivalent cost by sea.

Clause 10 of the Terms of Service has definitions of “home”, “free passage” and “permissible baggage charges”. The definitions are as follows:-

“Home” shall mean the nearest place that can be reached by schedule transport service to the place defined as “Home” in the Letter of Appointment.

“Free passage” shall mean the cost of travel by the most direct route between “Home” or other place approved by the Chief Administrative Officer and Eldoret or vice versa for the member of staff, his wife and children upto the equivalent of five economy class airfares.

“Permissible Baggage Charges” shall mean the cost of any of the following in respect of personal effects:

Parking (including crates), collection, storage, delivery insurance, freight be handling, dock charges and dues.”

It is clear from the above provisions of the terms of service, that the plaintiff and his spouse would be

entitled to free passage. The plaintiff's claim is limited to passages for himself and spouse. The plaintiff has not claimed for free passage for children, though, if there were children, they could as well be eligible for free passage. According to the terms of service, the plaintiff was entitled also to permissible baggage charges entitlement, The plaintiff claims that he should have been given by the defendant two air tickets (for himself and spouse) and baggage entitlement at the termination of his contract in May 1999. He should also have been given the same benefits at the end of the short term contract extension for the period from 5th May 1999 to 16th November 1999. The defendant's position is that the plaintiff was not entitled to the passage and baggage allowance for the contract that expired in May 1999 as he did not proceed on leave. He was only entitled to one way passage and baggage benefits at the end of the short renewal of contract which termination in November 1999, because he would have gone to the home station. In addition, the defendant contends that, though the defendant previously paid for the plaintiff and his spouse's air travel, that spouse of the plaintiff neither existed nor came to Kenya. Therefore the defendant was not liable to pay for the passage of that spouse, who was not in Kenya nor was there evidence that she existed.

The letter of appointment of the plaintiff did not mention anywhere in its contents about free passage and baggage allowances. However, it mentioned that the Terms of Service would form part of the contract of service. The terms of service applicable to the plaintiff were those of 1st July 1989. I have already held that the said terms of service were applicable throughout the contract of service. Therefore the stipulated terms of service therein on free passage and allowances for baggage were applicable.

It is clear to me that on first appointment, an employee appointed from outside Kenya is eligible for free passage and permissible baggage allowance. This is provided for in Clause II(b)(i) of the terms of service, which I have already reproduced above. Free passage is defined in Clause 10 to include spouse and children upto the equivalent of five economy class air fares. Free baggage is defined in clause 11(b)(i) and schedule IV(iii) as a maximum of 175 kgs by air as unaccompanied baggage. The free passage home is in two classes. Firstly, it is applicable on termination of appointment per clause 11(b)(i). Secondly, it is applicable on vacation every three years. The only difference applicable to the vacation situation is that the baggage allowance is limited to 20 kg excess where the maximum allowable accompanied luggage by air is 20kg. This difference means that for vacation, baggage passage applies to accompanied luggage with a maximum of 40 kgs. On the other hand for appointment and termination of appointment the maximum baggage is 175 kg as unaccompanied luggage. However, the vacation entitlement to free passage and baggage clause does not apply to the plaintiff in our present case.

In my view, when the contract of service lapsed on 5th May 1999, that amounted to termination of contract by lapse of time. When again it was terminated by the defendant on 16th November 1999, that was another termination of the new extension of the contract of service.

Though the defendant's witnesses seems to tie entitlement of the plaintiff to the free passage and free baggage to the plaintiff taking leave, that is not what is stated in the terms of service. That benefit, in my view accrues whether or not the employee takes his leave. The important thing to consider is only whether the contract expired or was terminated. Both situations would amount to termination of the contract of employment. The issue of leave is covered under clause 11(a)(iii) and appears to cover only local staff.

The plaintiff was not a local staff. Therefore, it is my finding that at the expiry or termination of contract on 5.5.1999, the plaintiff was entitled to free passage as well as baggage entitlement. However, this entitlement is subject to clause 10(ii)(j), which provides thus:-

“(j) a member of staff eligible for passages on termination of appointment must take such passages within six months of the date of such terminations.”

The above clause seems to put the burden on the employee to pursue his free passage within 6 months of the termination of appointment, and actually take the passages within 6 months of the effective date of termination. From the time that the plaintiff's contract terminated on 5.5.1999 up to 16.11.1999, there is no evidence that he attempted to pursue his free passages for the contract that terminated on 5.5. 1999.

Six months from 5.5. 1999 lapsed on 4. 11.1999. Therefore, in effect, in my view, the plaintiff ceased to be entitled for free passages under the contract of service which terminated on 5.5. 1999. He did not plead any ignorance of this clause which was in the Terms of Service. In fact, he was insistent that those were the terms of service that were applicable to him.

He is bound by those terms of service. He did not take his free passages or ask for them within six months, and therefore he lost his entitlement of the same. If he had asked for the passages within 6 months, I would have found otherwise.

I now turn to the renewal of contract for a period of some months from 6.5. 1999, which was a duration of less than one year. Though the plaintiff thinks that that contract of service was effective up to 17.2.2000, it has already been my finding that the said contract ended on 16.11.1999, when he received a specific communication informing him of his last date of service, which was the same 16.11.1999. This was obviously a termination of the contract of service by the defendant who was his employer. The plaintiff was entitled to the free passages as provided for in the Terms of Service. This is a one way passage only, as the plaintiff is not being re-engaged.

On these free passages, I wish to address first the issue of entitlement for the passage of his wife. There is no dispute that the passage benefit covers both the wife and three children. The existence of a wife or a child is a matter of proof to be established by evidence. It was for the plaintiff to show that he had a wife and children at any time, if he wanted to get the passage benefits for them. The plaintiff maintains that he is entitled to passage together with his spouse. The defendant maintains that the spouse does not exist. I do not think that it was unreasonable for the plaintiff to prove or show to the defendant, that he indeed had a wife. It was also not unreasonable for the plaintiff to establish to the defendant that the wife was in Kenya or was going to come to Kenya for her to be entitled to the passage. The plaintiff has not bothered, even before the court, to try to prove that he indeed has a wife who is entitled to free passage. He instead seems to be of the view that since he was previously given free passages for his spouse, he should likewise be given the same this time.

I disagree with him. The previous free passages for the wife might have been rightly or wrongly given. It cannot be a justification for giving free passage now. In any case, the reality in life is such that a wife in 1989 might not be a wife today. I find that the plaintiff could only be entitled to free passage for his wife (spouse) if he gave particulars of his wife to the defendant, and showed that the wife will require to travel from Kenya to his "home" as declared in the letter of appointment. His claim for free passage for his wife fails. For the plaintiff himself, he is entitled to the free passage and baggage allowances as provided for in the terms of service.

This being a termination of contract where the plaintiff is not being re-engaged by the defendant, the plaintiff is only entitled to one way free passages as per the Terms of Service of his "home" as declared by him on first appointment.

I now turn to the claim for house allowance. The plaintiff claims that he is entitled to house allowance for the period 16.11 .1999 to 17th February 2000. This is the period of approximately three months from the date when his services were terminated. According to the plaintiff, the payment in lieu of notice should cover both his basic salary and house allowance for that period. At the time that his services were terminated, he was not staying in a University house, therefore he claims that he should have been paid the house allowance for three months in lieu of notice.

Again, I have to turn to the Terms of Service of 1989. Clause 21 of the Terms of Service governs the issue of termination of service. Clause 21(i) provides that the appointment of a member of staff may be terminated by the Council (University) without notice on payment of salary in lieu of notice for the equivalent period of that notice. The notice period for staff who had completed probationary period is three months. The plaintiff's services were terminated without notice. He was to be paid salary for three months in lieu of notice. However, the plaintiff wants to be paid house allowance for the notice period, in addition to the salary.

Clause 7 of the Terms of Service and Schedule II deal with salary scales. These clearly exclude allowances. When we come to allowances under Clause 9, house allowance is not included among the listed allowances. It however features under Housing, which is clause 12. It is clear however from the provisions of clause 12(iv) and (v) that staff are either to be housed in University quarters, or to be paid house allowances for rented or owner occupied accommodation. For rented accommodation they have to claim the house allowance on the basis of a receipt from a landlord. This receipt, in my view, means that the defendant will know that the member of staff is a tenant of a landlord and is paying rent. That entitles a member of staff to be paid monthly house allowance. The other situation in which a member of staff can be paid a housing allowance, is where he is an owner occupier of a permanent house. I observe that house allowance is generally paid to staff even during annual leave.

Nowhere in the clauses of the Terms of Service is it stated that house allowance is not payable during the termination notice period, on which salary in lieu of notice is paid. Also the duration within which those staff who are living in University houses are required to vacate from the University quarters is not stated in the terms of service.

In my view, since house allowance is not one of those items listed as intermittent allowances under clause 9, and since it is based on actual occupation of a house of which it might not be practical to vacate immediately, it has to be treated as a special allowance. The defendant has not specifically stated in the Terms of Service that house allowance is not payable during period of notice, nor is it clear from the terms of service whether staff staying in University quarters are required to vacate the staff quarters immediately on getting a termination notice. That leaves a big gap which can be subject to abuse. It could as well mean that staff in University quarters will occupy accommodation for free for sometime, while those in privately rented quarters will have to dig into their pockets to pay the landlords, when their services are terminated without notice. The defendant cannot benefit from his own ambiguity. The circumstances and evidence before me dictate that I should give a liberal interpretation on the issue of entitlement to house allowance on termination of service without notice. I also give the benefit of the ambiguity to the plaintiff. If the defendant wants to be specific on the issue for the future, they are advised to make specific provisions in the terms of service. For now, I find that the defendant is liable to pay the plaintiff three months house allowance, in lieu of notice, at the same level paid to the plaintiff by the date of termination, which was 16/11/ 1999.

The plaintiff has claimed general for damages. Case authorities have been cited in this regard. Mr. Machio emphasized in his submission that a claim for loss of career could not be quantified therefore it was a claim in general damages. The plaintiff alleges that he was treated unfairly. Even after termination of service, the defendant did not act fast enough to pay for the plaintiff's air ticket, among other issues. In my view, general damages are not awardable in a case of wrongful termination of service. In this I am bound by the decision of the Court of Appeal in the case of Kenya Ports Authority - vs - Edward Otieno - Mombasa Civil Appeal No. 120 of 1997. The binding nature of the decisions of a higher court was emphasized by the Court of Appeal in the case of Barclays Bank of Kenya Ltd. - vs - Joseph Mwaura Njau of Nairobi Civil Appeal No. 314 of 2001 (unreported) in which the Court of Appeal stated:-

“while a Judge of an inferior court is perfectly entitled to entertain doubts, even grave doubts, on the correctness of a decision of a court superior to and whose decisions are binding on him, such judge has no jurisdiction to overrule the decision of the court superior to his.”

Perhaps, if the defendant failed to act hideously to enable the plaintiff go back to his home, the plaintiff should have quantified what additional expenses he incurred in Kenya involuntarily, due of the default by the defendant and claim for the same. That, in my view, might have been a more persuasive claim to be considered by a court rather than a claim in general damages.

I now turn to the counterclaim of the defendant. The counterclaim in the following terms:-

- That sometimes in or about the 2nd day of January 1991 the plaintiff requested the defendant to pay on his behalf a amount of ?3009.30 which the University duly paid on his behalf; and the same were payments of sea and freight charges of some goods (equipment).

- That the said payment were effected on the basis that the plaintiff would donate the said equipment to the University later and that the plaintiff never honoured the said pledge to donate the items to the University.
- that the plaintiff between 1991 and the year 2000 the plaintiff (sic) requested for and obtained two (2) tickets, one for himself and one ostensibly for his wife.
- that although a provision existed in the contract of employment for the plaintiff to be given one and also his spouse, the said spouse never came to Kenya and the defendant incurred expenses in air tickets for a person that never came to Kenya at the plaintiff's instigation more and better particulars of which are within the plaintiff's knowledge.

The defendant therefore sought that its counterclaim be allowed in terms of general damages and special damages.

I have considered the evidence for the defendant and the kickoff on the counterclaim. I am of the view that the defendant has not proved the counterclaim. Firstly, on the KSh3009.30 there is no evidence that it was paid to the plaintiff or on the plaintiff's behalf. The amount appears to have been paid to third parties for cost of freight. It was not for the purchase of any items from the plaintiff. If those items were not shipped and/or transported, then the refund should be claimed from those people to whom payment was made, as they had not rendered the services requested and paid for.

The only amount that is said to have been given to the plaintiff by the defendant is KSh100. In my view, that is an amount which should have been recovered from the plaintiff as an employee, if indeed he was paid the same by the defendant. It should not form part of a counterclaim simply because the plaintiff has filed this case in court against the defendant.

On the issue of air tickets paid for by the defendant for the wife (spouse) of the plaintiff, that was one of the terms of the contract of employment. The Terms of Service, as far as I can see them, did not give any conditions as to how the air tickets were to be procured and what conditions were to be fulfilled. I agree that this loophole could be open to abuse by members of staff. That in my view, calls for the defendant to put in place a watertight system for granting the intended benefits to staff, and apply the same rules to all staff affected in a uniform manner. There is no requirement in the Terms of Service that the wife or child of the plaintiff should have been in Kenya before the facility was granted. I need not emphasise that it was for the defendant to put in place a workable and watertight system that would facilitate the provision of the intended benefits to its employees. The defendant appears to have now learnt that they need some information before processing the provision of free passages. The defendant cannot benefit from their own past lapses. I therefore find that this limb of the counterclaim has not been proved. I have to dismiss the same.

The upshot of the above is that I find that this suit has to succeed. I also find that the defendant has not proved its counterclaim and I dismiss the same.

For the above reasons, I enter judgment for the plaintiff and dismiss the counterclaim of the defendant and order as follows:-

1. The defendant will pay or provide the plaintiff with one way free passage and permissible baggage to his "home" for only the period of service ending 16.11.1999 in accordance with the 1st July 1989 Terms of Service for Academic, Senior Library and Administrative Staff of Moi University if same has not been provided already. No free passage will be provided to his spouse.
2. The defendant will pay the plaintiff three months house allowance in lieu of notice, at the levels of house allowance applicable to the plaintiff when his services were terminated on 16. 11. 1999.

The defendant will pay the plaintiff's costs of the suit.

Dated this day of 8th day of November 2006.

George Dulu

Ag. Judge

Delivered at Eldoret this 22nd day of November 2006.

Jeanne Gacheche

Judge

In the present of:

Mr Kathiu for Mr Machio for the plaintiff

Mr Maina for the defendant