IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 68 OF 2014

BETWEEN

DIRECTLINE ASSURANCE CO. LTD ……..APPELLANT

AND

JEREMIAH WACHIRA ICHAURA …….....….....….RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment &Labour Relations Court of Kenya at Nairobi (Wasilwa, J) delivered on 13th December, 2012

in

E.&L.R.C.C. No. 873 OF 2011*).*

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JUDGMENT OF THE COURT

The respondent was employed by the appellant as a Sales and Marketing Director in charge of Mount Kenya Region. The contract of employment was to commence on 1st December, 2007 but by mutual agreement was postponedto 1st February, 2008. The respondent as per the contract was entitled to a monthly salary of Kshs.350,000/= and a production commission of 1% of all revenue he would generate in the region that surpassed 7,000,000/= per month less statutory deductions.He was also entitled to 10% of his monthly salary being paidinto the pension scheme by the appellant for as long as he remained in the appellant's employment but could only benefit if he remained in such employment for at least 3 years. The contract further provided for a fixed term of 5 years with a termination clause of 6 months written notice.

However hardly 3 months into his employment, the respondent was served with a letter from the appellant dated 28th May, 2008 summarily dismissing him from employment. The reason given for the termination was that he had not devoted his time and attention to the appellant's work more so as regards hours of reporting and leaving duty. The appellant feelingaggrieved by the appellant's letter lodged a claim in the Employment and Labour Relations Court at Nairobi claiming that there had been breach of contract, wrongful and unlawful dismissal and failure to pay him his terminal dues by the appellant. He claimed an aggregate sum of Kshs.29,116,114/=made up as follows:

(i) Unremitted pension for the period 140,000.00

(ii) Sum accrued during the induction period from

January to February, 2008 at Kshs.10,000/ per day 160,000.00

(iii) Costs of mitigating loss 316,114.00

(iv) Travelling and accommodation expenses 500,000.00

(v) Loss of pension for the remainder of the term 1,960,000.00

(vi) 6 months salary in lieu of notice 2,100,000.00

(vii) Loss of production commission 3,990,000.00

(viii) Loss of income for the remainder of the term 18,900,000.00

Total **29,116,114.00**

The appellant filed a defence to the claim. It admitted that the respondent worked for it but was summarily dismissed pursuant to clause 12A of the contract of employment. That pursuant to the summary dismissal, the respondent was paid his dues under the contract. Accordingly, no claim lay against it by the respondent.

The claim was heard by **Wasilwa, J** with each party calling one witness. The evidence of the respondent was briefly, that having been employed by the appellant in 2007 as a Sales and Marketing Director in charge of Mount Kenya Region, his duties included recruitment of brokers and agents in the region who would in turn sell the appellant's products to the customers. That when appointed, the appellant had no offices in the area. Through his efforts, he acquired and renovated the offices from 1st February, 2008 and by 1st March, 2008 they were ready for business. However, before he could settle into the offices, he was summoned to the appellant's head office in Nairobi by its Managing Director who told him that he had short-changed them in his contract of employment as he was a branch manager and should therefore earnKshs.100,000.00just like other branch managers in the appellant's employment. He was therefore asked to take a pay cut. The respondent declined the proposal. He was then asked to resign which he again declined to do. It was then that he was served with a letter of summary dismissal. He further testified that before taking up the employment with the appellant, he was working for Invesco Insurance Company Ltd as a General Manager earning a salary of Kshs.420,000/= but nonetheless accepted the appellant's employment as he was attracted by the 1% commission clause since he was convinced he could raise an extra Ksh.300,000/= with an output of Kshs.130,000,000/= in sales as he had done with Invesco Insurance Co. Ltd. He testified further that prior to joining Invesco, he worked for Blue Shield Insurance Company Ltd for 18 years where he had excelled and was even issued with a certificate for his excellent performance. His further testimony was that as a result of the appellant's wrongful action he had suffered loss and damage. That the termination letter did not even give any or any valid reasons for the summary dismissal.That due to his advanced age, he would find it difficult to get alternative employment and hence the prayers in the claim.

The appellant called the Customer Service Assistant, Accounts Department in its employment who testified that though the respondent was his boss he used to report on duty from 8.00 am, talk to some clients and then leave. That on other days he would report at 10.00 a.m. and leave by lunch hour.

Deciding the claim against the appellant,**Wasilwa, J**held that though the respondent's employment was terminated barely 4 months into the contract allegedly under clause 12 of the employment contract which relates to summary termination due to gross default or misconduct, the respondent's misconduct was not stated nor proved. That the appellant's witness who was his junior did not indicate that he supervised the respondent and therefore the acts of commission and omission by the respondent remained unproved. The learned judge also held that the respondent was not accorded any hearing so as to be explained to and given an opportunity to explain himself. That the right to be heard is enshrined in the Constitution under

Article 50 of the Constitution and reiterated in Section 41 of the Employment Act, 2007 as well as recommendation 119(4) of the International LabourOrganisation. For all the above reasons, the court determined that the respondent's termination was wholly unjustified, wrong and unfair.

On remedies, having determined as aforesaid, the court then converted the respondent's termination into a normal termination and compensated him as follows:

(i) 1 year salary for wrongful termination as provided under Section 49 (c) of

the Employment Act 2007 equivalent to 350,000 x 12 4,200,000.00

(ii) 6 Months salary in lieu of Notice as provided for

under the Employment Act 350,000 x 6 2,100,000.00

(iii) Unremitted pension for period worked equivalent

to 10% of 350,000 x 4 140,000.00

Grand Total **6,440,000.00**

Aggrieved by the decision, the appellant lodged the instant appeal on ten grounds but which ideally can be reduced into six to wit; that the trial court erred in law and fact in:-

(i) relying on the Constitution of Kenya (2010) and the Employment Act (2007) both of which were inapplicable to the case, in establishing the respondent'swrongful and unlawful termination of employment and using the Employment Act in accessing the damages.

(ii) holding that the misconduct and default on account of which the respondent was dismissed was not stated and proved.

(iii) disregarding the evidence of the respondent's witness on the ground that he was not the supervisor of the respondent and not on account of relevance, veracity and weight.

(iv) Not applying the provisions of Section 17 of the Employment Act, Cap 226, (repealed) which was applicable to the case at the material time, and therefore ought to have found that the appellant was justified in summarily dismissing the respondent.

(v) not finding that when the service contract contains termination clause, the measure of compensation or indemnity for unlawful dismissal is the period of notice specified in the termination clause regardless of the nature of the employment, and lastly;

(vi) Granting orders against the appellant that were not sought in the memorandum of claim.

Upon being served with the memorandum of appeal, the respondent filed a notice of cross-appeal on grounds that the court erred and misdirected itself in law and fact in:

i. not finding that the contract between the respondent and the appellant was fixed for a term of five years.

ii. not awarding a sum of Kshs.18,000,000/= being the salary for the unexpired period of the contract.

iii. awarding general damages for breach of contract,

iv.awarding interest on the decretal sum.

v finding that any award or payment is subject to statutory deductions.

At the hearing of the appeal and cross-appeal, and in compliance with directions given by a judge of this Court on 2nd August, 2016 during the pre-hearingand case management conference, parties filed and served on each other written submissions and the authorities relied on. Parties too were in agreement that there was no point in highlighting theirrespective written submissions.

The appellant's submissions on the appeal were that the Respondent's cause of action arose on 28th May, 2008 when his contract of employment was terminated. The Constitution of Kenya (2010) whose Article 50 the court relied on to make a finding that the Respondent's dismissal was wrongful and unfair was promulgated on 27th August, 2010. Similarly that the court relied on Sections 41 and 42 of the Employment Act [2007]in making a finding that the respondent was not accorded a fair hearing. That Act came into force on 2nd June, 2008 after the cause of action had already arisen. It was further submitted that the appellant was not expected to apply a law that was not in existence at the time the respondent's employment was terminated. It was further submitted that instead, what the court should have relied on should have been the Employment Act, Cap 226 then in force and now repealed, hereinafter "Cap 226."

On whether or not the respondent's misconduct was disclosed and proved, counsel submitted that contrary to what the court found, the misconduct that led to the respondent's dismissal was stated in the letter of termination dated 28th May,

2008. That from the evidence of the appellant's witness it was clear that the respondent did not devote his time and attention to the appellant's work. The court therefore erred in disregarding that evidence on account of the witness being a junior to the respondentand not on account of its relevance, credibility and weight.

On the application of Cap 226, counsel reiterated that the respondent's services were terminated on 28th May, 2008 when Cap 226 was the applicable statute to the dispute. Pursuant to the provisions of Section 17 (g) of the said Act, an employer was entitled to summarily dismiss an employee who absented himself from the place of work. Further under clause 2 (B) of the contract of employment, the respondent was supposed to be at his work station between 0800 to 1700 hours. There was evidence that the appellant violated this term. Counsel further submitted that under clause 12A, the appellant was at liberty to dismiss the respondent summarily for any gross default or misconduct. The respondent's conduct of not devoting his work and attention to the business of the appellant therefore justified the respondent's dismissal.

On the measure of compensation, counsel submitted that even if the respondent was entitled to damages for wrongful dismissal, the court erred in its assessment of damages in applying the Employment Act, 2007 which was not yet operational and disregarding established decisions and binding precedents at the time which were to the effect that where a contract contains a termination clause, the measure of damages is the period of the notice specified in the termination clause. In this regard counsel referred us to the following cases; **Joseph IleliKikumbi v Central Bank of Kenya, [2012] eKLR, Wanjohi v MichellCotts Kenya Ltd [2002] eKLR,Mughai v Lakner Techs Ltd [2002] eKLR 191, Central Bank of Kenya v Nkabu Civil Appeal No. 81 of 2000 (ur),** and**Gunton v L B Richmond upon Thames [1980] 3 ALL ER 589.**

With regard to the ground that the court granted orders against the appellant that were not sought, counsel submitted that nowhere did the respondent pray for damages under Section 49 (c) of the Employment Act, that though the respondent had sought for a declaration that his dismissal was wrongful and in breach of Employment Act,2007 the court instead made a declaration that the termination was unfair. Further the court awarded the respondent ***"unremitted pension"*** which he was not entitled to according to the contract of employment.

On the last ground of appeal, counsel submitted that any award in favour of the respondent was subject to taxation and statutory deductions including pay as you earn, National Social Security Fund and National Hospital Insurance Fund. For this proposition counsel relied on **Kenya Revenue Authority's Domestic**

Employer's

Guide to Pay as you Earn in Kenya. On this aspect, counsel concluded his submissions by stating that the respondent's monthly net salary that should have been used in the computation of the damages due to him was Kshs. 221,699/25 after the statutory deductions aforesaid.

Responding to the cross-appeal, counsel submitted that the measure of damages for termination in the context of a contract with a termination clause is an equivalent of the aggregate salary of the period of the notice and not for unexpired period of the contract. That in any event Section 15 of the **Trade Disputes Act** (repealed) but which was applicable then provided that the maximum that could be awarded for wrongful termination was twelve month's monetary wages.

Regarding general damages for breach of contract, counsel submitted that the general rule is that a court cannot award general damages for breach of contract. In support of this contention, counsel relied on the case of **Securicor Courier (K) Ltd v Benson David Onyango& Margaret R. Onyango, Civil Appeal No. 323 of 2002 (ur).** It was further submitted by counsel that in the cross-appeal, the appellant had not demonstrated circumstances to warrant such an award.

As for interest, counsel submitted that it was discretionary in terms of Section 26 (1) of the Civil Procedure Act. Therefore this Court should be slow to interfere with this exercise of discretion unless it is demonstrated that the trial court in the exercise of the discretion misdirected itself and as a result arrived at a wrong decision. He relied on the case of **New Tyres Enterprises Ltd v Kenya Alliance Insurance**

Company Ltd [1987] KLR 380for this proposition. In counsel's view, the respondent had not demonstrated that the court proceeded on some erroneous principle or was plainly and obviously wrong in the exercise of its discretion in favour of not awarding interest on the damages awarded.

For the respondent, it was submitted that in the letter of termination, the appellant did not specify the days, dates and time that the respondent had failed to devote his time to the appellant's duties. That the employment contract provided that, among other duties, therespondent was to develop the appellant's relationship with the intermediaries in the region. It was therefore expected that the respondent would from time to time be in or out of the offices to visit these other branches. That if the complaint was true, how was it that the respondent had never been served with any warning or even reprimanded. It was further submitted that dismissal from employment can be unlawful for reasons of being wrong or unfair. For this proposition counsel relied on the case of**Imenje v Kenya National Co. Ltd [1986] KLR 350.** In counsel's view, from the evidence adduced before court there was no proof that the respondent had not devoted his time and energies to the appellant's employment. Accordingly the finding by the court was inevitable.

As regards whether the respondent was lawfully entitled to an award ofKshs.4,200,000.00 counsel submitted that in deciding which remedy to give an employee who has been wrongfully dismissed, the court exercises discretion which an appellate court will only interfere with where the trial court either took into account an irrelevant factor or failed to consider a relevant one, or where the award was too high or too low as to amount to an erroneous estimate. **Kemfro Africa Ltd t/a Meru Express & Another v A. M.Lubia& Another [1982-88] 1 KAR 727** and **Peter M. Kariuki v Attorney General [2014] eKLR.**

Though the respondent in his submission conceded that the court erred in applying Section 49(1) of the Employment Act of 2007 instead of cap 226, it maintained that therelevantremedies then available for unfair dismissal were re-engagement, reinstatement and compensation. Indeed by Section 15 of the repealed Trade Disputes Act which was inforce then, compensatory awards in redressing unfair termination were awarded and capped at the equivalent of the employee's 12 months gross salary; counsel relied on the cases of **Kenya Ports Authority v Festus KipkorirKiprotich[2014] eKLR**and **major Wilfred KalloKangunyu v Tetrapark Ltd [2014] eKLR** for this submission.

On the question of whether the respondent was entitled to pension of Kshs.140,000.00 for the period

worked, counsel submitted that had the contract not been brought to an abrupt end by theunprocedural and unlawful termination, the respondent would have earned the same. On whetherthe contract of employment between the parties was for a fixed term,counsel maintained that it was by referring to the cases of **BBC v LOANNOU [1975] QB71** and **Dixon v BBC [1979] 2 ALL ER 112** the gist of the holding being that although a contract for a stated period was determinable by either party giving notice within that period, it was still a contract for a fixed term. It was counsel's submission therefore that the contract for a fixed term has to run the full length, irrespective of thepresence of the termination clause, save for gross breach of the contract by the parties.Regarding the question of interest on the amounts awarded, counsel submitted that the sum claimed by the respondent ought to have been paid at the time of the termination of his services. It therefore follows that interest is payable. Counsel relied on the case of **DalmasOgoye v KNTC, Civil Appeal No. 12 5 of 1996** (ur) for the proposition.

It would appear that the respondent did not file written submissions in respect of his cross-appeal.

We have carefully read and considered the record of an appeal, the respective written submissions, the authorities annexed thereto and the law. It is now settled that the duty of the first appellate court in an appeal is to re-evaluate the evidence led and come up with its own findings and conclusions. In this regard, see **Jabane v Olenja [1986] KLR 661, Selle& Another v Associated Motor Boat Company Ltd & Another [1968] EA 123** and **Peters v Sunday Post [1958] EA. 424.**

Some of the grounds of appeal and cross-appeal can easily be disposed of at this initial stage. These are the invocation and application of the Constitution of Kenya, 2010 and the Employment Act, 2007 to the dispute, the need to have the award subjected to statutory deductionsand failure by the trial court to award interest on the decretal sum.

With regard to the application of the current Constitution as well as the Employment Act, 2007 to the dispute, counsel for the respondent rightly conceded, in our view, that the same was not applicable to the dispute at all. The respondent admitted that his services were terminated on 28th May, 2008. Accordingly, this is when his cause of action arose or accrued. The current Constitution of Kenya whose Article 50 the court invoked to make a finding that the respondent's dismissal was wrongful and unfair was promulgated on 27th August, 2010 long after the respondent's cause of action had arisen. Similarly the court relied on Sections 41 and 42 of the Employment Act of 2007 to conclude that the respondent was not accorded a fair hearing. Once again the said provisions of the Employment Act, 2007 came into effect on 2nd June, 2008, a year or so after the cause of action arose. The legal position on the application of the Constitution of Kenya and the Employment Act 2007 were considered in the case of **Mary WakwabubiWafula v British Airways PLC [2015] eKLR** where it was held *inter alia:-*

"Court only has jurisdiction to award the remedies available at the time of wrongful dismissal or unfair termination, that is, when the cause of action arose. These are the remedies that are provided for under the repealed Employment Act, Cap 226 Laws of Kenya and the repealed Trade Disputes Act, Cap 234 Laws of Kenya…" See also**Kenya Ports Authority**(supra). On the basis of the foregoing then the court should have relied on the rested Constitution and Cap 226 that was in place at the time of the termination and not the current Constitution and Employment Act, 2007.

How about the need to subject the award to the mandatory statutory deductions? Surprisingly, the respondent did not submit on this aspect of the appeal. It is trite law that any lumpsum payment for say, terminal dues, is subject to statutory deductions for the years taken into account. Indeed in **Simon Deakin and Gllian S. Morris, Labour Law at page 405**, the writers observe that it is the net salary, salary after deduction of income tax, National Insurance contributionandcontributions to pension schemes or similar benefits, that is used to compute any damages due to any employees. Accordingly the court erred in not subjecting the award to the mandatory statutory deduction.

We now turn our attention to failure by the court to grant intereston the award.

The power to award interest is given by **Section 26(1)** of the Civil Procedure Code. It provides ***interlia"…***

"Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

Ourreading of the provision shows that the court enjoys a wide discretion on whether or not to award interest. Of course this court will be slow to interfere with the discretion exercised by the court unless we are satisfied that in its exercise it misdirected itself in some manner and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the court was clearly wrong in the exercise of the discretion resulting in an injustice. See **NewTyres Enterprises Ltdv. Kenya Alliance Insurance Co. Ltd**(supra).

In the statement of claim the respondent specifically prayed for interest on the decretal sum. In his testimony before court, he reiterated his claim for interest. Yet in the judgment of the court no mention is made regarding the prayer for interest. Could this have been an inadvertent error or(deliberate) omission on the part of the court to deny the respondent interest? Our view is that the former holds sway. If the intention was to deny the respondent interest, the court would specifically have stated so since it was one of the prayer sought in the claim and evidence was led on it. There can be no discretion exercised in or by silence. It cannot be inferred that by the trial court keeping quite on that aspect of the claimit had exercised its discretion properly or judicially. How would the appellate court determine whether the discretion was exercised properly or judicially? There is no telling. In which case we must hold that it was an omission on the part of the courtthat we must correct.

The amounts claimed and subsequently awarded ought to have been paid at the time of the termination of the respondent's services in May, 2008. The order for payment was being made in December, 2012, a whole four years down the line. In those circumstances can it be denied that interest is payable? We do not think so. Further this Court in the case of **DalmasOgoyev K.N.T.C**. (supra) held that since the amount due to the employee ought to have been paid at the time his employment was unlawfully terminated, it would be payable with interest of 14% from that date of termination. We think, that the same situation obtains here.

Was the misconduct and default on account of which the respondent was dismissed proved? The respondent testified on what transpired. He stated that on the 28th May, 2008 he was summoned to the head office wherethe appellant's General

Manager asked him to take a pay cut and earn a salary like any other branch manager which was 100,000/=. When he declined, he was then asked to resign. He again refused. It was then that he was issued with a letter of termination of services. It is instructive that the respondent was not cross-examined on this evidence at all.Further the letter of termination gave an entirely different reason for the dismissal of the respondent. It alleged that the respondent was not devoting his time and attention to the appellant's work which affected the appellant and its business. However, the appellant did not specify the days, dates and the time the respondent failed to devote his time and energies to the appellant's work. It was common ground that part of his work was to ***"… Developing the company relationship with intermediaries in the Mount Kenya region (for purposes of this contract the Mt. Kenya region shall be described as the Companies (sic) Nyeri Branch, Nyahururu Branch, Nanyuki Branch, Meru Branch, Embu Branch and KerugoyaBranch)…"***

How could the respondent have developed those relationships without travelling to those branches? This would certainly entail the respondent from time to time travelling and therefore being out of the office. If on such occasions he is out of his Nyeri Office, can it be said that he was not devoting his time and attention to the appellant's work? One too would have expected that having noticed the respondent's alleged misdeameanours regardinghis work ethic, the appellant would have issued him with a warning either verbally, in writing or even a reprimand. There was no such evidence. We also doubt whether the appellant's sole witness was aware of the above job description.

Further the appellant's evidence was that the respondent ***"used to work from 8.00 a.m. talk to some clients and leave. Other days he could report at 10.00 a.m. and leave thereafter, may be by lunch hours."***Given the respondent's job description, where is the direlection of duty here?In any event there is no evidence that part of the appellant's witnesse's duty was to supervise the respondent. Other than the witness's word of mouth, there were no records tendered in court showing when the appellant reported and left duty. Given the tenous evidence tendered by the appellant we are satisfied that the court did not err in holding that the gross misconduct alleged by the appellant was not proved to warrant the respondent's summary dismissal. Further there is uncontroverted evidence by the respondent that, when he was engaged, the appellant didn't have offices in Nyeri. Sothat between 1st February, 2008 to 1st March, 2008, he looked for the offices, renovated them and started trading on 1st March, 2008. Hardly, two months thereafter, he was summarily dismissed for not devoting his energies to the appellant's work. We doubt whether this period was sufficient to gauge the respondent's performance given the wide duties the appellant had assigned to him.

The respondent having lost his job on 28th May, 2008, his remedy lay in Cap 226. Even the appellant's action of dismissing the respondent would also be anchored on the same Act. Under Section 17(g) of Cap 226the appellant was entitled to summarily dismiss an employee who absents himself from the work place. Relying on the letter of termination the appellant has advanced the argument that it was entitled to dismiss the respondent for constantly absconding from work. But as we have already demonstrated there was no such evidence and even if there was, it was of a tenous kind. The burden of proof lay on the appellant to tender evidence in proof of the allegations pursuant to the provisions of Section 107, 108 and 109 of the Evidence Act. In our view the appellant failed in discharging the burden and we cannot blame the court for coming to the conclusion that the respondent had been wrongfully and unfairly dismissed.

Was the respondent entitled to those awards? The appellant does not think so, whereas the respondent thinks it is entitled and cross-appeals for more.It is easy to dispose of the award of Kshs.140,000/= for unremitted pension. It is obvious to us that the respondent was not entitled to this amount according to the contract of employment. Clause 6A of the Employment contract provided that the respondent could not be eligible to withdraw any monies paid by the appellant into the scheme until he had remained in employment of the appellant for not less than three consecutive calendar years. Simply put, the respondent was entitled to pension if he had worked for the appellant for three or more consecutive years. Though the court made the award, it was unmerited as the respondent had only worked for a period of four months which was much lower than the threshold of three consecutive years required for him to be entitled to the pension.

We now turn to consider whether the respondent was lawfully entitled to an award of damages in the sum of Kshs.4,200,000/= as general damages. Both parties concede that the applicable law to the dispute was Cap 226. The general rule then was that the court could not award general damages for breach of contract and or employment terms. This was succinctly summed up in the case of **Securicor Courier (K) Ltd v Benson David Onyango& Ann, Civil Appeal No. 323 of 2002 (ur)** as follows:

"… as general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract…"

Further in the case of **Joseph IleliKikumbi v Central Bank of Kenya,** (supra)it was held

"… The law with respect to the quantum of damages payable to an employee who is wrongfully dismissed is now well settled in this jurisdiction. When the contract of service contains a termination clause, the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause regardless of the nature of the Employment following the unlawful termination of such service contract. There is then breach of contract and the measure of compensation or indemnity or general damages or special damages is the loss of the employee would incur during the stipulated period of the termination clause or notice….." see also **Central Bank of Kenya vsNkabu**(supra)**.**

In this case, the contract of employment had termination clause being six month's notice. The measure of damages in our view should have been limited to the amount which the respondent would have earned

during the period of notice. In awarding the respondent the Kshs.4,200,000/=the court appears to have invoked albeit erroneously the Employment Act 2007 which was then inapplicable. As already stated the Employment Act, 2007 came into effect on 2nd June, 2008 while the respondent's employment was terminated on 28th May, 2008. Thus it was **Cap 226** which was applicable at the time. It is therefore obvious that the court erred in applyingthe new Employment Act2007 to award the respondent a sum of Kshs.4,200,000/= when that provision was not in force at the time of the respondent's dismissal.

The respondent has argued that in making the award, the court exercised discretion which discretion should not be disturbed by the court. That the court after considering that the respondent had workedfor the appellant in a senior position, his age which was 50 years and the country's economy where it is difficult to get employment, the court assessed compensation at 12 months. However, in our view this was a wrong consideration. Discretion must follow the law. In other words discretion cannot override the law. If the law is that where a contract contains a termination clause, the measure of compensation is the period of the notice specified in the termination clause, there can be no discretion other than to apply the clause. Of course the respondent has submitted that the contract of employment between the parties was for a fixed term of 5 years and it did not matter that there was a termination notice. To the respondent the termination notice could only come at the end of the five years depending on whether or not the respondent was desirousof renewing the contract. That the position in law was that contracts for fixed term have to run their full length irrespective of the presence of the termination clause, save for gross breach of the contract. In support of these positions the respondent relied on the case of **BBC** (supra) and **Halsbury's Law of England, Volume 16**. We do not think that this represent the position in Kenya given the local authorities we have cited elsewhere in this judgment. Our position receives further support from **Deakin**and **Morris** (supra) who positsthat ***"an employee who is employed under a fixed term contract which does not contain a termination notice clause is… entitled to receive the net salary for the unexpired period of the contract."***(Emphasis provided). However the consideration is different where the fixed term contract has a termination clause as was the case here. In concluding this aspect of the appeal, we make reference to the case of **Charles BosirevsMedicinsSans Frontieres(Holland) Case number 635 of 2009** in which the claimant who was employed on fixed term contract of one year and did not have a termination clause. When his employment was terminated five months to the end, the court awarded him damages for unexpired period of contract.

We have said enough to show that both the appeal and cross appeal have merit. The appellant has partially succeeded in its appeal just like the respondent in the cross-appeal.Accordingly we make the following orders in this appeal and cross-appeal.

(i) The appeal is allowed to the extent that the award of Kshs.4,200,000/= is set aside.

(ii) The award of Kshs.140,000/= being unremitted pension for a period of four months is similarly set aside.

(iii) In the premises the respondent shall be entitled to the sum of Kshs.2,100,000/=only subject to statutory deductions.

(iv) The cross-appeal succeeds to the extent that sum of Kshs.2,100,000/= shall attract interest at the rate of 14% from the date of termination, that is to say 28th May, 2008.

(v) Each party shall bear the costs of this appeal.

Dated and delivered at Nairobi this 4th day of November, 2016.

ASIKE-MAKHANDIA

…….…….

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