REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 130 OF 2003

JOHN GAIKUMI RUCHIUS……..……...PLAINTIFF

-VERSUS-

MISSION AVIATION FELLOWSHP EUROPE……..….DEFENDANT

JUDGEMENT

A. A CLAIM SOUNDING IN LABOUR LAW: THE SUIT AND THE PLEADINGS

The plaintiff's suit, commenced by plaint dated 10th February, 2003 and filed on 11th February, 2003 was essentially a claim sounding in labour law. I will set out the content of the pleadings, in substance, before laying out the evidence, summarising the submissions, analysing the respective cases of the parties, and determining the outcome of the litigation.

The plaintiff pleaded that he was at all material times an employee of the defendant, based in Nairobi as a premises manager. On or about 3rd September, 1999 while in the course of his employment, the plaintiff was involved in a serious road traffic accident in which he sustained serious personal injuries, from which he ultimately recovered though he did not fully regain his previous state of good health. Owing to the injuries he sustained, the plaintiff's work potential was impaired, and the defendant subsequently saw it fit to retire him. The plaintiff pleads that while he accepted retirement, the defendant wrongfully declined to pay his full dues, causing him loss and damage. He pleads that he was not paid the following dues:

(i) Group disability insurance (for 36 months);

(ii) Gratuitous payment (for three years).

He claims damages in respect of the two items. He states that his demand of the same, and notice of intention to sue in default, have elicited no response from the defendant. He has thus moved this Court, praying for damages, interest and costs.

The defendant responded to the suit by filing a defence and counterclaim, dated 16th June, 2003. The defendant admits that the plaintiff had been involved in an accident, but denies that the said accident occurred while the plaintiff was in the normal course of his employment. The defendant further pleads that it was the plaintiff himself who had tendered to the defendant medical evidence showing that he had fully recovered from the accident, and that he was able to fully and effectively discharge his duties and assignments in his capacity as an employee. The defendant denies the averment by the plaintiff that he, the plaintiff, had been retired from his employment on medical grounds or at all. To the contrary, the defendant pleads, the plaintiff's employment had been terminated on account of his failure to satisfactorily perform his duties. Such termination of employment, the defendant pleads, was entirely

consistent with the terms of the contract of employment between the defendant and the plaintiff.

The defendant denied that the plaintiff had not been paid any dues, upon termination of employment, and asserted that the plaintiff was not entitled to group disability insurance benefits since he had fully recovered. The defendant asserted also that the plaintiff's claim for three-years gratuitous pay had no basis in law or otherwise.

The defendant stated that, without prejudice to the aforementioned pleadings, the plaintiff had instituted *HCCC No. 189 of 2001* for third-party compensation, in respect of the injuries sustained in the said road accident; and as such the claim for similar compensation from the defendant would be unlawful and would represent an attempt to gain unjust enrichment.

The defendant counterclaimed against the plaintiff in the sum of Kshs.523,943/= being monies paid and expended by the defendant at the plaintiff's request —

(i) medical expenses paid on the plaintiff's behalf by the defendant, following the road accident

— Kshs.466,843/=;

(ii) legal fees paid to M/s. Meenye & Kirima Advocates in respect of HCCC No. 189 of 2001 where the plaintiff is claiming compensation on account of the accident
— Kshs.57,100/=

The defendant prays that the plaintiff's claim be dismissed with costs, and judgement entered for the defendant against the plaintiff for —

(i) Kshs.523,943/=;

(ii) Interest thereon at Court rates, with effect from 1st December, 2001 until payment in full;

(iii) Costs of the suit.

The plaintiff's reply to defence and defence to counterclaim, dated 20th June, 2003 was filed on 26th June, 2003. He pleads that the causes of action in this suit and in *HCCC No. 189 of 2001* are separate and are being litigated upon by different parties, and hence the claim of unjust enrichment does not lie.

The plaintiff denied any liability to pay the sum of Kshs.523,943/= in respect of expenses incurred at his request by the defendant. In the alternative, the plaintiff stated that the expenses borne on his behalf by the defendant were linked to the contingent object, that a refund would be made following the successful prosecution of *HCCC No. 189 of 2001;* and since that case is still pending the claim being made by the defendant is premature. In a further alternative, the plaintiff contended that it was the responsibility of the defendant, as his employer, to pay for and meet all costs and expenses incurred as a result of any accident while he was in the defendant's employ, under the plaintiff's terms and conditions of employment.

The parties, on 27th November, 2003 filed their list of agreed issues for determination in this litigation. The issues are as follows:

(a) Was the plaintiff injured while in the normal course of employment with the defendant?

(b) Was the plaintiff retired or dismissed by the defendant?

(c) Was such dismissal or retirement lawful?

(d) Was the plaintiff paid all his terminal benefits if any?

(e) Is the plaintiff entitled to the damages sought in the plaint?

(f) Is the defendant entitled to the amount sought in the counterclaim?

(g) Who should bear the costs of this suit?

B. THE PLAINTIFF'S CASE: EVIDENCE

PW1, ***John Gaikumi Ruchius*** was on 20th May, 2004 sworn and gave his evidence. He said he was the plaintiff, aged 42 years, was married with four children and lived in Ngong. He testified that he held no regular employment at the moment. In 1997 he had been employed by the defendant as an Administrative Assistant, but after some six months he got a promotion, becoming Properties Supervisor. In that capacity, the witness said, he was to function as a manager in the properties department. He remained in the employ of the defendant for seven years.

The plaintiff testified that he was involved in a road traffic accident in 1999 and liability for the accident is already the subject of another suit. He said the accident took place on a Friday, while he was in the course of his duties, and that he was in consequence hospitalised for a period of three weeks. He was given sick leave for one month after leaving hospital, after which he returned to work. The plaintiff remained in the employ for one-and-a-half years thereafter, before his employment was "terminated." I noted the plaintiff's use of the word "termination," which differed from the claim in the pleadings, that he had taken "retirement."

The plaintiff testified that he had not received a letter confirming him in the position of Properties Supervisor, but, in his perception, he was being treated as a manager and he was attending managerial meetings. He testified that after the accident part of his medical expenses, in the sum of Kshs.100,000/= was paid under the medical scheme, but the balance of Kshs.400,000/= was paid by the employer. The witness testified that the said sum of Kshs.400,000 paid by the employer was the subject of a counterclaim in this suit.

The plaintiff testified that he had not always felt very well as he carried out his duties, in the aftermath of the accident in which he was involved. He said that from time to time he had severe headache, dizziness and fatigue.

The plaintiff's work involved the making of arrangements for rental accommodation, provision of security for the rental premises, maintenance of utilities, and upkeep of the operations centre. By the time his employment came to an end the plaintiff was receiving a gross salary of Kshs.39,027/99 per month. He produced in evidence the main letters relating to his engagement in the defendant's employ (plaintiff's exhibits No. 3 – 6), as well as a staff handbook which made provisions on such matters as benefits, and health and safety arrangements (plaintiff's exhibit No. 1).

Testimony was given that the plaintiff's work was mostly outdoors. The defendant provided him with a motor vehicle for his work in general maintenance and facilitation of physical arrangements. He was, in this regard, responsible for some 27 houses occupied by international staff, and he saw to maintenance and repairs. He was a utility employee who worked during the day and was on call at night — especially in alarm response, or for dealing with emergencies.

The plaintiff testified that the accident took place on 3rd September, 1999 along Waiyaki Way. He had gone to pick up an electrician at Kangemi (along Waiyaki Way), for the purpose of his normal maintenance duties. He had gone to secure the services of one ***Peter Macharia Ngumi,*** an electrician, to deal with a power failure at the defendant's residential premises in the Lavington Estate, in Nairobi. He was hit by a passing vehicle as he stood by the road, waiting for the electrician to collect his tools. He later learned that it is the electrician who had taken him to hospital after the accident which had rendered him unconscious.

The plaintiff had understood that he was only entitled to a medical cover of Kshs.100,000/= — and so this went into paying part of his bill, leaving a balance of Kshs.466,000/= which was paid by the defendant, on the understanding that it would be refunded within a short period of time. The plaintiff said he did not mind paying up the said sum of Kshs.466,000/= once the other case, *Nairobi HCCC No. 189 of 2*001 is concluded.

Evidence was given that the plaintiff received a letter from the defendant's Finance Manager, on 24th October, 2000 (plaintiff's exhibit No. 8) after his return to work, granting him an 8% salary increment, so that his salary now stood at Kshs.36,860/= per month. The plaintiff produced (exhibit No. 8) minutes of the defendant's managers' meeting of 17th August, 2000 showing that he used to sit and deliberate with other Managers in the period following the accident and after his return to work. The plaintiff was, however, conscious of his uncertain designation and status at his place of work; and he also thought that "lots of demand were being made on me after the accident." He therefore raised the question with his employer, whether he could be confirmed as a manager. But he then received a letter dated 22nd January, 2001 from the Chief Executive of the defendant, ***Mr. Bernard Terlou,*** specifying his title as Properties Supervisor, the designation that had originally been assigned to the plaintiff. The plaintiff, by his letter to the Programme Manager, of 22nd January, 2001 had sought confirmation as a Manager; but he was advised, by the defendant's letter of 1st February, 2001, that there was no probability that he would be confirmed as manager, owing to his unsatisfactory performance.

The plaintiff was concerned that the defendant was doubting his performance, rather belatedly in February, 2001. But he averred*: "It was true that after the accident, my performance deteriorated."* This appears to have been a watershed period in the plaintiff's employment. He was anxious that considerable job-demands were being made on him; that he was loosely referred to as a Manager when officially he was only a Properties Supervisor; he had written to the Programme Manager on 22nd January, 2001 seeking an improved employment package. But soon after that he started receiving letters of warning — one on 24th April, 2001 and another on 17th October, 2001. There had been an earlier warning before these two. The warning of 17th October, 2001 stated that the plaintiff's performance was below expectation. The third and final "warning" was dated 5th November, 2001 — and on that date the plaintiff's employment was terminated. He was paid three-months' salary at the time of terminating his employment.

Being of the view that he should have been paid three years' salary upon termination of service, the plaintiff instructed counsel to write a letter of demand to the defendant and if necessary, commence suit. He was claiming damages, costs and interest as well as (i) group disability insurance; (ii) gratuity pay for three years.

On cross-examination, the plaintiff said he had been retired on medical grounds. But he then changed his mind on further examination. He said the warning letters which he had received from the defendant made no reference to retirement. He said*: "I was not retired, but sacked."* He said he used to make verbal appeals to the Programme Manager whenever he received a letter of warning; and that during these appeals he had *requested* retirement on medical grounds. The plaintiff said his poor performance at work had been due to the injuries which he had suffered in the accident. In his own words: "*The accusations [made by the defendant] were valid. I could not perform very well*." He said the defendant was wrong in dismissing him, and that he should instead have been retired. He also said that he did know that under his contract, he could very well have given notice to terminate his employment, but he did not do so.

On the group disability cover, under which the plaintiff was claiming, he said this cover was arranged by the employer, but he did not know the details relating to its operation. He said his claim for gratuity pay for three years was in terms of paragraph 6.9 of the ***Staff Handbook*** (plaintiff's exhibit No. 1). The plaintiff said he should have benefited from group disability cover, because his employment ceased on account of the injuries he had suffered.

On cross-examination, the plaintiff restated that he was not disputing the fact that the defendant had paid Kshs.466,000/= on his behalf, and that he owed this sum. He also acknowledged that the defendant had

paid to his lawyers, M/s. Meenye & Co. Advocates, the sum of Kshs.57,100/= to facilitate the prosecution of his accident claim case in *Nairobi HCCC No. 189 of 2001*.

On re-examination, the plaintiff said that since the accident he had not regained his full memories. He said that although he did owe to the defendants the sum of Kshs.466,000/= the defendants had not done a set-off against payments made to him when his employment had been terminated; but it was well understood that if he was successful in the accident claim suit, in HCCC No. 189 of 2001, he would repay the said amount. The plaintiff said that it was the responsibility of the insurance company to pay the group insurance in respect of himself, and that it was for the employer to make the claim on his behalf.

PW2, ***Dr. Nimrod Junius Mwakitaba Mwangombe***, was sworn and gave his evidence on 20th September, 2004. He said he was employed by the University of Nairobi as Associate Professor of Surgery. He was a visiting consultant at the M.P. Shah Hospital in Nairobi, and is the holder of the M.B. Ch.B, M.Med. (Surgery) and Ph.D. (Neuroscience) degrees. He testified that he had been practising medicine since 1976, and that the plaintiff herein had been his patient following the accident in which he was involved.

PW2 testified that the plaintiff had been admitted at M.P. Shah Hospital on ***3rd September, 1999*** with severe head injuries. The plaintiff had sustained severe neck injuries after being knocked by a motor vehicle, and he had initially to e attended to at the Intensive Care Unit, where he remained until ***9th September, 1999.*** An X-ray of the neck showed that he had mild sub-laxation of the 4th cervical vertebra (i.e., dislocation), a condition that was managed conservatively. A computerised tomography (CT-scan) of the head showed linear fracture of the skull and cerebral contusions (i.e., bruising of the brain). These conditions were also managed conservatively. The plaintiff thereafter had good recovery, and was discharged from the hospital on 23rd September, 1999. He was put on prophylactic medication, to prevent the development of fits.

Dr. Mwangome reviewed the patient again on 3rd May, 2004 for the purpose of preparing a report (plaintiff's exhibit No. 20). He found the plaintiff complaining of headache, episodes of dizziness, problems with memory, occasional neck pains, a feeling of irritability from time to time. The doctor's examination showed the plaintiff to be in good general condition. The neurological examination was within normal range. He concluded that the symptoms bothering the plaintiff were similar to those seen in patients who have undergone severe head injuries, and he advised the plaintiff accordingly. His classification of the plaintiff's present condition was: a patient with remarkable improvement. The doctor stated that the memory loss was significant only in accordance with the nature of the work done by the plaintiff; and after good recovery it was quite possible for the patient to drive a vehicle. He said the plaintiff's recovery was nearly 100%, and a period of 18 months-to-two-years was necessary for complete recovery.

The doctor had charged Kshs.3,000/= for the examination and the preparation of the report; and for Court attendance he was charging Kshs.5,000/=. He testified that he had already been paid for his services (plaintiff's exhibit No. 21).

On cross-examination, PW2 said he had reviewed the patient's condition several times. When he conducted the review on 25th October, 1999 he had advised that the plaintiff should not drive a vehicle until further review was conducted, and he had put the plaintiff on light duty for one month. When the doctor reviewed the plaintiff again on 27th November, 1999 he found the plaintiff fully recovered, and advised that the plaintiff resume his duties fully, including driving a vehicle. The doctor said, on re-examination that at the last review in 2004, the plaintiff was even much more fully recovered.

PW3, ***Peter Ngumi Wagece***, was sworn and gave his evidence on 20th September, 2004. He testified that he was an electrician, lived at Kangemi, and did know the plaintiff. The plaintiff used to work for Mission Aviation Fellowship, and used to give him electrical fitting jobs to do for the defendant. He would do such work on specific contracts. He testified that the plaintiff had been knocked by a motor vehicle at about 8.00 a.m. at Kangemi, on 3rd September, 1999. The plaintiff had called him before the accident, and was at Kangemi for the purpose of picking him up at about 9.00 a.m., to take him to Bahari

Court in Lavington, for the purpose of rectifying an electrical fault. When the plaintiff arrived at Kangemi, PW3 had not yet arrived, and so he gave his car to a car-wash bay for cleaning. When PW3 arrived at the pre-arranged meeting place, he found that the accident had just happened, and the plaintiff was being placed in a rescue car. PW3 accompanied the plaintiff to hospital. He produced invoices which he had in the past issued, when he did electrical contract jobs for the defendant (plaintiff's exhibit No. 22).

On cross-examination, PW3 identified his business outfit as Masha Electricals. He said he was self-employed, and his outfit was some 200 metres from the accident scene where the plaintiff had been injured.

C. THE DEFENDANT'S CASE: EVIDENCE

Learned counsel, ***Mr. Angote*** opened the defence case by indicating that the defence would seek to prove that the plaintiff was not entitled to group disability insurance nor to gratuity pay which he had claimed; to show that the plaintiff's employment was lawfully terminated; and to prove that the plaintiff was liable on the counterclaim for Kshs.523,943/=.

The defendant's one witness, ***Bernard Terlouw,*** was sworn and gave his evidence on 10th November, 2004. He said he was the Programme Manager of Mission Aviation Fellowship, Kenya Programme — and this was equivalent to the position of a Managing Director. He had joined the Kenya Programme of Mission Aviation Fellowship on 21st September, 1998 when he was the I.T. Director. In that position he did come to know the plaintiff. He moved to the Uganda Programme after several months, and the accident involving the plaintiff took place while he was serving in Uganda. The witness rejoined the Kenya Programme on 1st December, 1999 by which time the plaintiff had already been released from hospital. The plaintiff's doctor had issued reports on his state of recovery — one dated 25th October, 1999 and another dated 27th November, 1999. In the report of 27th November, 1999 (four days before DW1 took over the management of the Kenya Programme) the doctor had advised that the plaintiff had fully recovered and could drive a vehicle unaccompanied, and he could resume his normal duties. The witness testified that he arrived in Kenya to find the plaintiff back at work. In the words of the witness, *"[The plaintiff] was taken back on the basis of documents from the doctor; he was fully recovered."*

The witness testified that during his first stint in Kenya he had worked very well with the plaintiff. The plaintiff had been given an office and a car for daytime use in carrying persons and things, in connection with the discharge of his duties which had to do with homes and house, utilities and security. The witness found after his return to Kenya that he was not fully informed of all the duties and tasks the plaintiff was required to do, as more and more complaints about the plaintiff's performance began to be received at his office. The plaintiff's level of performance was ineffective and often delayed. It became necessary for the witness to engage the plaintiff directly, in relation to the complaints. He wrote to the plaintiff a total of four warning letters, the last three of these being on 24th April, 2001; 17th October, 2001; and 5th November, 2001. The plaintiff did acknowledge that his performance was unsatisfactory; on 24th April, 2001 he wrote a letter of apology to DW1, and he promised to improve his performance (defendant's exhibit No. 3). The witness testified that it became necessary, with the final warning letter of 5th November, 2001 that the plaintiff's employment be terminated. Throughout the period of complaints and warning letters against him, the plaintiff had given no explanation for his non-performance; and he had not said he was under any disability.

DW1 testified that the plaintiff's dismissal had been properly done, in accordance with the ***Locally Employed Staff Handbook*** (plaintiff's exhibit No.2). Paragraph 5.3.2 (ii) thus stipulated:

"Dismissal after warning *— this is for less serious offences, or unsatisfactory performance, when the employee has been given two written warnings which gives him/her a chance to correct his/her behaviour."*

Paragraph 5.6 of the same booklet provided for "*termination by notice*". The relevant portion thus

provides:

> *"The employee may also wish to leave to take up a better job. In any case notice should be given one month before the date he intends to stop working. MAF may also terminate an employee's contract by giving reasonable notice in accordance with current legislation."*

DW1 testified that he had not effected dismissal abruptly, but had given notice. He said he had been properly advised that it would be proper for him to terminate the plaintiff's employment after giving one month's notice; but on compassionate grounds he gave there months' pay to the plaintiff when he effected dismissal; and so the plaintiff collected his full pay for November and December, 2001 and January 2002 — amounting to Kshs.110,850/=. Certain deductions (including for co-operative loans) were made, leaving the plaintiff with the sum of Kshs.52,849/=. The plaintiff had still other debts which, however, were not deducted as it was realised that he would be unable to clear those debts from the money he was receiving. It was agreed that other claims would be dealt with subsequently.

On the question whether the plaintiff could benefit from the defendant's group disability insurance, the witness said disablement was an essential condition for such a claim, which was provided for under paragraph 6.9 of he ***Staff Handbook***. It states:

> *"**Group Disability Income Insurance** — which provides continued income for 3 years if work ceases due to disability/injury."*

The payment, the witness testified, would come from the insurance company, in a proper case. For a beneficiary to qualify under that provision, he has to have been disabled for more than six months. The witness testified that the defendant had, indeed, treated the plaintiff's case as Potentially one of disability payment; and so, on 16th September, 1999 the Finance Manager had reported the plaintiff's injury to Aon Insurance Brokers (defendant's exhibit No.6). The insurance brokers also took the precaution of reporting to the Life Office (defendant's exhibit No. 7); but the insurance brokers advised the defendant that such payment would be made only if the plaintiff remained disabled for more than six months. As it turned out, the plaintiff resumed work before the expiration of six months, and he was fully recovered.

DW1 testified that the sum of Kshs.523,943/= in the counterclaim included Shs.466,843/= which the defendant had paid towards the plaintiff's hospital bill; and the balance had been paid towards the plaintiff's legal fees in another matter.

In cross-examination, the witness said that the plaintiff's position in the defendant's employ was not that of Manager; he had first been Administrative Assistant, and subsequently Supervisor. The witness testified that the plaintiff did claim he should have carried the designation of Manager, but the defendant did not elevate him to that position. While it may be true the plaintiff could have been referred to in some documents as manager, this was no more than common parlance and it "could have been for the purpose of making him happy." The plaintiff had no financial powers and was not a Manager.

DW1 did understand that the plaintiff had been on normal duty at the time of the accident. He said the plaintiff was returned to work on the basis that he had fully recovered, as this was the clear position taken by the doctor in his report. He further testified that as more complaints were received about the plaintiff's performance and he discussed the matter with the plaintiff, he formed the impression that the plaintiff was not clear in his understanding of the tasks assigned to him, or the outputs expected of him. He gained the impression that the plaintiff was unable to give an account of his activities and how these related to the defendant's expectations. This state of affairs was not acceptable to DW1; in his words: "*As line manager I was unable to accommodate this inability.*"

The witness said he had paid to the plaintiff three months' salary on dismissal, whereas what would have been due was only one month's salary. He said this was a friendly gesture, as he still felt that the plaintiff was a friend. The fact that the medical bill payments which had been made in favour of the plaintiff had not been deducted at the time of dismissal, was an act of compassion, as repayment was well and truly due, from the plaintiff.

The witness said that the deductions made against the plaintiff on dismissal were in respect of tax and co-operative loans. The payment made to the plaintiff had also included compensation for leave days. What was now being claimed in the counterclaim was mainly the medical bill payment which had been made on behalf of the plaintiff, and which had always been understood to be refundable. This amount had not been deducted at the time of dismissal because, in the words of the witness: *"We did not want at that moment to ground him completely."*

The witness said he had seen no medical reason that made it difficult for the plaintiff to work well. He said the several warning letters were not the reason for the plaintiff's dismissal, they were the means. The reason was *"the issues that piled up and showed ineffective performance."*

The witness testified that the defendant's medical scheme did cover the plaintiff. There was also a life insurance policy covering the plaintiff in the event of death. If the plaintiff had an insurance claim he would make it, and follow a procedure enabling the defendant to claim it from AON-MINET, in a proper case. If any money was payable in that regard, the insurance company would bear the responsibility. The witness said he was not aware of any arrangements for gratuitous pay for any category of employees of the defendant.

The witness said that the defendant's counterclaim was made because payment of moneys due to it was not made upfront by the plaintiff, and there had been a clear understanding that he would pay up. When the plaintiff commenced suit, it became necessary to consider and to seek settlement for the whole financial arrangement —and this necessitated the counterclaim. There had been no need to file earlier for the amount indicated in the counterclaim — because the plaintiff's duty to repay was common cause.

D. SUBMISSIONS FOR THE PLAITNIFF

Learned counsel, ***Mr. Kimathi,*** stated the plaintiff's case as being —

> *A claim for damages for wrongful termination of employment, under the heads (ii) Group Disability Insurance; and (ii) Gratuitous Pay for a period of three years.*

Counsel's summary of the plaintiff's pleadings was as follows: the plaintiff was involved in a road traffic accident while in the course of duty, and was so severely injured that he could not perform his duties as well as he had done before the accident, and the deterioration in his performance led his employer to terminate his employment though not on medical grounds.

Counsel summarised the plaintiff's evidence as showing that the plaintiff *"was employed at the time as a manager and … continued in his work as a manager in charge of the defendant's property."* Although, throughout the examination of witnesses, counsel clearly set store by this description of the plaintiff as manager, it was not entirely clear whether any legal consequence did turn on the nomenclature. From the specific provisions of the ***Staff Handbook*** referred to in the evidence and the submissions, I would doubt whether the plaintiff's claim would be different if he is considered to have been a manager or a Properties Supervisor. From the evidence in the form of official communications between the defendant and the plaintiff, and of the testimony, I believe the formal position of the plaintiff was that of Properties Supervisor.

Learned counsel disputes the assertion in paragraph 3 of the statement of defence, that the plaintiff was not in the course of duty when he was injured in a motor traffic accident. From the evidence given by all the witnesses including DW1, I must draw the conclusion that the plaintiff was indeed in the course of his duties when he was involved in the accident.

Mr. Kimathi made contentious submissions regarding the gravity of the injuries sustained by the plaintiff, and how the same related to his work-performance at the time he was injured. In his words:

> *"The nature of the plaintiff's injuries [was] of the spine and skull as evidenced in the medical report. The injuries confirm that the plaintiff's deterioration in his performance at work was not*

unexpected… The best course the defence would have taken after the institution of this case was to ask for a second medical opinion…"

Was such "best course" the legal course? I have serious doubts, as the only proper judge of the "best course" was the doctor. The doctor had cleared the plaintiff as healed, and certified him fit to conduct all normal duties including driving a vehicle unaccompanied. To the defendant, therefore, the plaintiff seemed to be well and had been pronounced so to be, by the only qualified person to say it — the doctor. The factual status on a medical question pronounced by the doctor, is the foundation that the law must support, I would hold; and therefore the defendant's legal obligations are tied to the doctor's factual pronouncement. I therefore, would not agree that the defendant erred in any manner whatsoever by considering the plaintiff well and truly healed. Besides, DW1 gave evidence that was in my opinion, perfectly credible, that the plaintiff had been unable to account for his falling levels of performance, let alone set this fact down to the accident in which he had been involved. I would, therefore, not consider valid the contention by learned counsel for the plaintiff, that *"it is evidently clear that the accident caused his deterioration at work."*

Learned counsel contended that the plaintiff had proved his case on a balance of probabilities and should be awarded Kshs.5 million under the headings (i) Group Disability Insurance; and (ii) 36 months salary of Kshs.24,968/08 totalling to Kshs.898,850/08, and Gratuitous pay for 3 years on the same salary. The total amount claimed was ***Kshs.6,797,700/16.***

E. SUBMISSIONS FOR THE DEFENDANT

Learned counsel, ***Mr. Angote***, submitted that while the plaintiff was indeed involved in a traffic accident which resulted in his hospitalisation for three weeks, his termination of employment was not for any reasons linked to health condition, but rather, for non-performance; and even then, the plaintiff was paid all his terminal benefits. Counsel stated that the defendant was making a counterclaim for Kshs.523,943/= which it had paid on behalf of the plaintiff at his own request, on the understanding that the same would be repaid.

(i) Was the plaintiff retired or dismissed by the defendant?

Counsel noted that the defendant had served the plaintiff with three letters of warning, when it became clear that the plaintiff had failed to provide timely, adequate and updated reports. The defendant had clearly stated in writing that it was terminating the plaintiff's employment because he failed to perform his duties to the defendant's expectations. Counsel submitted, and I am, with respect, in agreement, that the plaintiff was not retired on medical grounds, but was dismissed from employment. Under paragraph 5.5. of the ***Staff Handbook*** retirement was only available to staff over 55 years of age; but no evidence was tendered that the plaintiff had attained that age by the time his employment ceased.

(ii) Was the plaintiff's dismissal lawful?

It is clear from the evidence that the plaintiff's dismissal took place after he had been issued with three warning letters, as required by paragraph 5.3.2 (i) of the ***Staff Handbook***. I am in agreement with counsel for the defendant, that the plaintiff did not succeed in proving illegality in his dismissal.

(iii) Was the plaintiff paid his terminal benefits?

Counsel cited paragraph 5.6 of the ***Staff Handbook***, which stipulates that a party whose employment is being terminated is entitled to *"a reasonable notice in accordance with the current legislation."* The relevant legislation is the Employment Act (Cap. 226), and section 16 thereof provides that an employee is entitled to one month's notice before his service is terminated. Credible evidence was given that the defendant paid the plaintiff three months' salary in lieu of notice. Counsel submitted that the plaintiff had produced no evidence to show that he was entitled to any other benefit under the terms set out in the ***Staff Handbook*** or the current legislation.

(iv) Is the plaintiff entitled to the damages sought in the plaint?

Learned counsel submitted that the plaintiff, while claiming to be entitled to damages against the defendant, did not specify the type of damages being sought. The plaintiff merely claimed: Group Disability Insurance (36 months); and Gratuitous Pay (3 years). Counsel submitted that any claim against the Group Disablement Income Insurance Policy, an employee must claim from the insurance company, through the defendant and only if the claimant has been disabled for a continuous period of six months, from the date of the injury. Counsel submitted that the plaintiff had not proved that he had been disabled for a continuous period of six months. Consequently, it was submitted, *"the plaintiff cannot claim for the disablement benefit because the provisions of clauses 7 and 8 of the Group Disablement Income Insurance Policy were not satisfied."*

Learned counsel submitted, correctly, with respect, that the defendant did comply with the provisions of the policy by informing its insurance brokers of the accident; but it is the plaintiff who voluntarily returned to his duties with a medical report which gave him a clean bill of health. In counsel's view, the plaintiff must not approbate and reprobate at the same time.

Counsel submitted that the doctor's report of 19th May, 2004 which had been produced by PW2 (plaintiff's exhibit No. 20), which gave the plaintiff a clean bill of health as at 27th November, 1999, did not state that his medical condition did affect his performance at work. When he was examined in this trial, PW2 confirmed that he stood by the said report; and counsel now submitted that in those circumstances there would have been no basis f or the defendant to turn away the plaintiff when he sought to return to work after the accident had occurred. Counsel noted from the evidence that there was no time when the plaintiff had complained that his state of health was causing him to be ineffective in the discharge of his duties.

In these circumstances, counsel submitted, the plaintiff had not established his entitlement to Group Disability Insurance, nor to Gratuitous Payment for three years.

Special damages not pleaded

Learned counsel submitted that the plaintiff had not only failed to prove his claims, but he had also not pleaded any specific figures — a task which could not be done through submissions. Counsel cited case law to show that a party, in a matter such as the present one, must specifically plead the amount he seeks.

The Court of Appeal had authority held in ***Coast Bus Service Ltd. v. Sisco E. Murunga Ndanyi & 2 Others***, Civil Appeal No. 192 of 1992 that:

> **"If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars."**

Similarly in ***Siree v. Lake Turkana El Molo Lodges Ltd*** [2000] 2 EA 521 (CAK) the Court of Appeal thus held (p.522):

> **"When damages could be calculated to a cent, they ceased to be general in nature and had to be claimed as special damages. Damages for loss of profits were classified as special damages and as such, had to be specifically pleaded and proved… Where a plaintiff claimed loss of profits on a continuing basis, he was obliged to amend the plaint at or before the time of hearing to qualify and claim those damages. In this instance, the trial judge erred in awarding the respondent damages for claims that it had not specifically pleaded and those awards would be disallowed."**

Basis of general damages not laid in the evidence

Learned counsel submitted that the plaintiff, while claiming the sum of Kshs.5,000,000/= in general damages, had laid no basis for this amount in the evidence. On this account, counsel submitted, the damages may not be awarded even if the plaintiff's employment had been unlawfully terminated.

In the judgement of the Court of Appeal in ***Dalmas B. Ogoye v. KNTC Ltd***, Civil Appeal No. 125 of 1996, the following eminently relevant passages appear:

> **(i) "Since the appellant's appointment was unlawfully terminated, the only damages he is entitled to in law is the amount he would have been paid if his employment had been brought to an end in the manner stipulated in his contract of service and no more."**
>
> **(ii) "The only remedy in a claim for wrongful dismissal is damages. Courts do not order reinstatement in such cases because such an order would be difficult to enforce. Besides, it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer.**
>
> **"The appellant's other complaint was that the Judge had declined to award him damages for mental anguish and distress. There is no doubt that the appellant must have been distressed by what happened, but he cannot recover damages for this because such damages are not recoverable in an action on unlawful dismissal."**

I understand the principle in the ***Dalmas Ogoye*** case to be that the redress for wrongful dismissal is basically damages — and damages representing the sum of money allowed where the terms of the contract are duly complied with, or the provisions of the applicable legislation (Employment Act (Cap.226)) are complied with, and no more. It must then follow, as counsel for the defendant has properly submitted, that if there is any additional claim to the claim for damages for dismissal, then it must be pleaded and strictly proved.

Counterclaim for monies expended on the plaintiff at his request

The defendant did produce a receipt for Kshs.466,843 — being evidence of payment to M.P. Shah Hospital on behalf of the plaintiff. Payment vouchers were also produced in respect of Kshs.57,100/= being payment on behalf of the plaintiff for legal fees under *HCCC No. 189 of 2001*. Counsel noted that these payments had not been disputed by the plaintiff. The defendant's evidence was that the amount counter-claimed would be paid at a later stage. Counsel submitted that the fact that the plaintiff had now sued the defendant had the effect of rendering the owing sum immediately payable — so that the defendant does not have in the future to file a suit for recovery.

E. FINAL ANALYSIS AND JUDGEMENT

The plaintiff in his pleadings and evidence has been equivocal on the question whether he was retired or dismissed from the employ of the defendant. No proof was given that he had attained the age of retirement; and no cogent evidence was given that the plaintiff had been retired on medical grounds. I find and hold that the plaintiff was dismissed from his employment.

By virtue of paragraphs 5.3.2 and 5.6 of the ***Staff Handbook*** it was open to the defendant to dismiss the plaintiff, in a proper case. Reliable evidence was adduced by the defendant that the plaintiff had given unsatisfactory performance over time, and the matter had been discussed between the defendant and himself, and he had been issued with three letters of warning, but still he did not improve his performance. Therefore, there were good reasons for which the plaintiff could be dismissed under the law, and so his dismissal was not contrary to law.

Although the plaintiff has set store by the fact that he had in 1999 been involved in a traffic accident which impaired his health, all the professional evidence before the Court is that he had fully recovered, and his lack of performance at work cannot be attributed to the accident and its consequences upon the plaintiff's health. Therefore in this case the Court is concerned with a straightforward question of

dismissal. In the light of my earlier review of case law, and especially in the light of the Court of Appeal decision in ***Dalmas B. Ogoye v. KNTC Ltd***., I will state the legal position to be that whatever the plaintiff can win out of this case is strictly limited to the existing contractual provisions for the handling of cases of dismissal. The plaintiff can only get what the contract says he is entitled to if dismissed; and strictly speaking, that would be one month's pay in lieu of notice and no more. Reliable evidence has been given that the defendant had paid to the plaintiff, on compassionate grounds, the equivalent of three months pay. For this he should be truly thankful.

The plaintiff did not, in my view, prove his claim under Group Disability Insurance. He needed to have been disabled for a continuous period of six months, in order to qualify for that benefit, but he was not. Similarly there is no legal basis for the plaintiff's claim for Gratuitous Pay: its legal basis has not at all been shown.

While claiming as much as Kshs.6,797,700/16, the plaintiff had not pleaded this, and has not strictly proved it. The claim, therefore, has no basis in law and must be rejected. The law regarding special damages is clear. It has been laid down in numerous authorities that he who claims special damages must first plead it, and then strictly prove it. The plaintiff did none of these. And neither did he prove by evidence the basis of his claim for general damages. Therefore the claim for general damages must also be rejected as it has no legal basis.

There is really no controversy over moneys owed by the plaintiff to the defendant, and which the defendant has claimed in the counterclaim. The evidence tendered shows very clearly the basis of the claim by the defendant. While, for purely compassionate reasons, as it emerges from the evidence, the defendant would have waited for sometime before being paid by the plaintiff the monies owed, the plaintiff himself, by filing suit, has brought forward the time for the settlement of accounts; and therefore it is, in my view, entirely justified, and indeed correct in the play of Court procedure, that the monies owed be demanded at this stage.

In the light of the evidence before me, the documents tendered in proof, the submissions of counsel and the authorities considered, I find that the plaintiff's case is lacking in merits, and that the defendant's counterclaim is well founded. Accordingly I dismiss the plaintiff's suit with costs to the defendant; and I uphold the defendant's counterclaim against the plaintiff, again with costs to the defendant.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13th day of May, 2005.

J. B. OJWANG

JUDGE

Cora m: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff: Mr. Kimathi, instructed by M/s. Arimi Kimathi & Co. Advocates

For the Defendant: Mr. Angote, instructed by M/s. Ndungu Njoroge & Kwach Advocates.