



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO 270 OF 2017

BETWEEN

CHARLES MUTURI MWANGI.....APPELLANT

AND

INVESCO ASSURANCE CO. LTD.....RESPONDENT

(Being an Appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Hellen Wasilwa, J.) dated and delivered on 15th March, 2016

in

ELRC Cause No. 128 of 2011)

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the Employment and Labour Relations Court (ELRC) (Wasilwa, J.) delivered on 15th March, 2016 in which the learned Judge passed judgment in favour of the appellant granting orders that: the suspension of the appellant was unlawful; the appellant was entitled to unpaid salary for the remainder of the contract period being from 14th December, 2007 to 5th May, 2009 when his contract expired amounting to Kshs. 6,680,000/- and unpaid leave allowance for the year 2009 amounting to Kshs. 100,000/-. The appellant being dissatisfied with the findings of the trial Court proffered this appeal.

2. A brief background of the case as pleaded by the appellant in his amended memorandum of claim dated 9th May, 2013, is that he was at all material times an employee of Invesco Assurance Co. Ltd (the respondent), having been employed on 1st June, 2006 in the capacity of a Marketing General Manager. The Contract stipulated that the employment was on permanent basis running for a minimum period of three (3) years with a basic salary of Kshs. 400,000/- per month, monthly entertainment allowance of Kshs. 200,000/-, monthly mileage allowance of Kshs. 92,500/-, monthly mobile phone airtime of Kshs. 15,000/-, members' club membership fees and Medical Health Insurance Cover covering his spouse and up to five (5) children under the age of 25.

3. It was the appellant's case that he had worked diligently for the respondent from June 2006 until 14th December, 2007 when the respondent purported to suspend him, by a letter from the Respondent's Chief Executive Officer, one Dave Leteipan, pending alleged investigations vide a memo dated the same day. The claimant further contended that as at the time of his suspension he had not received his annual leave nor received payment in lieu thereof, his club membership fees and that his remuneration for the months of September, October, November and December were yet to be paid. He contended that during that period deductions were duly made from his salary for pension as per the contract of service.

4. He contended that by a memo dated the 17th December, 2007 he was requested to hand over all documents and company property to one Mr. Makanga who immediately took over his office and work.

5. He averred that since being placed on suspension, the respondent had not commenced termination proceedings as stipulated for the agreement hence he was in limbo for a period of 2 ½ years and that the situation had persisted to the time of filing suit where he was not paid

remuneration, which he alleged was irregular and unlawful and in breach of the contract of service, the rules of natural justice and the Employment Act.

6. On 8th January, 2008 vide a letter addressed to the Chief Executive officer the appellant made demands for his unpaid salary, which were not honored, and the same has remained unpaid to date despite a further demand of the same on 13th February, 2008. Further, since the alleged suspension the appellant has never been informed of the findings of the purported investigations or the status of his employment.

7. The particulars of his claim against the respondent were as pleaded on the face of the Memorandum of Claim as follows:

- “a) Failing to advise Claimant on the existence of proceedings, meeting and deliberations concerning his conduct as employee of Respondent contrary to rules of natural justice.***
- b) Failing to accord Claimant opportunity to be heard during the alleged investigation into his conduct***
- c) Failing to notify the Claimant of the outcome and/or recommendations of the alleged investigations***
- d) Wrongfully and without justifiable cause sending Claimant on suspension and compulsory leave***
- e) Wrongfully and without justifiable cause extending Claimant’s purported compulsory leave and failing to reinstate him to employment***
- f) Wrongfully and without justifiable cause terminating Claimant’s service contract***
- g) Failing to serve Claimant with due notice prior to termination of service contrary to terms of the said contract***
- h) Failing to compensate claimant for termination of contract service as provided therein for the unexpired period of the contract term***
- i) Failing to pay Claimant salary for months of September 2006 (*sic), October 2007, November 2007 and December 2007 in breach in (*sic) the service contract***
- j) Failing to compensate Claimant for annual leave accrued but not taken and preventing the Claimant from earning for the unexpired period of the contract of service***
- k) Failing to pay the Member’s Club membership fee***
- l) Failing to pay the Claimant the Employer’s contribution to the Provident Fund.”***

8. The appellant extensively pleaded particulars of special damages and unpaid salaries and allowances, which he also sought from the Court. Consequentially, the appellant sought the following prayers:-

- “a) Immediate release of the investigation report***
- b) Clearance certificate from the purported investigation and an apology to that effect***
- c) Reinstatement to earlier position without loss of salary, annual increments and benefits as per the contract of service***
- d) A declaration that the purported suspension was unlawful and that the Claimant is entitled to the prayers sought.***
- e) Payments of sums pleaded in Paragraph 14 i.e. particulars of special damages/unpaid salaries and allowances amounting to Kshs. 1,080,000.00 and interest from due dates***
- f) Interest at the compounded commercial rate of 25% per annum from the 17th of December 2007, until payment in full***
- g) Costs of this suit.”***

9. In opposition, the respondent filed a Statement of Defence on the 15th of August, 2013. According to the respondent, the appellant was employed as Marketing General Manager earning a remuneration package of Ksh. 400,000.00 per month and benefits and allowances as outlined in the statement of claim. The respondent further averred that the appellant had been engaged in an employment contract running for a minimum period of 3 years commencing on 1st June, 2006. It was contended that the said contract was subject to the Employment Act, 2007 and that the appellant was legally dismissed summarily for acts of dishonesty, professional misconduct and for abandoning his place of work, and that in any event the respondent’s contract could not be performed owing to frustration of the contract following the imposition of a moratorium on the respondent.

10. It was the respondent's case that the Chief Executive Officer, Insurance Regulatory Authority on the 29th of February 2008, placed it under statutory management and that by virtue of such occurrence, the claimant's contract of service (if any) was thereby determined by the doctrine of frustration occasioned by change of corporate identity of the respondent during the moratorium period. The respondent further averred that by virtue of the cessation of the respondent to operate as a going concern and the subsequent closure of its branch network countrywide, the respondent's source of income was suspended as the respondent was prohibited from issuing any policies and/or transact any business. The respondent maintained that if at all a contract of service subsisted between itself and the claimant as at the time of the moratorium, it was frustrated and the same lapsed automatically. That it became legally extinguished and incapable of performing through frustration.

11. The respondent contended that the appellant was sent on compulsory leave on cogent grounds and tangible evidence and denied that the appellant was entitled to the reliefs particularized and sought in the claim and prayed for dismissal of the suit with costs.

12. From the forgoing facts and evidence before her, the learned Judge isolated the three issues for determination to be:

"1. Whether this claim is time barred.

2. What was the status of the Claimant with the

Respondent after 29th February, 2008 when the Respondent was placed under Statutory Management?

3. What remedies are available to the Claimant if at all."

13. On the first issue the learned Judge found that the claimant was suspended from duty on 14th December, 2007 and that thereafter in February 2008, a Statutory Manager was appointed to run the respondent's affairs for a period of 12 months and give appropriate recommendations for revival or liquidation. Further, that the Statutory Manager despite having the duty to manage employees either on duty or suspended, failed to address the claimant's issue hence the claimant remained suspended until his contract expired on 5th May, 2009. In view of this she held that:-

"...time did not start running until 5.5.2009 when the contract expired. This claim was filed on 2/2/2011 without the Respondents addressing the position of the Claimant again and so it is my finding that within this period, from 5/5/2009 to 2/2/2011, the Claimant was within the limitation period of 3 years provided under Section 90 of Employment Act 2007 and therefore this claim is not time barred."

14. The learned Judge determined the second and third issues together. She found that following her aforementioned findings that the claimant remained suspended even after the statutory manager declared a moratorium over the respondent until the time when his contract expired, from 14th December, 2007 to 5th May, 2009, then the Court was to determine whether such suspension was justified or not. The learned Judge held that despite the fact that there was an arbitration clause in the contract, the parties could be construed to have opted out of arbitration since none of them raised the same before the trial Court. She therefore held that in determining the claim, the Court was guided by the Employment Act 2007. The learned Judge established that in a case of disciplinary issues before any drastic measures are taken, first an employee's alleged misconduct ought to be investigated. Thereafter the employee is to be notified of the alleged misconduct and be issued with a notice to show cause why disciplinary proceedings should not be leveled against him. Further, that it is only after an employee has explained himself that a suspension/ interdiction may follow.

15. The learned Judge found that in this case there was no evidence that such procedure had been followed. Hence, from the onset, the process taken against the claimant was flawed. She further found that the claimant had remained suspended for an unjustifiably long period hence the disciplinary process against him was against the dictates of the law.

16. The learned Judge held that in view of her findings that the claimant had remained suspended until his contract expired, and such suspension being unlawful, he was entitled to: Ksh. 6,680,000/- being the unpaid salary for the remainder of the contract period being from 14/12/2007 to 5/5/2009 i.e. 16 months 21 days and leave allowance all amounting to Ksh. 6,780,000 less statutory deductions and; costs of the suit plus interest accrued.

She further held that,

"The other claims for medical expenses were on reimbursable basis and so are not tenable. Also the claim for club membership is not tenable without proof that the Claimant paid for himself the amount in question."

17. Dissatisfied with the above findings, the appellant filed the Notice of Appeal dated 22nd March, 2016 challenging "part of the said decision" without specifically stating which part of the judgment aggrieved him. He has proffered eleven (11) grounds of appeal which *inter alia* fault the learned Judge for: failing to find that the appellant was employed on permanent basis; failing to appreciate that the service contract could only be terminated on its own terms and; failing to assess the appellant's claim for salary arrears for the period between September 2007 to December 2007.

18. At the plenary hearing of the appeal before us, parties were represented by learned counsel. Miss Mukami Mwangi appeared for the appellant while Mr. Peter King'ara appeared for the respondent. Both counsel highlighted their submissions which had been filed earlier pursuant to directions given at the case management conference held on 5th December, 2017.

19. Miss Mwangi reiterated that the learned Judge erred in finding that the appellant's contract with the respondent was a fixed term contract yet it was on permanent basis. Further, that the holding that the said contract expired on 5th May, 2009 was a misapprehension of the evidence on record.

20. Relying on the provisions of **Section 10(3)(c)** of the Employment Act and the case of **Samuel Chacha Mwita v. Kenya Medical Research Institute (2013) eKLR**, counsel submitted that the plain language of Clause 2 of the service contract clearly indicated that the contract period was for an indefinite period, for not less than three (3) years and no expiry date was expressly or impliedly indicated. Further, that the contract could only be terminated in the manner stipulated in the contract.

21. Secondly, counsel argued that the learned Judge erred in failing to make a finding that there was no contractual basis for suspension and/or suspension without pay. He cited the case of **The Board of Trustees National Social Security Fund v. Michael Mwalo (2015) eKLR** where the Court held that a Court of law cannot sanction an illegality and that where such illegality is brought to its attention it overrides all questions of pleadings including admissions made thereon. He argued that the suspension was an illegality and that the Court ought to have found as much.

22. Counsel also contended that the terms of the contract did not provide for suspension with or without pay. Further, that there was no evidence of a Human Resource manual expressly providing for suspension as a sanction. He urged that indeed the learned Judge made a finding that the contract of employment dated 3rd May 2006 did not list any disciplinary processes. Therefore, that there was no legal basis for the suspension imposed on the appellant.

23. Counsel faulted the learned Judge for finding that if indeed the appellant had been suspended, such alleged suspension ended on 5th May, 2009. She maintained that this was erroneous as the said suspension could only come to an end by the respondent lifting the suspension but not by effluxion of time. Citing, *inter alia*, the case of **Philemon Musembi Muhindi v. Chairman Board of Management Keveve Youth Polytechnic (2015) eKLR** she faulted the learned Judge for failing to find that the appellant was entitled to the unpaid remuneration during the period of suspension despite finding that such suspension was unlawful.

24. She further argued that the learned Judge failed to make a finding that the appellant had experienced untold suffering due to the unlawful suspension despite the same having been pleaded and canvassed before the Court. She maintained that the appellant was entitled to damages for the unlawful suspension.

25. Counsel also submitted on the protection of an employee's salary under

Part IV of the Employment Act, which prohibits the manner in which deductions may be made against an employee's salary during a period of suspension. He cited the case of **Thomas Sila Nzivo v. Bamburi Cement Limited (2014) eKLR** and **Peterson Ndung'u & 5 Others v. KP&L Company Limited (2014) eKLR** where the Court emphasized on the protection of an employee's wages during suspension as suspension without pay offends the principles of Fair Labour Practices and Protection of wages.

26. Relying on the case of **James Njuguna Muchiri v. Armed Forces Canteen Organization (AFCO) 2016 eKLR** counsel contended that the Court failed to determine the status and rights of the appellant during the period of unlawful suspension. He further submitted that the learned Judge erred in finding that the non-communication by the respondent on the position of the appellant's suspension was to be construed as a termination of the contract.

27. Thirdly, she faulted the learned Judge for failing to make a finding that the contract expressly provided for termination of the employment only on conditions set out in the termination clauses. She urged that the contract could only be terminated as per Clause 10 of the contract i.e. by the respondent without notice or payment in lieu of notice for any gross default or misconduct; by either party upon giving notice in writing of not less than six months or payment in lieu of notice thereof or; by either party, otherwise than in the latter manner, where the party terminating the contract is to pay, upon a demand in writing, to the other an amount equivalent to the aggregate salary value of the remainder of the contract period.

28. Relying on this Court's decision in **Pius Muthoka v. Alice Gesare Moninda Mombasa** Civil Appeal No. 58 of 2014, counsel faulted the learned Judge for finding that the service contract expired on 5th May, 2009 contrary to the intentions of the parties as per the express provisions of the terms of the contract. She maintained that there was no compelling evidence produced by the respondent to prove that the respondent ever terminated the appellant's term of service. Further, that the law provides that termination must be in writing.

29. Fourthly, counsel submitted that the learned Judge failed to assess and award remuneration for 4 unpaid months before the unlawful suspension, annual increments and benefits during the unlawful suspension. Citing the case of **Patrick Lumumba Maikuva v. Kenya Ports Authority (2013) eKLR** she urged that there was evidence showing that the respondent had failed to pay the appellant's remuneration for the four months prior to his suspension despite consistent demand by the appellant. Counsel also raised the issue of

failure by the Judge to order that the appellant be awarded a certificate of service as prayed in the memorandum of claim. Ultimately, counsel urged us to allow the appeal and grant the appellant the orders sought.

30. Opposing the appeal, Mr. Kin'gara learned counsel for the respondent submitted that the claim before the ELRC was predicated on an unfounded assumption that the appellant was still in employment with the respondent more than 8 years after his contract was terminated. He further submitted that the anticipatory salaries claimed by the appellant go against the firmly established principle, which dictates against awarding anticipatory salaries. In buttressing this point, the respondent cited this Court's decisions in **D.K Marete v. The Teachers Service Commission**, Nairobi Industrial Case No. 379 of 2009 and **David Mwangi Gioko & 51 Others v. The Nairobi Water & Sewerage Company Limited** (2013) eKLR.

31. On the award of damages sought by the appellant, counsel cited the case of **George Onyango Akuti v. G4S Security Services, Mombasa Industrial Cause No. HCCC 107 of 2013** and the case of **Menginya Salim Murgani v. Kenya Revenue Authority**, HCCC No. 1139 of 2002. In a nutshell, he submitted that general damages as prayed for by the appellant were not awardable for a claim of wrongful termination of employment. Further, that an aggrieved party seeking relief has an obligation to mitigate his/her own losses and must move on to seek other employment opportunities and not sit back waiting to enjoy anticipatory remuneration. Counsel submitted that the appellant's contract of employment with the respondent had expired. Further, that he had not reported to his office or offered any services or did any act that could be construed to mean that he was engaged by the respondent.

32. Counsel went on to submit that the submission on the appellant's inability to service his financial commitments owing to withheld salaries and other dues was misplaced as there was no nexus between the issue of loan and the appellant's employment as the lending institution could not have advanced the loan on the security or the strength of his salary alone. Further, that the money lending business involves evaluation of the applicant's suitability and urged the Court to disregard that line of submission.

33. On the appellant's claim that his services had never been terminated, counsel contended that the letter by the appellant dated 6th April, 2010 referred to unlawful termination, which meant that he was aware that he was not an employee of the respondent by the time the letter was sent to him. He further submitted that one Jeremiah Ichaura confirmed that under the moratorium communicated and declared by the statutory manager on the 29th of February, 2008, the respondent stopped trading as a going concern and could not have continued in its business of selling insurance policies for which the claimant had been employed. Counsel submitted that by the appellant's own testimony, it was evident that he was employed by the respondent on 1st June, 2006 and his engagement with the respondent ended on the 14th of December, 2007, this being about one and a half years, yet his claim was pegged on a period in excess of 8 years.

34. Relying on the case of **Engineer Francis N. Gachuru v. the Energy Regulatory Commission**, Industrial Cause No. 203 of 2011 counsel submitted that the mere fact that the appellant's contract is referred to as permanent and pensionable does not mean that it cannot be terminated and indeed no employment is permanent. Counsel submitted that the contract was to run for a minimum period of three years meaning that the same was subject to renewal at the lapse of the three years and as such it was not necessarily permanent employment. Counsel argued that it was legally untenable for the appellant to claim to still be in employment while the respondent was under a legal moratorium and not trading as a going concern. Counsel submitted that **Section 67(c)** of the Insurance Act gives one of the implications of a moratorium to be the suspension of running of time for purposes of limitation and other legal processes. Counsel submitted that the appellant chose to ignore the implications of the moratorium declaration, which was succeeded by the sell-out of the respondent as a new outfit with new owners, Memorandum and Articles of Association, new shareholding, new operational structures and even new staff.

35. Counsel submitted that even if the appellant had not been summarily dismissed by the respondent, the most he could have remained in employment was for a maximum period of two months owing to the placement of the respondent under a moratorium on the 29th February, 2008 which had the effect of rendering its employees constructively redundant. He posited that it was not legally permissible to issue a redundancy notice owing to the unique circumstances of the case.

36. Lastly, on the issue of quantum, counsel faulted the claim for anticipated salaries and awards citing the case of **Mariah Kagai Ligaga v. Coca Cola East and Central Africa Limited** (Industrial Cause NO. 611 (N) of 2009 (UR)). On unpaid salaries, he submitted that the respondent led evidence to show that its records and software were lost and grossly mutilated during and after the legal moratorium including those relating to the appellant. On unpaid allowances for September, October, November and December 2007, counsel submitted that under the circumstances the said allowances were not payable to the appellant as expenses incurred had to be approved by the director in charge of marketing and the same had to be supported by receipts and approved for reimbursement and that no shred of evidence was adduced in support of the reimbursement claimed.

37. On payment in lieu of leave from 2006 all through to 2013 and leave allowance, counsel submitted that the appellant was not justified in asking for leave for a period of 8 years while he was employed for less than two years.

38. On pension benefits, counsel submitted that the appellant was only engaged for a period of one and a half years i.e. the whole of the year 2006 to 14th December, 2007 and pension is not due for the remainder of the years. He further submitted that the staff pension scheme was administered and that all the staff contribution was remitted to the scheme administrator, Brittak. The respondent further referred the Court to the appellant's submission before the High Court where he admitted to have withdrawn a sum of 600,000 from Brittak in the year 2012 and that if at all there was a balance, the same was to be pursued with the administrator.

39. On costs of medical cover, the respondent submitted that since the appellant's employment was terminated in December 2007, the medical cover, which was part and parcel of the said contract, determined the minute the contract was terminated.

40. On club member's joining fees the respondent submitted that this was a discretionary benefit extended to the claimant at the pleasure of the board and which determined upon termination of the contract and that **the fact that the appellant admitted not joining any club he is not entitled to the same.**

41. On notice period remuneration, the respondent submitted that it led evidence to show that the appellant was terminated under clause 10.1(a) of his contract of employment for gross misconduct affecting his business with the company and under those circumstances he was not entitled to notice.

42. Finally on reinstatement, the respondent submitted that this was not a remedy available to the appellant for reasons that the people who had contracted the services of the appellant in the first instance are not the owners and that the said position has since been taken up by another employee and over 8 years have lapsed. It was further submitted that the appellant's termination was under controversial circumstances based on his integrity, which broke mutual trust between him and the former owners, and that there was no cogent basis for an order of reinstatement. Counsel urged that the appeal be dismissed with costs.

43. We have considered the evidence summarized above in its entirety as is expected of us on a first appeal. See **Rule 29 (1) (a) Court of Appeal Rules**, along with the grounds of appeal and rival submissions by counsel and the law. Having done so, we have been able to decipher the issues for determination as follows; -

i) The nature of the appellant's employment contract. Was it permanent or was it a 3yr term contract;

ii) Whether the appellant continued to be in employment upon placement on suspension or his contract of employment was deemed terminated by virtue of the indefinite suspension?

iii) Whether the learned Judge erred in awarding remedies as she did.

44. On the first issue, it is common ground that the appellant was engaged by the respondent vide a service contract dated the 3rd May, 2006 as General Manager/Marketing. The contract commenced on 1st June, 2006 and continued thereafter subject to termination as provided. Under Clause 2 of the contract, the appellant's employment was said *"to be permanent employment and shall run for a minimum period of three (3) years"*. This clause must be considered along with the other clauses in the contract and not in isolation. The first question that comes to our minds is if indeed the employment was permanent, why was there inclusion of a minimum period of three years? What would happen if either party walked out before the expiry of the 3 years? Was there an exit clause?

45. The said contract of employment provided that the contract was to be deemed to have commenced on 1st June, 2006 and was to continue thereafter subject to termination. The salient features of the said service contract on termination were as set out in clause 10 as follows;-

"10.1. The employment of the employee may be determined;

a) By the company without notice or payment in lieu of notice if the employee is guilty of any gross default or misconduct in connection with or affecting the business of the company or in the event of any breach or non-observance by the employee of the stipulations contained in this agreement which is materially detrimental to the company's interest or

b) Subject to clause 2 of this contract, by either party upon giving to the other not less than 6(six) months' notice in writing or payment of six (6) months' salary in lieu of notice. (Emphasis supplied)

c) In the event of any termination of this contract by either of the parties herein, otherwise than as stipulated in sub-clause (a) and (b) above, the party thus terminating this employment contract shall pay on demand in writing to the other, an amount equivalent to the aggregate salary value of the remainder of the contract period, that is to say the salary as stipulated in clause 5(1) (a) above multiplied by the number of months remaining in the contract period as at the time of such termination." (Emphasis supplied)

46. Our understanding of clause 2 and clause 10 as underlined above is that the contract of employment was for a minimum of three years and if either party was desirous of terminating the contract before the three years were over, it was obligated under clause 10.1 (c) to pay the other party the basic salary for the remainder of the 3 years. We do not see any ambiguity in the above clauses. We also need to emphasise here that the amount to be paid pursuant to the above clause is the amount stipulated for under clause 5.1 (a). Clause 5.1 (a) provides for payment of the "basic salary of Ksh. 400,000 per month". This therefore excludes, expressly, all the allowances the appellant is now claiming, including leave allowance which falls under 5.1 (c). We are however apt to note that the award for leave allowance of Ksh. 100,000 by the trial court was in respect of 2008, though erroneously indicated as 2009, and the same was properly awarded.

47. On the second issue for determination indicated above, the appellant seems to be saying that there was no provision for his suspension in the contract of employment and so his suspension was unlawful. Without overstressing that argument, we can only say that we find that line of argument preposterous. We say so because, even in cases where employees are employed under permanent and pensionable terms, suspension and interdiction pending investigations for alleged misconduct is ordinarily part of the disciplinary process. Whether such suspension or termination was unfair is another issue altogether.

48. In our view the appellant's service contract provided various modes of termination under clause 10. In the instant case there were three modes by which the said contract could be terminated. The first mode is as set out in clause 10.1(a) of the contract which envisages termination without notice in case of gross misconduct, the second mode of termination is set out under clause 10.1(b) where either party may terminate the contract by issuance of a six (6) months' notice or payment of six (6) months' salary in lieu of such notice or under clause

10.1(c) where the contract is terminated in any other mode other than that contemplated in 10.1(a) or 10.1(b) as set out above.

49. The respondent presented two approaches under which it considered the said contract as terminated. The first approach was termination of the appellant's contract of employment for gross misconduct without notice, as provided for in clause 10.1(a). Termination under that clause applies where an employee is guilty of any gross default or misconduct in connection with or affecting the business of the company or in the event of breach or non-observance by the employee of any of the stipulations in the agreement without issuance of a notice.

50. Although the respondent alludes to the summary dismissal of the appellant herein under the said clause, a careful perusal of the record shows that there is no evidence to suggest that the appellant was summarily dismissed from employment as contemplated by the said clause. The appellant was suspended to allow for investigations into certain allegations. There is evidence that the appellant sought clear communication of his status of employment through his letters dated 17th December, 2007, followed by several other correspondences including demand letters addressed to the respondent. All these were met with mute silence. There is therefore no basis in any of the submissions by the respondent suggesting that the appellant was summarily dismissed as per clause 10.1(a) of the service contract.

51. In any event, where dismissal of an employee is actuated by allegations of gross misconduct, section 41 of the Employment Act sets out an elaborate procedure on the procedural aspects of any such termination. Under the provisions of section 41(1), before any such termination on grounds of misconduct takes place, an employee subject of the disciplinary proceedings is issued with a show cause letter in writing and given an opportunity to respond to the allegations/ charges leveled against him. Even after, the employee answers to the said allegations, prior to any termination being effected, an employee is afforded an opportunity to make representations through a disciplinary hearing pursuant to the provisions of section 41(2) of the Employment Act, 2007. There is no evidence that the respondent complied with any of the foregoing procedural safeguards set out in law.

52. On the 2nd option of termination as provided for under clause 10.1(b) of the contract, it is not disputed that none of the parties to the employment contract issued a six (6) months' notice to terminate the same. It cannot therefore be said that the said contract was terminated by virtue of the said clause.

53. The appellant seemed to have placed emphasis on the above two modes of termination of the contract and thereby submitted that since none of the said modes of termination had been invoked, he was deemed to be in the respondent's employment as at the time of filing the proceedings before the Court. It is on the foregoing basis that the appellant sought payment of his salaries and other benefits as if there was continuity of employment.

54. There is however, the other mode of termination other than those provided for under clause 10.1(a) and (b) highlighted above and that is under clause 10.1(c) which we outlined earlier. The said provision makes reference to the "remainder" of the contract period, which can be construed to refer to the residual contract period of the appellant's employment as at the time of the termination. A simple reading of clause 10.1(c) of the contract shows that it was contemplated that the contract was to be for a defined period i.e. "*a minimum of three years*", with the option of renewal.

55. In her judgment, the trial Judge rendered herself as follows:-

"In the case of the Claimant, the suspension remained until the contract expired. It is this court's findings that the suspension was unfair and unjustified and it amounted to a termination where there was no communication as to the next cause of action. That being the case the claimant is entitled to the unpaid salary for the remainder of the contract period being from 14.12.2007 to 5.5.2009 when he remained on suspension..."

56. Can the learned Judge be faulted for arriving at the above conclusion?

We don't think so. The learned Judge only applied the third option of termination as provided under clause 10.1 (c) and given the circumstances surrounding the termination and that the suspension was never lifted, that was the most justified option. We find that the appellant's claim and submissions that he was entitled to payment of salaries for January 2008 to May 2013 has no basis as the said contract was deemed terminated under clause 10.1 (c) as correctly held by the Court.

57. The Judge held, and rightly so in our view, that the indefinite suspension amounted to a termination in the absence of any communication as to the next cause of action. In the circumstances, clause 10.1 (c) of the contract makes provision for payment of salaries for the entire period that the appellant was placed on indefinite suspension and for the remainder period of the contract and therefore the same reasonably

compensates the appellant for any losses suffered. In our view, in view of the damages awarded which was in strict compliance with the appellant's contract of employment, the question of reinstatement does not arise.

58. On the issue of interest rates awarded, the appellant prayed for interest at compounded commercial rates of 25% per annum from the 17th of December until payment in full. He faulted the trial court for failing to award under this head as prayed. The award of interest and the interest rate is at the discretion of the court. The dispute before the trial Court was an Employment dispute predicated on a contract of employment and not a commercial contract. The appellant has not placed any material before us to justify an award of interest at commercial rates. We find no justification whatsoever for such an award. We note however that the learned Judge did not specify which interest rate should apply. The accepted practice is that where the interest rate is not indicated, the interest rate applicable should be the prevailing court rate.

59. On the whole, for the reasons given above, we are not persuaded that this appeal is meritorious. Accordingly, we dismiss it with orders that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 24th day of January, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR