



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1862 OF 1995

GODFREY MWANGI WANJOHI.....PLAINTIFF

VERSUS

MITCHELL COTTS KENYA LTD.....DEFENDANT

JUDGMENT

This is a dispute on a contract of employment. On the 21. 05. 1990, Godfrey Mwangi Wanjohi (Wanjohi) received a letter of offer of employment from M/S Mitchell Cotts Kenya Ltd. (The Company) on terms and conditions stated therein. He accepted his employment as the Company’s Finance Manager with effect from 01. 09. 1990. For the next 5 years or so until 15. 06. 1995, Wanjohi rendered what the Company itself assessed as “Professionally efficient, trustworthy and responsible” service to the company. Indeed on 23. 01. 95 the company saw it fit to review Wanjohi’s salary upwards in “Recognition of the good performance of your duties.”

But the company’s majority shareholders met on 27. 4. 1995 and resolved to restructure the company by dismantling the Head Office and segregate the Company’s business units to operate hence-forth as independent Corporate bodies. The resolutions were subsequently approved by the Company as a whole and that put paid to Wanjohi’s position as Financial Manager at the Head Office. He was informed about the arrangements under foot and that his services would no longer be required in Mid-May 1995. He felt alarmed at the development and addressed himself to the Company at length on 23. 05. 95 enumerating *inter alia*, a compensation package including:

(i)	Redundancy	payment	Kshs.	7,529,215
(ii)	Leave due		Kshs.	493,583.20
(iii)	6 months	payment	in lieu	
of	Notice			Kshs.1,505,843
(iv)	Loan write off	Kshs. 166,828		
Total		Kshs.9,695,468.20		

He based his calculations on his total monthly remuneration package at Shs.250,974.

The Company reverted to him on 15. 6. 95 with an offer of settlement of his terminal dues at:

(i)	3 months	payment	in Lieu	of Notice	Kshs.361,500.00
(ii)	Leave	Pay			Kshs.233,737.00
(iii)	Severance	pay	(15	days per year)	Kshs.297,123.00
(iv)	15 days	work for June		Kshs. 60,250.00	

Total

Kshs. 952,610.00

From that would be made deductions for taxation and staff loans. The Company based its calculations of the gross monthly salary of Kshs.120,500/=.

Wanjohi would not accept that offer and infact revised his claim upwards when he instructed his advocates to send a Demand Notice to the Company. He came to this Court on 15. 6. 95 and filed suit claiming general damages for breach of contract, loss of career and financial loss; together with special damages particularised as:

a)	Accrued Leave (59 days)	Kshs.	493,582.20
b)	3 months salary in lieu of Notice	Kshs.	752,922.00
c)	Car Loan write off	Kshs.	166,828.00
d)	Outstanding Car Insurance	Kshs.	273,772.00
e)	Pension Funds	<u>Kshs.</u>	<u>623,057.00</u>
Total			<u>Kshs.2,310,161.20</u>

The Company filed a defence denying the claim and laid its own counterclaim for Shs.441,884.15 on account of a motor vehicle loan balance and insurance premiums paid on behalf of Wanjohi, which counterclaim he denied.

The parties then discussed the suit and agreed on facts which were on dispute and those which were not. These they set out in a consent document and applied to court to proceed by way of "Case stated" under Order 34 of the Civil Procedure Rules. An agreed bundle of documents was also filed with the consent of both parties recorded on 12. 3. 98 while by further consent recorded on 4. 12. 2001, the parties agreed to file written submissions. It is on the basis of the agreed facts and documents, together with the submissions of Counsel that this Court is asked to answer four issues, namely:

- "(a) What circumstances led to the termination of the plaintiff's employment and whether the termination was lawful or oppressive, unreasonable, unfair and malicious, callous and motivated by ulterior motives.
(b) Whether the plaintiff is entitled to any damages and/ or compensation as a result of the termination and if so, the quantum thereof.
(c) Whether the compensation or terminal benefits should be calculated on the basis of an income of Kshs.250,974/= or Kshs.120,500/=
- (d) Who should bear costs of these proceedings?"

The Agreed facts are these:

1. The plaintiff was employed by the defendant as a finance manager with effect from 1st September, 1990, by a letter dated 21st May, 1990.
2. With effect from 23rd January, 1995, the plaintiff's gross monthly remuneration was Kshs.250,974/= made up as follows:

a) Salary

i.	Basic salary (pensionable)	Kshs.	82,500.00
ii.	Sundry allowances (non-Pensionable)	Kshs.	22,500.00
iii.	House allowance (non-Pensionable)	Kshs.	12,500.00

Total

Kshs.120,500.00

b). Benefits

i.	Pension contribution	Kshs.	82,500.00
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ii.	School fees	Kshs.	7,500.00
iii.	Motor vehicle running expenses of 2,500 km @ 29.75	Kshs.	74,375.00
iv.	Medical allowance	Kshs.	15,416.00
v.	Security	Kshs.	12,416.00
vi.	Telephone and electricity	Kshs.	8,000.00
vii.	Newspaper	Kshs.	1,343.00
viii.	2 club memberships	Kshs.	1,355.00

Total Kshs.130,473.00

3. The defendant terminated the plaintiff's employment in June, 1995.

4. At the time of termination of employment, the plaintiff:

- a) Had 58 days accrued leave.
- b) Was indebted to the defendant in the sum of Kshs.166,828/= being balance on a car loan.
- c) Had received Kshs.10,734/= on his pension – account for the months of June to August, 1995.

5. By a letter dated 12th June, 1995 the defendant offered to pay the plaintiff terminal dues and severance pay as follows:

-15 day pay for June 1995	Kshs.	60,250.00
-3 months salary in lieu of notice	Kshs.	361,500.00
-58 days outstanding leave	Kshs.	233,737.00
-Severance pay at 15 days for each year worked	Kshs.	233,737.00

Sub-total Kshs.952,610.00

-Less tax	Kshs.	273,648.00
-Balance	Kshs.	678,962.00
-Less: -Car Loan	Kshs.	166,828.00
-Car Insurance	Kshs.	149,078.00
-Staff debtors	Kshs.	125,978.15
-June-August Pension	Kshs.	10,734.00

Total Kshs.226,343.85

This calculation was based on a salary of Kshs.120,500/= per month.

6. On 18th September, 1995, the defendant paid to the plaintiff the sum of Kshs.552,591/= being pension benefits due to the plaintiff.

7. On 4th October, 1996, the defendant paid to the plaintiff a further sum of Kshs.362,681/= made up as hereunder:-

a) 3 months salary in lieu of notice	Kshs.	361,600.00
b) 58 days outstanding leave	Kshs.	233,737.00
c) 15 days pay for June, 1995	Kshs.	655,487.00
Sub-total	Kshs.	655,487.00
Less: Balance on car loan	Kshs.	166,828.00
Staff debtors	Kshs.	125,978.00

Total

Kshs.362,681.00

The calculation is based in a salary of Kshs.120,500/= per Month.

8. The defendant's counter claim has been settled.

The disputed facts are these:

- 1) That the termination and offer by the defendant were oppressive, unreasonable, callous, unfair and motivated by ulterior motives.
- 2) That the termination was in breach of the contract of employment.
- 3) That the plaintiff has suffered loss and damage.
- 4) That the plaintiff is entitled to general damages for loss of career and breach of contract, and severance pay.
- 5) That the plaintiff's terminal benefits severance pay should be calculated using a salary of Kshs.250,974/=

On the first issue, the plaintiff's advocates M/S Wangai Nyuthe & Co. submit that the shareholders of the company took a decision to downsize the Company without giving any opportunity to Wanjohi to be heard. After the decision was effected Wanjohi sought but was not given audience to discuss his predicament. He was a good employee of the Company who had dedicated his professional service to it for five years and was suddenly being jettisoned at the young age of 46 years with a bleak future for himself and family. His career prospects were curtailed and his reputation was cast in doubt in the eyes of his professional colleagues. All this was contrary to the Rules of natural justice, oppressive, unreasonable, unfair, malicious, callous and was motivated by ulterior motives.

M/S Mbai & Kibuthu, Advocates for the Company saw the issue differently. The relationship between Wanjohi and the Company was no more than a normal contract of employment whose terms bound the parties. And one of the terms was that it was terminable by the giving of either party three months notice or paying three months salary in lieu of notice. These are the terms the company complied with in terminating the Plaintiff's employment and there was no requirement that the Plaintiff be involved in discussions prior to the company taking decisions on its reorganisation. At all events Wanjohi was kept abreast of the developments as he admitted in his letter dated 17. 5. 95. He was aware the Head Office was being dismantled. No ill motive or malice was intended or proved. No career prospect was curtailed either because the plaintiff had known all along that either party could determine the contract. The allegation of unlawfulness or oppressiveness does not therefore arise.

I have looked at the bundle of agreed documents which form the basis of the parties' relationship and I am satisfied that the letter dated 21. 5. 1990 and the General Instruction No. 6/5 referred to in paragraph 3 of that letter form the basis of such relationship. These are the terms accepted by the plaintiff in his employment and they include a clause on termination of the employment. Specifically as relates to the plaintiff clause II (ii) of the General Instruction provides:

“..... Contracts of employment shall be terminable by the giving by either party three months notice effective from any day of any month failing which there shall be paid by the party terminating such contract without notice three months salary in lieu of notice.”

That provision echoes the truism that employment is not servitude and either party can walk in and out of it without having to assign reasons for doing so. There are other provisions for termination which do not concern us here.

It is argued by counsel for the plaintiff that what the Company did was not provided for in the agreement

as it amounted to redundancy which is not mentioned. It was an unlawful termination because the plaintiff had not committed any crime or other breach of contract to deserve it. That is why condemnation of the Company and damages should ensue.

I think with respect that the argument has no merit. By whatever name called, the services of the plaintiff with the Company were terminated and he was expressly so informed in writing. That accords with the terms of employment of the plaintiff and the Company need not to have assigned a reason for invoking an employment clause agreed on by both parties. The adjectives employed in the first issue do not therefore arise. I answer the issue in the negative.

As for the second issue on damages and/or compensation the plaintiff's advocates argue, assuming the first issue was positive, that general damages to the tune of Kshs.100,000/= is awardable. That would take care of the suffering the plaintiff underwent at the unfair treatment and loss of career prospects in the future. For that proposition the Court of Appeal decision in *East African Airways vs Knight* [1975] EA 165 was relied on. There, general damages for loss of career were awarded in a contract of employment which had no exhaustive provisions for termination of the contract.

On the same issue the defendant's counsel submitted that such damages are not maintainable on law. For that the Court of Appeal decision of *Kenya Ports Authority Vs Edward Otieno* CA No. 120/97 (Gicheru/Omolo/ Lakha JJA) and *Emmanuel Kimani Gitau Vs E. A. Power & Lighting Co. Ltd*, HCCC 1568/83 were cited.

It is indeed so that the Court of Appeal has held in several decisions that general damages for wrongful dismissal are not recoverable. In cases decided earlier than the *Edward Otieno* Case (*Supra*) which was decided on 19. 09. 1997, the Court dealt with that issue at length. I allude to one of the cases CA 124/1985 *Kenya Oilfield services Ltd vs Peter Njoroge* (Muli/Akiwumi/Tunoi JJA) decided on 8. 12. 1994. there the plaintiff was employed and worked successfully as an "Operational Manager" but was unlawfully dismissed and claimed special and general damages for unlawful dismissal. The court in discussing damages for unlawful dismissal stated:

"The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination clause the measure of compensation is for the reasonable period of notice depending on the nature of the employment."

The Court relied on the House of Lords case of *Addis Vs Gramophone Co. Ltd* (1908 – 1910) All ER Rep 1 F and cited from it *in extenso*. The *EAA Vs Knight* case (*Supra*) was also discussed. Citing four categories, only one of which is relevant to this case, the court stated:

"Where the employer and the employee enter into a service contract which stipulates a termination clause or notice to terminate the employment, there is no difficulty because the employer and the employee intended to be bound by the termination clause or notice regardless of the nature of the employment. Following the unlawful termination of such service contract there is then breach of that contract and the measure of compensation or indemnity or general damages or special damages, call them what you may, is the loss the employee would incur during the stipulated period of the termination clause or Notice. (see *Addis Vs Gramolhong Co. Ltd (supra)* and *Southern Highlands Tobacco Union Ltd Vs David Mcqueen* (1960) E.A 490)"

It was also held in that case that:

".....no account should be taken for the injured feelings of the employee by the nature of termination of his employment nor the termination thereof renders it difficult for the employee to obtain alternative employment. The overriding principle in all the categories is that the unlawfully terminated or dismissed employee is to mitigate his damages so far as he can"

Similar sentiments were expressed in the *Edward Otieno* Case (*supra*) where the employee was working

as a Manager but was prematurely and summarily retired when he was on leave. He claimed and was awarded general damages of Kshs.100,000/= for “shock and distress” by the High Court. On Appeal it was held following the *Addis Case (supra)* where the employee had been dismissed in “harsh and humiliating manner,” that the manner of dismissal could in no way affect the damages. The court adopted the words of Lord Loreburn LC as applicable in this country:

“To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905 and April, 1906, together with the commission which the jury think he would have earned had been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge CJ, has been quoted as authority to the contrary. I doubt if the Learned Lord Chief Justice so intended it. If he did I cannot agree with him.

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

Finally, 10 days after the *Musa Otieno Case* (29. 10. 97), the same Court of Appeal differently constituted in Criminal Appeal 135/94 *Shimba Tourist Services Ltd Vs Wilson Mise Kigan* (Kwach/Akiwumi/Pall JJA):

“The law on the point in issue (ie general damages for wrongful dismissal) is well settled. In a claim by an employee against his employer for damages for wrongful dismissal, such damages are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with the terms by giving either the proper notice or salary in lieu thereof. General damages are not recoverable.”

With that the fate of the second issue is sealed. It is answered in the negative.

The contest in the third issue is whether the payments made to the plaintiff should have been based on the figure of Kshs.250,974/= or Kshs.120,500/ =. The plaintiff insists on the former figures and bases his argument on the fact that his total emoluments per month totalled that figure. He relied on HCCC 2179/98 *Francis Wanganju Vs Unga Group Ltd* where Khamoni J. used the figure of combined salary and benefits to award compensation. Needless to say that decision is not binding on me.

The company on the other hand maintained that the salary which was the basis of payment in lieu of notice was stated in the plaintiff’s letter of Appointment. The payment does not include benefits which are set out separately and are not part of the salary. Again the Court of Appeal decision in the *Musa Otieno Case* was relied on in addition to *David Chege Mwangi Vs University of Nairobi CA 144/95* and HCCC 775/87 *George Kang’ethe Kimani Vs Associated Steel Ltd*.

I have perused these decisions and I am satisfied that the Company’s proposition is more consonant with the law and the facts of this case.

The starting point once again is the contract signed between the parties as shown in the agreed bundle of documents. The letter of offer of employment which was accepted, clearly distinguished between “salary and allowances” as one package and “benefits” as another package, although both accrued monthly. Edward Otieno in his case claimed his entire monthly package including “salary, medical allowance, housing allowance, leave allowance, mileage allowance, telephone allowance and services.” But the Court of Appeal held that the payments were not due after termination of employment as “they are enjoyed by those in actual employment and not those who have been retired.” Bosire J. (as he then was) in *George Kang’ethe Kimani’s case (Supra)* rejected payment of claimed emoluments of the general

manager whose services came to an end when the employer company was sold out. The letter of appointment had a designated salary. There were also other terms including entitlement to 30 days leave, a house allowance, a car allowance and later a company car and entertainment allowance.

In so rejecting the claims the Learned Judge stated:

“House allowance is not payable. The plaintiff was not entitled to it after his employment had been terminated. The contract document is clear that in default of notice either party would give to the other three months pay. House allowance cannot be regarded as part of pay. It is not payable for services rendered but as a means of providing an employee with accommodation for himself while he works for that employer, in order to make him comfortable. There is no provision in the contract document for the payment of house allowance in lieu of notice. In *Luhume Vs Coffee Marketing Board of Uganda* (1970) EA 155, a decision of Dickson J. it was held that a servant whose employment is terminated summarily is not entitled to free housing and all other incidental benefits after the date of termination in lieu of notice, unless the contract expressly so stipulates. The Learned Judge quoted with approval the words of Russell J. in the case of *Wakiro Vs Committee of Bagisu Co-op. Union* (1968) EA 523, in which he had stated:

“It is clear that the appellant’s employment was terminated the moment they received the letters of dismissal and they ceased to be officers of the society. It would have been otherwise if they had been given three months’ notice prior to termination, as they would in such event have continued to be officers of the Society until the notices had expired.”

Dickson J. said:

“It follows, therefore, that once the plaintiff had been given salary for a certain period in lieu of notice, his rights as an officer of the defendant ceased, and he and his wife and children were not entitled to medical and dental treatment; free housing or car allowance in lieu thereof..”

Both decisions are from High Court of Uganda. They are not binding. They are only persuasive. I am persuaded as to the soundness of the reasoning therein.

I adopt the words.”

In this case the salary package included “Sundry allowances” and “House allowance”. Clause No. 2 of General Instruction No. 6/5 provides for “REMUNERATION” and draws a distinction between salary and allowances, that:

“Salary in accordance with rates agreed between the company and the employee are payable monthly in arrears less any deductions which properly fall due to be made. No allowances are payable unless specifically stated on engagement or if allowances are payable in accordance with the laws of Kenya.”

The parties then went ahead and specified what would be included in the generic term “Salary” and what amounted to “Benefits”. I agree with the authorities cited above that the benefits were paid as a means of providing the employee with a more comfortable environment to discharge his duties and they ceased with the termination of employment. There was clear provision in the termination clause that it is the “salary” which would be paid in lieu of notice and both parties have defined what salary entails in the agreed facts. The original letter of offer dated 21.5.1990 which was accepted by the plaintiff is also instructive as it distinguishes “Remuneration” as “Basic Salary” and “Benefits” which are all enumerated therein.

I am of the view that the compensation or terminal benefits are calculable on the basis of the income of Kshs.120,500/=.

Lastly on costs I am of the view that the plaintiff had maintained an erroneous basis upon which his

terminal benefits would be worked out and so made the likely settlement of the matter more difficult. Payments have already been made by the company on the basis of the income figure now determined by the court and only three issues remained undetermined. I am also of the view that the company adopted an unrealistic stand in denying any liability for payment of terminal benefits in their defence and did not with the filing of the defence deposit in the court by way of tender the amounts they considered due to the plaintiff.

Both parties are equally to blame for the litigation and I would make an order that each party bears its own costs.

Dated and delivered at Nairobi this 28th day of June, 2002

P.WAKI

JUDGE