IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 31 OF 2015

BETWEEN

KENFREIGHT (E.A.) LIMITED …….....…APPELLANT

AND

BENSON K.NGUTI …….....RESPONDENT

(Being an appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Mombasa (Makau, J.) dated 13th June, 2014

in

Industrial Court Cause No.146 of 2013)

****

JUDGMENT OF THE COURT

The respondent who had a long and checkered career in the employment of the appellant spanning over fourteen (14) years rose from the post of Finance Manager to become the General Manager. That career was abruptly terminated by a letter dated 26th November, 2010, in which the appellant, through its Group Managing Director, invoking the respondent's contract of employment of 5th September, 1996, informed the latter that his employment would be terminated with effect from 1st December 2010, having been given one month notice. He was also informed that he would be paid salary for the month of December 2010 *in lieu* of notice. We shall shortly explain this apparent anomaly in the notice.

The letter further stated that although the respondent's contract of employment did not provide for payment of any other terminal benefits, and while the Employment Act was not clear on such payment, the appellant was nonetheless prepared to pay the respondent the ***"normal dues"*** of 15 days worked for every year in its employment. Ultimately on 8th December, 2010 another letter, pursuant to the earlier one communicated the break-down of his final dues as follows;

1. Salary for 210 days (15 days salary per completed year

   worked for 14 years) at the rate of Kshs.676,362/- Kshs.

per month 4,669,677.00

2. One month's salary *in lieu* of notice 676,362.00
3. Prorata leave earned as at 30th November 2010(6.20 days) 137,866.00

Gross income 5,483,905.00

Less:

P.A.Y.E. (1,585,140.00)

N.S.S.F. (200.00)

N.H.I.F.
(320.00)

3,898,245.00

Less:

Cost of vehicle registration No. KAW 402 Mitsubishi Pajero (640,000.00)

Net income payable **3,258,245.00**

The full amount was said to have been transferred electronically to the respondent's bank account with CFC Bank, Mombasa.

From the above tabulation it is apparent that apart from the salary and leave dues the appellant was offering the respondent a motor vehicle, – KAW 402 K, Mitsubishi Pajero, the terms of which, including the price of Kshs.640,000, appear to have been agreed between the parties.

On 12th June 2013 the respondent brought an action against the appellant in the former Industrial Court (now Employment and Labour Relations Court) claiming that the termination of his employment was illegal, wrongful, unfair and discriminatory; that there was no justifiable reasons for the termination; that he was not given a hearing before the termination; and that the termination was actuated by the respondent's intention to replace him with a Belgian national. As a result, the respondent contended that the payment of Kshs.3,258,245 as his terminal dues was grossly low as it did not take into consideration an existing practice in the appellant company where full-time directors/employees whose employments were terminated would be paid terminal dues inclusive of 2 months (as opposed to 15 days) salary for each year worked with the appellant. As a consequence thereof the respondent claimed to have suffered the following loss and damage;

i. 1 ½ month pay at Kshs.676,362 per month for each year worked,
ii. Benefits which the respondent would have enjoyed had he remained in employment until retirement age, and
iii. Physical and mental anguish due to harassment as a result of the dismissal.

For these reasons the respondent asked the court to:-

i. Declare that his dismissal was unfair, unlawful and a nullity,
ii. Reinstate him, and
iii. Order payment of his salary for the period between November, 2010 and the date of his reinstatement.

In the alternative to his reinstatement, the respondent asked for payment of full salary plus 14% per annum interest thereon from the date of dismissal until the date of his retirement at the age of 60 years. Further and as alternative to this alternative, the respondent sought payment of 12 months' salary for unfair termination, in addition to terminal dues equivalent to two months' salary for each year worked, plus interest at 14% per annum effective 26th November, 2011 until payment in full, costs and interest.

After hearing the evidence by both sides, the court (**Makau, J**) framed the following two questions upon which he based the impugned judgment;

a. whether the termination of the respondent's employment was wrongful and unfair, and
b. whether the claimant was entitled to the reliefs sought.

The learned Judge found on the preponderance of evidence that, in terms of **sections 41, 43 (a), 45 (2) (a) (b), and 47 (5)** of the Employment Act the appellant did not prove any justifiable cause for terminating the respondent's employment. The suggestion that the respondent was negligent and inefficient as a result of which he caused loss to the appellant was never put to him for rebuttal and the respondent was not accorded disciplinary hearing, nor was he given the reason or reasons for his discharge. On the basis of this the learned Judge declared the respondent's termination unfair and unlawful, awarded 12 months gross salary at the rate of Kshs.676,362 per month for unfair termination, the total translating to Kshs.8,116,344 with costs and interest. This award was expressed to exclude the dues of Kshs.3,258,245, (described in the judgment as *ex-gratia*) already paid. The rest of the prayers were rejected.

Aggrieved, the appellant has now challenged this decision on eight grounds contained in the memorandum of appeal but condensed and argued in the written submissions as five. First, it was submitted that the learned Judge erred in his finding that the termination of the respondent's employment was wrongful and unfair. That having found that the respondent's contract of employment was for an indefinite term, only terminable by one month's notice, it was erroneous for the Judge to hold that the termination was substantially and procedurally unfair and to award Kshs.8,116,344; that the appellant invoked its contractual rights to terminate the respondent's employment upon giving 30 days' notice and payment of one month salary *in lieu* of notice, a right distinctly independent of the statutory right under which valid reasons must be given, an employee heard in his defence and strict procedure followed before termination; that an employer can elect to terminate an employee's employment either under contractual terms or under statutory provisions; that the appellant elected the former even though there were sufficient grounds to invoke the latter and summarily dismissed the respondent; that the appellant having invoked the contract of service did not have to assign any reason or justification for the termination; and that in any case the respondent accepted the termination of his employment by receiving without a protest the final dues paid to him.

It was further submitted that the learned Judge not only ignored the appellant's evidence but also misdirected himself by relying on **sections 43** and **47(5)** relating to summary dismissal whereas the respondent's case was based on unfair termination pursuant to a contract of employment; that the award of Kshs.8,116,344 by way of damages for unfair termination amounted to unjust enrichment of the respondent, and further that it was erroneously based on ***"gross"*** salary thereby ignoring the tax element. The learned Judge, it was contended, committed a further error by treating the entire amount of Kshs.3,258,245 as *ex-gratia* yet only a small fraction (15 days salary for every year of service) constituted *ex-gratia* payment, made as a sign of good faith. To illustrate these points **Mr. Khagram** cited several authorities which we have considered as will be evident in this judgment.

Mr. Mogaka learned counsel for the respondent had a different view of the matter and in agreeing with the decision of the learned Judge submitted that fundamental rights of employees are defined in the Employment Act which is expressed to be applicable to "***all employees employed by any employer under a contract of service***"; that under **section 41(2)** an employer is enjoined, before terminating the employment of an employee or summarily dismissing him, to hear and consider any representation of such an employee with regard to any grounds of misconduct or prior performance; that termination of employment, if unfairly done or in the case of summary dismissal, **section 49** provides for remedies

which includes an award equivalent to a number of months wages or salary not exceeding 12 months based on gross monthly wage or salary of the employee at the time of dismissal or termination; and that the respondent's case before the trial court was that his termination was unfair, unlawful, unjustifiable and discriminatory and was a violation of his statutory right under **section 45(3).** Learned counsel finally submitted that the award was based on the provisions of **section 49(1) (c)** and was not given as general damages.

From these submissions it is clear to us that the contest in the dispute is whether the appellant could elect to terminate the respondent's employment outside the provisions of the Employment Act and instead rely solely on the contract of employment. Put differently, whether in the circumstances of this case the respondent was only entitled to the amount specified in the contract of service as payable to him by the appellant upon termination of his employment *in lieu* of notice or whether he was entitled to remedies for unfair termination under **section 49** of the Act.

According to the appellant its relationship with the respondent was governed by a written contract with clear terms and conditions on how the engagement would be terminable; that by it, either the appellant or the respondent was at liberty to terminate the contract upon giving one month notice to the other or *in lieu* the payment of one month salary; that, therefore there was no obligation on its part to follow the procedure outlined in Part VI of the Act; that is, it was not bound to explain to the respondent, before terminating his employment, the reasons for intending to do so, or to hear him before terminating his employment.

The respondent, on the other hand insisted that today there can be no termination of employment or dismissal of an employee outside the Employment Act, which requires that before doing so an employee is given reasons for such intention, and thereafter heard.

We are enjoined to revisit the evidence presented before the court below afresh, analyse it in order to arrive at our own independent conclusion but bearing in mind that we did not see or hear the witnesses as they testified. See **Seascape Ltd V Development Finance Company of Kenya Ltd, (2009) KLR 384.**

Mr. Khagram relied on the following High Court decisions for a combined proposition that rules of natural justice have no application in simple contracts of employment unless the parties themselves specifically provide for their application in the contract; that no duty is imposed on the employer to hear the employee in his defence before termination or dismissal; that an employer need not assign any reason for termination of an employee's employment so long as the latter has been given notice or paid salary *in lieu* of notice in accordance with the contract of employment; and that the relationship being one of master and servant, if the termination is wrongful the employment is effectively terminated albeit in breach of contract. **Peter Denis Mbwali & Anor v Kenya Literature Bureau H.C.C.C. No. 230 of 2000**, **Consolata Kihara & 241 Others v Director, Kenya Trypanosomiasis Research Institute (2003) KLR 232** and **Kepha Otwoma v The Standard Group Ltd. H.C.C.C. No. 395 of 2007.**

Mr. Mogaka, on the other hand relied on three authorities which had no direct relevance to the main question before us, save for the statement of the law on the jurisdiction of this court on first appeal.

The arguments advanced by Mr. Khagram were aptly explained by this Court in **Walter Musi Anyanje v Hilton International Kenya Ltd & Another, Civil Appeal No. 269 of 2003** thus:

> **"Is an employee whose services have been terminated entitled to general damages? This Court in Kenya Ports Authority v Edward Otieno, Civil Appeal No. 120 of 1997 drawing support from the case of Addis v Gramophone Company (1909) AC 488 emphatically stated that there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract. See also Rift valley Textiles Ltd v Edward Onyango Oganda Civil Appeal No. 2 of 1992 and Ombanya v Gailey & Roberts (1974) EALR 522 where in the latter case it was stated by Muli, J (as he then was) that:**

> ***'I think it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current'".***

This position held sway and was consistently and faithfully applied by the courts for many years. It was premised on the concept of freedom to contract , the underpinning of *laissez-faire* economic theory, that the pursuit of self-interest leads to the prosperity of the whole society; that individuals possess general freedom to choose with whom to contract, whether to contract or not and on what terms to contract. They are equally free to decide on the mode of terminating the contract. Accordingly, courts and legislatures exercised restraint and avoided to interfere with those arrangements in obedience of the power of the parties to structure their relationship freely. This belief assumed that in this relationship parties were equal and competent to choose the terms upon which they would be bound. Common law doctrines were developed later to obviate the harsh realities of this practice. For example they granted parties the freedom to avoid contract obligations to children, and in cases of fraud, mistake, misrepresentation, duress or undue influence. Legislative changes that have adopted these common law principles have also played significant role in the protection of the weaker party to a contract. These interventions intruded directly into contract contents displacing the time-honoured notion that individual parties, not the governments, could decide the fairness of their bargains. The legislature continues upto this moment to advance the evolution of employment contract law. It is through this prism that this appeal must be seen, the prism of law reform.

The repealed Employment Act came into operation on 3rd May 1976. **Section 16** thereof provided that;

> **"Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection".**

It is immediately apparent from the above section that the decisions cited by learned counsel for the appellant were based on that provision and were decided before the Act was repealed.

In 2001 the reform to laws relating to labour and employment began in earnest when the Attorney-General appointed a tripartite Taskforce to review labour and employment laws. From its terms of reference the object of the Taskforce, was, *inter alia*, to ensure the laws were responsive to contemporary economic and social changes and to be consistent with the Conventions & Recommendations of the International Labour Organization (ILO). The Taskforce presented its report in April 2004 and recommended the enactment of five labour and employment laws which were duly passed in 2007. Among the legislations enacted was the Employment Act, 2007. The five legislations heralded a new era of reforms in the labour market through improved environment for employees, employers and trade unions. The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.

Based on the international best practice, the Employment Act was modeled along the International Labour Organization Termination of Employment Convention No. 158 of 1982. In particular, like **section 46** of the Act, **Article 7** of the Convention requires, in mandatory terms, that no decision to terminate the services of a worker for reasons relating to the worker's conduct or performance can be taken without

providing him with an opportunity to defend himself on the allegations. So that, although there is freedom to contract, under the present regime, the terms of the contract must be in consonance with the irreducible minimum terms and conditions in the Act.

Although there were attempts by this Court before the enactment of the Employment Act, 2007 to break away from the traditional thinking, there was no impact. For instance in **C.P.C. Industrial Products v Angima, Civil Appeal No. 197 of 1992**, the Court (**Gicheru**, (as he then was), **Kwach** and **Muli, JJ.A**) , in a departure from the previous decisions, held that the principle that damages will only be limited to the period of notice agreed between the parties could only apply if, in exercising its right to terminate the appointment, the employer was not actuated by ulterior motives or did not act in bad faith; and that if the employer acted maliciously, oppressively or even callously the court was bound to consider that fact in assessing the damages the employee would be entitled to for wrongful termination or dismissal. **Muli, JA** in his judgment drew a distinction between ordinary common employment and professional or career employees who may face challenges to obtain an alternative equivalent employment after dismissal. He explained that;

> **"In all the above categories no account should be entertained for circumstances of harshness or oppression accompanied by dismissal or injury to the employee's feelings and also for taking into consideration the fact that the dismissal would make it more difficult for the terminated employee to obtain an alternative employment. The dismissed employee, being a prudent and reasonable person, must take all reasonable measures to obtain an alternative employment to mitigate his damages……..**
>
> **Where the contract of service contains a termination clause and the employment is terminated otherwise than in accordance with the termination clause clearly, there is a breach of the contract of service. The termination is also unlawful. The terminated employee is entitled to compensation, indemnity, general damages, call them what you may, for the loss he suffers had he been allowed to serve for the period of the termination clause. See Ombanya v Gailey & Roberts (1974) EA 522".**

In that case the Court was unanimous that the respondent was entitled, in addition to terminal benefits, to general damages equivalent to 12 months gross salary for wrongful dismissal.

Part VI of the Act makes a distinction between wrongful dismissal and unfair termination. The claim in the present appeal relates to unfair termination. A termination of employment by an employer is unfair in terms of **section 45**, if the employer fails to prove;

> **"(a) that the reason for the termination is valid;**
>
> **(b) that the reason for the termination is a fair reason -**
>
> **(i) related to the employee's conduct, capacity or compatibility; or**
>
> **(ii) based on the operational requirements of the employer; and**
>
> **(c) that the employment was terminated in accordance with fair procedures."**

Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reason or if the reason itself or the procedure of termination are themselves not fair. Specifically, it will be unfair if it relates to;

i. a female employee's pregnancy,
ii. the going on leave of an employee,
iii. an employee's membership of a trade union,
iv. the participation of an employee in the activities of a trade union,
v. the employee's seeking office in a trade union, or his refusal to join or withdraw from a trade

union,

vi. an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability,

vii. an employee's initiation of a complaint or legal proceedings against the employer unless done irresponsibly, or

viii. an employee's participation in a lawful strike.

According to **section 45(3)** only an employee who has been in continuous employment for a period not less than thirteen months immediately before the date of termination has the right to complain that he has been unfairly terminated.

The respondent as we have stated was employed by the appellant on 5th September 1996 by a contract of employment of the same date. At the time of termination of his employment on 26th November 2010 he had been in the employment of the appellant for a period of 14 or so years. In his Statement of Claim he alleged that the letter of 26th November 2010, unlawfully and unfairly terminated his employment; that the termination was done without any justifiable reason at all, capriciously, maliciously and without being afforded a chance to be heard; and that it was discriminatory as it was done to create room for the appointment of a Belgian national to occupy his post.

From the letter of employment, it is clear that either the appellant or the respondent was at liberty to terminate the contract of service by giving either party one month notice or payment of one month salary *in lieu* of notice. The termination letter of 26th November 2010 strangely stated that it was giving the respondent ***"one month notice. The effective date of this notice will be 1st December 2010."*;** that the notice given was more than that provided by statute; and that;

> **"As provided in the contract, we will pay your salary for the one month of December 2010** *in lieu* **of notice and you will therefore not be required to work during your notice period."**

In a nutshell the appellant simply paid the respondent one month salary *in lieu* of notice, as clearly there was no notice.

Termination notice is regulated by statute. **Section 35** makes provision for categories of contracts and the manner of their termination. Of relevance is section **35(1) (c)** and **(2)** which is to the effect that a contract of service for an indeterminate period, where wages or salary are paid periodically at intervals of or exceeding one month, is terminable by either party at the end of the period of 28 days next following the giving of notice in writing. This provision and the entire **section 35(1)** does not apply ***"… in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto"***. (our emphasis). A ***'month'*** under **section 3** of the Interpretation & General Provisions Act means calendar month. In this case the month of the notice was December hence the notice was for 31 days. The contract of service in this dispute provided for a notice period greater than 28 days. The parties were bound by the terms of the contract of service to the effect that the contract would be terminated by either party giving one month notice or *in lieu* of notice, the payment of one month salary by either party. *Ex facie* the appellant complied with the terms of the contract of service by paying to the respondent Kshs.676,362/-, the latter's one month salary *in lieu* of notice.

The next and more critical question is whether the termination was unfair. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. **Section 43** specifically places the burden to prove that the termination was fair on the employer. It provides;

> **"43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and**

where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

The burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer.

The letter of 26th November 2010 does not specify any reason at all for terminating the respondent's employment. We must therefore trace the reason from the events preceding the termination.

We note that before his termination the respondent had been appointed a trustee of the appellant's staff retirement scheme, promoted to the rank of Finance & Administration Manager, Regional Finance & Administration Manager, to supervise the entire operations of the appellant within the East Africa & the Great Lakes region, appointed a member of the appellant's board of directors and finally designated the General Manager of the appellant with effect from January 2006, answerable only to the Group Managing Director. In December 2008 the Group Managing Director wrote a letter of appreciation on behalf of the board to the respondent stating:

"… I wish to appreciate your commitment and hard work which you have engaged towards the accomplishment of the company's budget targets for 2008 ….. Be encouraged & remain firmly committed to the ideals of Kenfreight (EA) Limited …."

This was before things took a turn for the worse. From the record there were two incidents, that accellerated the termination, one relating to diversion of 7 truckloads from Kampala to Kigali on the instructions of the respondent and another regarding the delayed loading of a cargo destined for Kericho and the attendant failure by the respondent to update the Group Managing Director. These two events, it was alleged, caused revenue loss to the appellant. On this occasion the respondent was addressed by the Group Managing Director in a memo of 5th February, 2010 as follows;

"4. On various occasions I noticed that instructions coming from the undersigned's office are not complied with ….

5. Reports which you present are often incomplete, inaccurate, i.e. salary reviews for the junior staff, budget volumes (group concept), daily transport allocation reports etc.

On various occasions you were advised about the shortcomings but your performance is unsatisfactory and beyond (sic) the expectations required fulfilling (sic) the position as general manager …. Therefore I strongly advise you to step up and improve on your performance."

The following month, on 29th March 2010 another memo from the Group Managing Director addressed to the respondent once more complained of the negative results in sales being the fifth (5th) such result since October 2009. It gave a target that the respondent was expected to meet in 2 months and concluded with a warning that:

"… the undersigned shall not hesitate to take action even if it results in re-organization if this target is not met".

Before 30th June 2010, the date the respondent was required to meet the above targets, another letter dated 12th April from the Group Managing Director was addressed to him complaining of backlog of

intercompany disputes that the respondent ought to have resolved, some dating back to 2009 and earlier. Again the memo ended with this warning;

> **"It is obvious …. you do not comply with the instructions issued from my office and more over this is not the first time that this subject is brought to your attention …. Take note that I shall no longer tolerate this kind of performance and shall not hesitate to take the necessary and adequate action to ensure compliance of instructions and procedure".**

The Kericho-bound cargo was once again revisited in a letter of 22nd April 2010 in which the respondent was told that he had acted negligently causing the appellant loss of revenue. Further loss to the appellant arising from lack of maintenance and repair of the truck fleets, lack of controls in fuel allocation and efficient management in the transport department was also brought to the respondent's attention.

Then came the Board meeting of 17th November 2010 whence it was clear the respondent's days in the appellant company were numbered. At the meeting, the company's performance under the stewardship of the respondent was discussed. He explained to the board that he had not been in the office of General Manager for long and could only rely on what was contained in the records, from which he attributed the loss to a cartel. The subject was concluded with a directive that **Mr. Furley**, another director would review the matter of fuel allocation and maintenance of the vehicle fleet to clear any doubt of a fraud. The respondent on the other hand, was directed to relook into the issue of the fleet and GPS system. It would appear from an email to the respondent by the Group Managing Director that the next day following the board meeting the respondent met Mr. Furley. Pursuant to that meeting the Group Managing Director e-mailed the respondent, directing that;

> **"… whilst the Board is reviewing your position do not report to work until further notice …. Please return the company car and other assets you hold by latest Monday lunch time 12 p.m."**

The details of the meeting between **Mr. Furley** and the respondent are not documented and are not known, except a suggestion that he had demanded that the respondent resigns. Five days from the date of this e-mail the termination letter of 26th November 2010 was issued.

What is the effect of these events in law?. From these events and the oral testimonies before the trial court it appears to us that although there were obvious signs that the Group Managing Director was dissatisfied with the performance of the respondent, no disciplinary action, as envisaged under the Employment Act, other than the warning letters were commenced or undertaken. Even though there were warning letters before the board meeting the letters were not the subject of the meeting of 17th November, 2010. No issue attaching on the performance of the respondent personally was raised during the meeting. In any case he had explained to the board why the company's poor performance could not be attributed to him, having been the General Manager for a short period. There were no specific charges against the respondent for which his direct response was or could possibly be sought. There was no evidence that the respondent was responsible for the alleged loss of the USD 280,000 per year.

The Group Managing Director admitted that initially the respondent was approached and directed to resign, so as to avoid tainting his CV; that he was given two hearings but he refused to resign. He was however categorical that the board meeting of 17th November 2010 was not a disciplinary hearing; that when he joined the appellant company in 2008 there were no negative reports on the respondent from his predecessors.

Apart from issuing proper notice according to the contract (or payment *in lieu* of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.

Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself. Nothing demonstrates his bewilderment than his own sentiments contained in his letter written after the board meeting and the meeting with **Mr. Furley.** He wrote,

> **"It was to my utter shock that Mr. Kevin Furley asked me to resign right after said meeting without the impasse being put to rest, and I did not resign as asked.**
>
> **Afterwards I was further surprised by the e-mail received from Mr. Bletterman ordering me to hand over all of the company's property back to the company and not to report to work until further communication … I have fully complied …. It is my humble request to be informed, and to have clarification on the following:**

i. **Is my employment with the company terminated?**
ii. **If so, when is the commencement date of such termination?**
iii. **What are the grounds of such termination?**
iv. **Will I be accorded a chance to be heard …. So far I have not had any chance of knowing and or responding to the wrongful omission or commission that I may be accused of…."**

The letter of termination was issued two days after this. It is apparent from the e-mail directing the respondent not to report to work and surrender company assets that the respondent's employment was terminated before the termination letter was issued.

Having rendered service to the appellant for over 14 years and considering his rank, we think he was unnecessarily subjected to an unfair and shabby treatment. No one, not even the respondent himself could be able to tell at the end of the day the reason for his termination.

It was conceded that the complainant was replaced by a Belgian national (like the Group Managing Director) immediately after termination of his employment, confirming the respondent's position that he was treated in a discriminatory manner. The Employment Act emphasizes equality of opportunity and outlaws all forms of discrimination. See **Section 5**. The respondent was also subjected to a demeaning treatment by being required by Mr. Furley, a director like him, to resign. On a Saturday while taking his wife to undergo surgery, a fact the Group Managing Director was aware of, the respondent received an e-mail from the former directing him to surrender the official car and mobile phone. When he went to the offices in compliance, he was kept at the gate by the security guards for 15 minutes and later escorted to the office like a stranger or criminal. All this was unnecessary in view of the freedom and wide leeway given by **section 45(2)** of the Employment Act, which even allows the employer to terminate a contract on the ground of incompatibility.

We come to the conclusion and find, in agreement with the trial judge, that the termination of the respondent's contact of service, in the circumstances, was unfair, the payment *in lieu* of notice notwithstanding. What then are the remedies for unfair termination under the law? Where it is demonstrated that the termination of a contract of service was unjustified, a range of remedies is available, subject to certain considerations. An employer can pay to an employee whose services are unfairly terminated;

i. The wages which the employee would have earned had he been given the period of notice to which he was entitled,
ii. The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
iii. Reinstatement of the employee
iv. Re-engagement

The learned Judge relied on (ii) above and awarded 12 months gross salary, being the maximum number of months' salary. This was an exercise of judicial discretion for which on appeal can only be interfered

with or reversed if it is demonstrated that the judge misdirected himself on the law, or that he misapprehended the facts and thereby arrived at a wrong decision. See **Mrao Ltd v First American Bank of Kenya Msa Civil Appeal No. 39 of 2002.** To the extent that the learned Judge explained that the award of 12 months gross salary was in consideration of the respondent's rank and the difficulty he was likely to face to obtain another employment, we think that the discretion was judicially exercised. We may only add to this list the treatment of the respondent as explained earlier and the long period of service to the appellant.

The appellant while terminating the respondent's contract of service indicated that it was prepared to pay to the latter terminal benefit of 15 days worked for every year, even though, it claimed, the law on this was unclear. On that basis the appellant paid to the respondent on this head Kshs.4,669,677 made up of salary for 210 days (15 days salary per completed year worked for 14 years at Kshs.676,362/- per month). The respondent in his pleading alleged that this payment was grossly low and did not take into consideration the practice in the appellant company where fulltime directors/employees whose employments were terminated would be paid, as part of terminal dues, two months' salary for each year worked with the appellant. In his testimony the respondent gave the examples of **Mwadegu**, **Kayallin** and **Kinyua** who were paid upon termination of their employment with the appellant, and wondered why he was getting a different treatment.

The evidence of **Benard Ochieng Ogaja**, the appellant's Human Resource and Administration Manager was not helpful in this aspect of the dispute. He admitted that he did not deal with matters involving the high enchlons of the appellant company and did not know what senior managers were paid on termination or retirement. According to the Group Managing Director the respondent was paid more than what was lawfully due to him; that no employee has ever been paid more than 15 days salary.

Custom and practice is one of various ways that terms may be implied into an employment contract. For a term to be implied by custom and practice it must be fair, reasonable, notorious and certain. Secondly the court must ascertain from the parties' conduct whether the circumstances demonstrate that they intended the term to form part of the contract. See **The Law of Contract**, 8th Edition by **G.C. Cheshire** and **C.H.S. Fifoot.** The appellant feigned the basis of the payment of 15 days salary for completed year worked, describing it falsely as a terminal benefit which it was not obliged to pay and which is not provided for in the Act. We are, ourselves satisfied that payment amounting in total to Kshs.4,669,677 was based on an established practice of the appellant company and was therefore not *ex gratia*. To that figure Kshs.676,362/- and 137,866/- constituting one month salary *in lieu* of notice and leave pay, respectively, were added. From the total of Kshs.5,483,905/- statutory deductions and the cost of the motor vehicle were subtracted, leaving Khs.3,258,245/-. This amount is independent of the award of Ksh.8,116,344/- under **section 49**. That award, in terms of **section 49(2)** is subject to statutory deductions. The learned judge erred in not taking this into consideration. We accordingly order that from that award statutory deductions be subtracted.

In a nutshell, the appeal therefore fails and is dismissed.

In view of this outcome we order that the parties bear their own costs.

Dated and delivered at Mombasa this 11th day of March 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M’INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR