



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, GATEMBU & OTIENO-ODEK JJA)**

**CIVIL APPEAL NO. 64 OF 2018**

**BETWEEN**

**RICHARD ERSKINE LEAKEY.....1st APPELLANT**

**Dr. SALLY JEMGETICH KOSGEY.....2<sup>nd</sup> APPELLANT**

**THE HON. ATTORNEY GENERAL.....3<sup>rd</sup> APPELLANT**

**AND**

**AMBASSADOR SAMSON KIPKOECH CHEMAI.....RESPONDENT**

***(Being an appeal from the judgment and decree of the Employment and Labour Relations Court***

***at Nairobi (M. N. Nderi, J.) dated 10<sup>th</sup> November, 2017***

**in**

**Nairobi ELRC Cause No. 842 of 2013**

***formerly***

**HCCC No. 1183 of 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. By a Complaint dated 17<sup>th</sup> July 2001 and amended on 31<sup>st</sup> July 2001 and filed in court on 1<sup>st</sup> August 2001, the respondent, ***Ambassador Samson Kipkoech Chemai***, lodged suit against the appellants, ***Richard Erskine Leakey***, ***Dr. Sally Jemgetich Kosgey*** and ***The Hon. Attorney General***.

2. At all material times to the dispute between the parties, the respondent was Kenya's Ambassador to the United States of America, the Republic of Colombia and the United Mexican State. He took up his ambassadorial tour of duty in November 1997. He was appointed for a term of 36 months which was due to expire on 2<sup>nd</sup> August 2001. By letter dated 14<sup>th</sup> October 1999, twenty-two (22) months before the expiry of his contract, the 2<sup>nd</sup> appellant, ***Dr. Sally Jemgetich Kosgey***, recalled the respondent from his station in Washington DC. The 1<sup>st</sup> appellant, ***Richard Erskine Leakey***, subsequently wrote a letter dated 21<sup>st</sup> March 2000 terminating the respondent's appointment as Ambassador. The respondent contended that his recall and subsequent termination was unconstitutional, conspiratorial, malicious and illegal and there was no lawful reason to recall him.

3. Aggrieved by the letter of recall, the respondent filed a suit contending that his recall was illegal and unconstitutional; that the letter of recall did not assign any reason for recall and he was abruptly required to return to Kenya by 15<sup>th</sup> November 1999 notwithstanding he was residing in Washington DC and had school going children. Based on the foregoing facts, the respondent filed a suit seeking damages for unlawful, *mala fide* and unconstitutional termination of his contract. He prayed for special damages itemized as follows:

i. Loss of income and benefits for service abroad for the unexpired twenty-two (22) months for US \$ 1,311,522.00

ii. Loss of income and benefits paid locally for the unexpired 22 months at Ksh. 2,033,857.00.

iii. Total direct loss of income and benefits in (i) and (ii) above at Ksh. 101,709,529.50.

4. The particulars of illegality is that the 1<sup>st</sup> appellant's letter dated 21<sup>st</sup> March 2000 was a gross violation of **Section 111** of the retired Constitution as it purported to retrospectively terminate and remove the respondent from his presidential appointment as Ambassador with effect from 15<sup>th</sup> November 1999.

5. Further prayers in the Plaint included exemplary and punitive damages, special damages, costs of the suit and interest on the sums claimed at court rates.

6. The appellants in their statement of defence denied there was *mala fides* or any conspiracy or ill-motive to recall or terminate the appointment of the respondent as an Ambassador; the particulars of loss and damages were denied in entirety. It was urged that removal of the respondent as an Ambassador was done in accordance with **Section 25** of the retired Constitution.

7. Upon hearing the parties, the learned judge entered judgment in favour of the respondent and expressed himself as follows:

***“(i) The court will in the circumstances of this case rely on the doctrine of legitimate expectation and upon consideration of personal circumstances and similar cases, the court awards the claimant equivalent of the basic allowance, both foreign and local for the period twenty-two (22) months remaining to complete the contract of service that was unlawfully breached by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as set out in the particulars of loss US \$ 133,122 and Ksh. 985,800/=.***

***(ii) The rest of the allowances may only be justified provided that the claimant serviced the full term. Since the contract was unlawfully terminated, the claimant is not entitled to the enumerated benefits which were meant to facilitate his office while he served.***

***(iii) The court further awards the claimant loss of school fees K-GD12 and GD6-GD12 in the sum of US\$ 25,800 and US \$ 27,000 which loss is directly attributable to the unlawful and sudden recall from USA and termination of employment of the claimant in public service.***

***(iv) In the final analysis, judgment is entered in favour of the claimant against the 3<sup>rd</sup> respondent as follows:***

***(a) US\$ 185,922***

***(b) Ksh. 985,800/=***

***(c) The award in (a) and (b) is payable with interest at court rates from date of filing suit till payment in full.***

***(d) Costs to follow the outcome.”***

## **GROUND OF APPEAL**

8. Aggrieved by the judgment, the appellants have lodged the instant appeal on the following abridged grounds of appeal:

***(i) The judge erred in relying on Section 111 (2) of the repealed Constitution without taking into account the provisions of Sections 23 (1) and 25 (1) of the repealed Constitution.***

***(ii) The judge erred in finding that there was legitimate expectation on the part of the respondent to serve as an Ambassador for the unexpired 22 months contrary to Section 25 (1) of the repealed Constitution.***

***(iii) The judge erred in finding that the recall and subsequent termination of the respondent's contract was tainted with malice, ill-will and illegality.***

***(iv) The judge erred in finding that the respondent was entitled to US 133,122 and Ksh. 985,800/= being basic allowances, both foreign and local for the period of 22 months for the remainder of the contract.***

***(v) The judge erred in finding that the respondent was entitled to US \$ 25,800 and US\$ 27,000 being loss of school fees and the judge further erred in awarding the said sums which the respondent did not specifically plead, prove and or incur.***

***(vi) The judge erred in awarding the respondent damages in US dollars without specifying the rate of exchange to the Kenya shilling.***

***(vii) The judge erred in finding that the respondent had a legitimate expectation to serve in another public office after his recall from his ambassadorial position when the same was neither pleaded nor proved.***

(viii) *The learned judge's findings are not supported by law or the evidence on record.*

9. At the hearing of the instant appeal, learned counsel **Mr. Wycliffe Odukenya** and **Ms Lorine Shitubi** appeared for the appellants while learned counsel **Mr. Phillip Murgor** and **Mr. George Ouma** appeared for the respondent. Both parties filed written submissions and list of authorities.

#### APPELLANTS SUBMISSION

10. Counsel for the appellants submitted that the judge erred in relying upon the provisions of **Section 111 (2)** of the repealed Constitution and totally ignoring **Sections 23 (1) and 25 (1)** of the repealed Constitution. The Sections provide as follows:

**“111 (2) The power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country and to remove from office a person holding or acting in any such office, shall vest in the President.**

**23 (1) The executive authority of the Government of Kenya shall vest in the President and subject to this Constitution may be exercised either directly or through officers' subordinate to him.**

**25 (1) Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold such office during the pleasure of the President.”**

11. The appellants submitted that the letter recalling the respondent dated 14<sup>th</sup> October 1999 and signed by the 2<sup>nd</sup> appellant was signed upon authorization by the President. The letter reads:

***“I am directed to inform you that it has been decided that you be recalled from your duty station. I am further directed to inform you that you are expected to wind up all formalities and be back in Kenya by 15<sup>th</sup> November 1999.”***

12. It was further submitted that the respondent's terms and conditions of service as Ambassador were governed by a Local Agreement dated 30<sup>th</sup> September 1998 between the respondent and the Government of Kenya. The Local Agreement expressly stipulated that instructions or directions to the respondent shall be given by the Government through the Permanent Secretary/Head of Department or other duly authorized officers. **Clause 9** of the Schedule to the Local Agreement provides that any party may determine the engagement by giving the other party three months' notice in writing or by paying one month's salary in lieu of notice.

13. Counsel submitted that the judge erred in applying a narrow and restricted interpretation to **Section 111 (2)** of the repealed Constitution and failed to appreciate that pursuant to **Section 23 (1)** of the retired Constitution, the President could perform executive functions directly or through an officer subordinate to him. Citing a persuasive High Court decision in **Katiba Institute -v- Attorney General & 9 Others, Petition No. 84 of 2018**, counsel urged that the judge erred in failing to interpret and apply the Constitution wholistically; the judge ignored the prerogative powers of the President in **Section 25 (1)** of the repealed Constitution wherein Presidential appointees, such as the respondent, held office at the pleasure of the President; that pursuant to **Section 23 (1)**, the Government had power to recall the respondent and the authority to recall could be exercised through officers subordinate to the President; and that in exercise of powers under **Section 25 (1)** of the old Constitution, no explanation or reason need be given by the President for removal or recall of an Ambassador.

14. The appellants fault the judge for relying on the doctrine of legitimate expectation when the same was never pleaded in the Complaint. In the absence of pleading, the findings and award of damages based on legitimate expectation have no legal foundation. Citing the decision of this Court in **Kalpna Rawal -v- Judicial Service Commission & 3 others, [2016] eKLR** counsel submitted that since the doctrine of legitimate expectation was not pleaded, the court erred in basing its decision on unpleaded issues.

15. On quantum of damages, it was submitted that the judge erred in making an award for the unexpired period of 22 months when the respondent had not worked; the judge erred and treated the unexpired term as an absolute right and ignored **Clause 9** of the Local Agreement which provides that a party can terminate the relationship by paying one month's salary in lieu of notice. Counsel further urged that the judge ignored various decisions of this Court which state that even where dismissal or termination is wrongful, damages payable to the employee is the salary which would have been paid in lieu of notice. (See **Kenya Revenue Authority -v- Mengiya Salim Murgani, Civil Appeal No. 108 of 2010; Rift Valley Textiles Limited -v- Edward Onyango Oganda, Civil Appeal No. 27 of 1992**).

16. On the issue of school fees awarded as damages by the trial judge, it was submitted that the respondent never adduced evidence that entitled him to school fees; that no travel documents for the children were produced; and that there was no evidence of payment of school fees or evidence to prove the alleged children remained in the United States of America upon the respondent's recall and return to Kenya. Based on the foregoing, it was submitted the judgment of the trial court is not supported by the evidence on record and applicable law.

#### RESPONDENT'S SUBMISSION

17. Counsel for the respondent submitted that the instant appeal raises three issues namely: exercise of executive power by the President; application of doctrine of legitimate expectation and the quantum of damages awarded by the trial court.

18. It was submitted that the judge properly took into account the unique and personal circumstances of the respondent *to wit*: he was a career diplomat; his contract was terminated at the height of his career; he was highly inconvenienced by sudden recall without according

him and his school going children time to prepare for return to Kenya; his terminal dues have never been paid and his prospects of continuing his career back home was snuffed by the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

19. The respondent reiterated his claim against the appellants is founded on unfair and unlawful termination of contract of employment. Citing the case of **Geoffrey Muguna Mburugu -v- The Attorney General Civil Case No, 2230 of 2001**, counsel submitted that it is the duty of every employer to act fairly; that the Government of Kenya through the 1<sup>st</sup> and 2<sup>nd</sup> appellants, did not act fairly but acted *mala fides* with ill-motive in recalling the respondent from his ambassadorial station.

20. In supporting the decision of the trial court, the respondent submitted that the judge did not err in relying on **Section 111 (2)** of the repealed Constitution; that it is not in dispute that the power to appoint or to remove a person from holding or acting in the office of Ambassador or High Commission vests in the President. However, in the instant appeal, it is the respondent's submission that the letter of recall signed by the 2<sup>nd</sup> appellant was not issued pursuant to the direction of the President; the letter was written and actuated by malice and ill-motive on the part of the 2<sup>nd</sup> appellant; the circumstances of the respondent's termination constitute unfair and or unlawful termination fraught with ulterior motive for personal gain of the 2<sup>nd</sup> appellant; the 2<sup>nd</sup> appellant recalled the respondent in order to create a vacancy and facilitate appointment of her husband, **Prof. Yusuf Nzibo**, to the position of Ambassador to the United States of America.

21. On legitimate expectation, the respondent cited the case of **Communication Commission of Kenya & 5 Others -v- Royal Media Services & 5 Others SC Petition Nos. 14, 14A, 14B & 14C of 2014** where it was stated that legitimate expectation arises where a public body has aroused an expectation that is within its power to fulfill. Counsel submitted that the judge correctly expressed no person has entitlement to be appointed as an Ambassador but once appointment has been made for a fixed term, the doctrine of legitimate expectation comes into play and the terms and conditions of service must be fulfilled by either party.

22. The respondent urged us to find the circumstances that led to his recall and subsequent termination of his contract constituted unfair and unlawful termination. We were urged to find the recall letter dated 14<sup>th</sup> October 1999 was without just or legal cause and was malicious taking into account that shortly thereafter, the 2<sup>nd</sup> appellant's husband or former husband, **Dr. Yusuf Nzibo**, was appointed Ambassador to the United States of America; that such an appointment conferred a direct benefit to the 2<sup>nd</sup> appellant on account of her spouse and children; and that the recall and termination of the respondent's contract was an ill-motivated conspiracy between the appellants. Based on the foregoing submissions, we were urged to dismiss the instant appeal.

#### **ANALYSIS AND DETERMINATION**

23. We have considered rival submissions by counsel and examined the record of appeal and the authorities cited. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. In **Selle -vs- Associated Motor Boat Co., [1968] EA 123**, it was stated:

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”**

24. As appropriately stated by the respondent, there are three pivotal issues for determination in this appeal namely the exercise of Presidential power to appoint and remove a person from holding the office of Ambassador; the application of doctrine of legitimate expectation and whether the learned judge erred in awarding the quantum of damages under the various heads as stated by the court.

25. It is the appellants' contention that the learned judge erred in relying on **Section 111 (2)** of the repealed Constitution and ignored the provisions of **Sections 23 (1)** and **25 (1)** of the same repealed Constitution.

26. It is common ground and not in dispute that pursuant to **Section 111 (2)** of the repealed Constitution, the power to appoint a person to hold or act in the office of Ambassador and to remove a person from such office vested in the President. There is a *proviso* which states that before exercising the power in relation to a person who holds an office in the public service, the President shall consult the Public Service Commission. It is also not in dispute that **Section 25 (1)** of the repealed Constitution provides that a person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President. **Section 23 (1)** of the repealed Constitution provides the executive authority of the Government shall vest in the President and he may exercise the same directly or through officer's subordinate to him.

27. The appellants have premised their appeal on the doctrine of pleasure as enunciated in **Section 25 (1) of the repealed Constitution**. It is settled law that the doctrine of pleasure is a historical anachronism. The justification for doctrine was explained in **B.P. Singhal -vs- Union of India & Another** (2010) INSC 365 where the India Supreme Court observed:

**“12.1 In Shenton -vs- Smith (1895) AC 229, the Privy Council explained that the pleasure doctrine was a necessity because, the difficulty of dismissing those servants whose continuance in office was detrimental to the State would be, if it were necessary to prove some offence to the satisfaction of a jury (or court) be such as seriously impede the working of the public service.”**

28. In its original formulation, the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. However, with the passage of time and evolution of democracy, the doctrine has undergone modification. In **B.P. Singhal -vs- Union of India & Another (2010) INSC 365** the Supreme Court of India found that in the absence of an express limitation on the application of the doctrine of pleasure there exists an implied limitation that the power would not be exercised arbitrarily, whimsically or capriciously; the power would be subject to the fundamentals of constitutionalism. (See also the decision of this Court in **County Government of Nyeri & another -v- Cecilia Wangechi Ndungu [2015] eKLR**).

29. In this appeal, it is the appellant's case that the letter dated 14<sup>th</sup> October 1999 recalling the respondent from his station as Kenya's ambassador to the United States of America was written pursuant to the direction of the President; that the said letter is lawful and properly communicated the Government's decision to recall the respondent. Citing **Section 23 (1) of the repealed Constitution**, the appellant submitted that the letter of recall need not be under the direct hand of the President because the Section permits an officer subordinate to the President to write such a letter. In addition, the appellant cited *Clause 9* of the Local Agreement between the Government of Kenya and the respondent which expressly provided that instructions and directions to the respondent as Ambassador shall be communicated through *inter alia* the Permanent Secretary or Head of Public Service.

30. Contrariwise, the respondent's case is that the letter of recall dated 14<sup>th</sup> October 1999 is illegal, unlawful and unconstitutional to the extent that the letter is not under the hand of the President; the Government is under obligation to provide reason (s) for recall; the letter was actuated by malice and ill-will for the personal benefit of the 2<sup>nd</sup> appellant; the letter is unlawful as it provides no reason for recall of the respondent from his ambassadorial station of duty.

31. We have considered the appellant and respondent's submissions on the lawfulness of the letter of recall dated 14<sup>th</sup> October 1999 and the exercise of executive power by the President or officers subordinate to him.

32. The letter of recall dated 14<sup>th</sup> October 1999 is signed by the 2<sup>nd</sup> appellant in her capacity as Permanent Secretary. In no other capacity would the 2<sup>nd</sup> appellant have written the letter. In our view, **Section 111 (2)** of the repealed Constitution must be read together with **Section 23 (1)** which allows officers subordinate to the President to exercise executive authority of the Government.

33. It is not in dispute that the 2<sup>nd</sup> appellant was an officer subordinate to the President. It is not in dispute that the letter was signed by the 2<sup>nd</sup> appellant in her capacity as Permanent Secretary. Pursuant to **Section 111 (2)** of the repealed Constitution, the decision of the Government or President to recall a person appointed as an Ambassador could properly be communicated under the hand of a duly authorized officer subordinate to the President; the President need not directly sign the letter of recall or appointment. In addition, the Local Agreement between the Government and respondent indicated instructions or directions to the respondent shall be through *inter alia* the Permanent Secretary. Further, the letter was effective, took effect and was implemented. For these reasons, we are satisfied that the letter of recall dated 14<sup>th</sup> October 1999 was written and signed by a duly authorized person; the letter is lawful and was properly signed by the 2<sup>nd</sup> appellant.

34. On the issue of legitimate expectation, the appellant submitted that the judge erred in grounding his decision on legitimate expectation when the same was neither pleaded nor canvassed by either party.

35. Conversely, the respondent submitted that the judge did not err in relying on legitimate expectation. The respondent submitted that he had legitimate expectation to serve until the end of his contract; he legitimately expected that upon his recall, he would be posted to another ambassadorial station; and upon his return to Kenya, he legitimately expected to be given audience by the 2<sup>nd</sup> appellant who refused to see him and finally, because his contract had not expired, he legitimately expected to continue receiving his salary.

36. We have scrutinized the amended Complaint to ascertain if legitimate expectation was pleaded. All that is stated is that upon returning back to Kenya, the 2<sup>nd</sup> appellant arrogantly refused to give the respondent audience and illegally directed stoppage of remittance of the respondent's monthly emoluments and entitlements.

37. Lord Diplock in **Council of Civil Service Union v. Minister for Civil Service [1985] 1 A.C.374 (at pages 408-409)**, stated that for legitimate expectation to arise, the contested decision must have the effect of depriving one some benefit or advantage, which he had been permitted in the past by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy, or he has received assurances from the decision-maker that it will not be withdrawn without giving him an opportunity to advance reasons for non-withdrawal.

38. In Kenya, the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** held that for legitimate expectation to arise:

(a) *there must be an express, clear and unambiguous promise given by a public authority;*

(b) *the expectation itself must be reasonable;*

(c) *the representation must be one which it was competent and lawful for the decision-maker to make; and*

(d) *there cannot be a legitimate expectation against clear provisions of the law or the Constitution.*

39. In the Indian case of **P.T.R. Exports (Madras) Pvt. Ltd. And Others vs. Union of India and others (AIR 1996 SC 3461)** it was laid down that the doctrine of legitimate expectations has no role to play when the appropriate authority is empowered to take a decision under an executive policy or the law itself and that the Government is not restricted from evolving new policy on account of 'legitimate expectations' as and when required in public interest.

40. We have evaluated the record to determine what representation, if any, was made to the respondent by the appellants to invoke legitimate expectation. The contract between the respondent and the Government of Kenya was renewed for a further term of thirty six (36) months. Whereas the contract was an ,the said contract was subject to the provisions of **Section 111(2)** of the retired Constitution and **Clause 9** of the Local Agreement. The only representation made to the respondent is contained in the letter renewing his contract as Ambassador and the provisions of the Local Agreement signed between the Government of Kenya and the respondent. **Clause 9** of the Local Agreement provides that the Government may at any time determine the engagement of the person by giving three months' notice in writing or paying one month's salary in lieu of notice. In his initial letter of appointment dated 28<sup>th</sup> September 1995, it is provided that upon satisfactory completion of the contract, the respondent will receive a gratuity equivalent to 25% of the aggregate salary paid during the period of service.

41. It is not in dispute that the respondent was holding a constitutional office as an Ambassador of Kenya to the United States of America. There is a consistent line of judicial opinion that a constitutional office is not to be regarded as an item of property in which a person has proprietary interest. (See **Amraphael Mboghohi Msagha v. The Chief Justice & Others, HC Misc. App. No 1062 of 2004**) In the USA, in **Mial v. Ellington, 134, N.C. 131 (1903)**, the Supreme Court of North Carolina held that a public office is not property and that an office holder has no vested property interest therein.

42. In the instant matter, the respondent's employment contract stipulating a duration of thirty-six months cannot override the provisions of statute law or the Constitution with regard to its terms and conditions as well as mode of termination of employment. **Section 111 (2)** of the repealed Constitution expressly states the power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country and to remove from office a person holding or acting in any such office, shall vest in the President. The constitutional power of President to appoint or remove a person from holding the office of ambassador is not subject to restriction or limitation by a contract of employment. The respondent's letter of appointment is subject to **Section 111 (2)** and **23 (1)** as read with **Section 25 (1)** of the repealed Constitution. There can be no legitimate expectation on the part of the respondent or any ambassador to continue holding the office when the appointing authority has recalled or terminated such appointment in line with **Sections 111 (2)** and **25** of the repealed Constitution. There can be no legitimate expectation to hold any constitutional office beyond the terms, conditions and limits expressly stated in the Constitution. To this extent, the learned judge erred in law in applying the doctrine of legitimate expectation to oust the clear and express provisions of **Sections 111 (2)** as read with **25 (1)** of the repealed Constitution.

43. The final issue for our consideration is the quantum and heads of damages awarded to the respondent by the learned judge. In **KEMFRO AFRICA LTD v LUBIA & ANOTHER, (No. 2) 1987 KLR 30**, it was stated:

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”**

44. At the risk of repetition, in this matter, the trial court awarded the following quantum of damages under various heads as follows:

*i. The court will in the circumstances of this case rely on the doctrine of legitimate expectation and upon consideration of personal circumstances and similar cases, the court awards the claimant equivalent of the basic allowance, both foreign and local for the period twenty-two (22) months remaining to complete the contract of service that was unlawfully breached by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as set out in the particulars of loss US \$ 133,122 and Ksh. 985,800/=.*

*ii. The rest of the allowances may only be justified provided that the claimant serviced the full term. Since the contract was unlawfully terminated, the claimant is not entitled to the enumerated benefits which were meant to facilitate his office while he served.*

*iii. The court further awards the claimant loss of school fees K-GD12 and GD6-GD12 in the sum of US\$ 25,800 and US \$ 27,000 which loss is directly attributable to the unlawful and sudden recall from USA and termination of employment of the claimant in public service.*

*iv. In the final analysis, judgment is entered in favour of the claimant against the 3<sup>rd</sup> respondent as follows:*

*US\$ 185,922*

*Ksh. 985,800/=*

45. In **Ethics and Anti-Corruption Commission -v- Nicholas Mwenda Mtwaruchiu & 8 others [2018] eKLR**, this Court stated that if the contract itself provides for an exit clause and the same is terminated lawfully in terms of the said contract, then the employee is only entitled to payment equivalent to the notice period provided in the contract itself.

46. Comparative jurisprudence from the Canadian case of **Wells -v-Newfoundland [1999] 3 S.C.R. 199** is illuminating on the issue of payment of salary for balance of unexpired contractual term. It was held:

**“While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superseded by explicit terms in the statute or the agreement. The terms of such a contract are to be found in the written and verbal manifestations of the agreement, applicable statutes and regulations and the common law.”**

47. In **Reilly v. The King**, [1934] A.C. 176, the Privy Council stated that if the relationship between an employer and employee is statutory, then all rights and obligations are created by statute; the relationship remain in essence one defined by statute, and thus not subject to the duties arising under the ordinary law of employment. The fundamental terms and conditions of these relationships cannot be modified by either party, even by agreement. The mechanism for enforcement of those terms is not in contract, but through a declaration of the constitutional guarantees underlying their positions.

48. In the instant matter, the first head for the damages awarded by the judge is loss of US \$ 133,122 and Ksh 985,800/= based on legitimate expectation. We have made a finding that the judge erred in relying upon the doctrine of legitimate expectation. *Ipso facto*, the judge also erred in awarding the sum of US\$ 133,122 and Ksh. 985,800/= under the doctrine of legitimate expectation. We hereby set aside the award of damages under this item head. We reiterate the respondent’s contract of employment was subject to **Section 111 (2)** and **25 (1)** of the repealed Constitution; the only legitimate expectation the respondent had was to serve under the express terms of the repealed Constitution and Local Agreement upon which he was appointed. In this matter, the respondent’s contractual rights relating to his employment as an Ambassador were acquired under the repealed Constitution and the Local Agreement and enforcement of his contractual rights is subject to the repealed Constitution and the Local Agreement.

49. Where a contract of employment has been reduced in writing, the parties are bound by its terms. In other words, the employee will expect the contract to be terminated in accordance with the terms and procedure agreed upon by the parties. Comparatively, Justice Mulenga, of the Uganda Supreme Court in **G. Ushillan: vs. Kampala Phamarceutical Ltd.** SC Civil Appeal No.6 of 1998 reported in (1999) SCD, expressed:

**“Where a contract of employment is repudiated by the employer through dismissal of an employee, even in a case of employment for a fixed period, the employee cannot insist on continuing to be provided with work and payment. If the dismissal, be it express, implied or even constructive, is unequivocal, then the only remedy available to the wronged employee is damages. The issue that remains to be decided therefore is the measure of damages, to which I now turn.**

***In deciding that issue, the Court of Appeal appreciated that the employment in the instant case, was for a fixed period. The court made distinction between a contract which makes no provision for termination prior to expiry of the fixed period, and one in which there is a provision enabling either party to terminate the employment. The learned Justices stated the law to be that in the event of wrongful termination by the employer, the employee in the former contract would be entitled to recover as damages, the equivalent of remuneration for the balance of the contract period, whereas in the latter case the wronged employee would be entitled to recover as damages, the equivalent of remuneration for the period stipulated in the contract for notice I respectfully agree that this is the correct statement of the law. I would add that it is premised on the principle of restitutio in integrum. Damages are intended to restore the wronged party into the position he would have been in if there had been no breach of contract. Thus, in the case of employment for a fixed period which is not terminable, if there is no wrongful termination, the employee would serve the full period and receive the full remuneration for it. And in the case of the contract terminable on notice, if the termination provision is complied with, the employee would serve the stipulated notice period and receive remuneration for that period, or would be paid in lieu of the notice”. (underlining supplied). (See also judgment of Tsekooko SCJ in Kengrow Industries Ltd. v Chandran ((Civil Appeal No. 7 of 2001)) [2002] UGSC 19 (22 April 2002).”***

50. We are persuaded by the merits of the aforestated comparative jurisprudence from Uganda. In this matter, pursuant **Clause 9** of the Local Agreement, the respondent is not entitled to payment for any unexpired period of the contract. The right of the respondent at the point of disengagement is to either a three months’ notice or one month’s salary in lieu of notice. The contract between the parties did not provide for payment for any unexpired period not served under the contract. We note that there is a difference between legitimate expectation and legitimate anticipation. (See **Jitendra Kumar & Ors. Vs. State of Haryana & Another**, India Appeal (Civil) No.5803 of 2007). In this matter, whereas the respondent had a legitimate anticipation that he would serve for the unexpired term, he had no legitimate expectation in law to serve for the unexpired term of the contract.

51. The other issue is whether the learned judge erred in awarding the respondent salary for the unexpired period of twenty-two months. The decision in **Pravin Bowry -v- Ethics & Anti-Corruption Commission** [2013] eKLR, Industrial Cause No. 1168 of 2012, is distinguishable from the instant case in that the Claimant’s appointment was for a fixed term of five years with no termination clause (see paragraph 13 of the judgment). In the instant case, the respondent’s contract was a fixed term with a termination clause. The respondent’s ambassadorial appointment was subject to the provisions of **Section 25 (1)** of the repealed Constitution as read with Clause 9 of the Local Agreement between the Government and the respondent.

52. In **Butler v. Pennsylvania**, 10 How. 402: 13L. ed. 472 the US Supreme Court rejected the argument that an official is entitled to pay for a period he expects to work, but has not in fact worked. The court expressed itself thus:

**“...promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of contract and of equity, but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures.”**

53. The other item head for damages awarded by the learned judge is loss of school fees K-GD12 and GD6-GD12 in the sum of US\$ 25,800 and US \$ 27,000. The learned judge awarded this sum as fees for payment for the respondent's children while studying in the United States of America.

54. In the persuasive decision of the Employment and Labour Relations Court in **Pravin Bowry v Ethics & Anti-Corruption Commission [2013] eKLR** it was expressed:

**“The claim for telephone allowance; provision of security guards; provision of fuel; cost of medical premium and annual insurance; amounts due for outpatient and medicines; amount in lieu of leave; proportionate AAR premiums for Claimant’s wife; cost of AAR cover for the unspent term of contract are all dismissed for the reason that these allowances are predicated on actual performance of the contract and not otherwise in the court’s view.”**

55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.

56. In this appeal, the alleged school fees for the respondent's children were not part of his salary or emoluments. The Local Agreement has no provision for payment of school fees. In addition, there is no evidence on record to show that the respondent paid the fee to any school in the United States of America. As such, the respondent is not entitled to claim such fees as of right. To this extent, the learned judge erred in awarding the respondent the sum of US\$ 25,800 and US \$ 27,000 as loss of school fees K-GD12 and GD6-GD12. We hereby set aside the award of these sums as damages.

57. As regards other claim for allowances, we affirm and uphold the decision of the learned judge that the rest of the allowances may only be justified provided that the claimant served the full term.

58. The upshot of our consideration of the grounds of appeal and applicable law is that this appeal has merit. The judgment and decree of the Employment and Labour Relations Court dated 16<sup>th</sup> November 2017 is hereby set aside in its entirety. For avoidance of doubt, the respondent is entitled to payment of one month's salary in lieu of notice as provided for in Clause 9 of the Local Agreement and payment of gratuity equivalent to 25% of the aggregate of the basic salary paid during the period of service. As was correctly stated in **Pravin Bowry - vs- Ethics & Anti-Corruption Commission [2013] eKLR** payment of gratuity is premised on the provision of actual service.

59. Taking into account the appellants are represented by the State Law Office, each party is to bear its own costs in this appeal and the High Court.

*Dated at delivered at Nairobi this 7th day of June, 2019*

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**