REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL NO. 300 OF 2006

CORAM: MARAGA, GATEMBU, & J. MOHAMMED, JJ.A

BETWEEN

TWIGA CHEMICALS INDUSTRIES LIMITED……APPELLANT

AND

ALLAN STEPHEN REYNOLDS…….....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Githinji, J) dated 12th November, 2004

in

HCCC NO. 2772 OF 1997)

****

JUDGMENT OF THE COURT

Background

This appeal arises from the judgment of the High Court of Kenya at Nairobi delivered by Mr E.M. Githinji, J *(as he was then)* on 12th November, 2004.

The respondent who was the plaintiff in *HCCC No. 2772 of 1997*, sued the appellant for various liquidated sums for alleged breaches of his contract of employment with the appellant which was terminated on 3rd October, 1997. These breaches were in respect of non payment of school fees by the appellant for the respondent's daughter, failure to meet removal expenses for the respondent's personal effects on his return to his home in South Africa and the value of the respondent's goods which were sold by AGS Kenya expenses. The total claim as pleaded amounted to KShs.8,116,767/-; Sterling Pounds 6,000 and interest on both sums as well as costs of the suit. The appellant denied the respondent's claims and claimed a set-off of KShs.2,201,355/- against the respondent.

Following negotiations, the parties recorded a consent on 18th February, 2003, the appellant having admitted the claim to the extent of KShs.2,226,144/-. The trial proceeded on the remainder of the claim made up of two issues; the payment of KShs.260,000/= for school fees and KShs.4,550,000/= being the value of the respondent's goods which were auctioned by AGS to recover its costs. The appellant's set-off was compromised to the extent of KShs.1,919,515.66/= being the appellant's expenses account including advances and travel.

The gist of the respondent's claim was that he was employed by the appellant by virtue of a contract of employment dated 14th March, 1996. The respondent, an expatriate from South Africa, was employed as a General Manager (Pharmaceuticals). In addition to the monthly salary, the respondent asserted that the appellant had agreed to make other additional benefits to him including school fees for his daughter who came to Kenya in August 1996 and joined Hillcrest school. On 3rd October, 1997, the appellant terminated the respondent's services and agreed to pay him six months' salary in lieu of notice in addition to the benefits accrued as agreed in the contract of employment. The appellant also undertook to pay removal fees for a limited quantity of the respondent's personal effects. The respondent was later deported from Kenya on 10th November 1997.

The respondent contends that these course of events compelled his wife to make arrangements of removing their personal effects from Kenya to South Africa. In view of the fact that he was no longer resident in Kenya, the respondent's wife contracted AGS to ship the respondent's goods to South Africa. AGS sent its invoice to the respondent but the amount due was not paid. As a result, AGS instituted a suit against the respondent, Nairobi HCCC NO. 2839 OF 1998, to recover the amount due to it for work done including storage costs for the respondent's goods. Judgment was entered in favour of AGS who proceeded to auction the respondent's goods to recover its storage charges. The respondent consequently asserted that the appellant owed him the sum of KShs.4,550,000.00 being the value of his goods that were auctioned by AGS. The respondent averred that the appellant was responsible for this loss as it failed to pay for the shipping expenses for removal of his goods as stipulated under the terms of termination of his contract.

In rebuttal to the two contentious issues, the appellant contended that at no particular point in the employment contract or in any additional communication thereto, did it agree to pay the respondent's daughter's fees at Hillcrest School. It asserted that there was no documentary evidence to prove that it was obliged to pay the said fees. On the issue of whether the appellant was responsible for the removal costs of the respondent's personal effects from Kenya to South Africa, the appellant argued that the employment contract allowed for removal expenses for a limited quantity of the respondent's personal effects. The appellant asserted that the goods that the respondent wanted to ship exceeded a *1×20* foot container as allowed under the contract of employment, and the amount of 11,980 USD demanded by AGS was not reasonable.

The learned Judge entered judgment in favour of the respondent and allowed the respondent's claim of KShs.260,000/= for school fees, the admitted sum of KShs.2,226,144/- and the value of the respondent's goods sold by AGS, amounting to KShs.4,550,000/=. In his computation the total amount payable was KShs.9,036,144/=. Upon discounting KShs.1,919,515 set-off, he entered judgment in favour of the respondent for KShs.7,116,628.34 plus costs and interest at 12% per annum.

By a notice of motion filed on 23rd November, 2004, the appellant sought a correction of the arithmetic mistake in the judgment. The appellant sought orders that the correct figure for judgment was KShs.5,617,979 and not KShs.7,116,728.30.

Aggrieved by the decision of the learned Judge, the appellants filed this appeal and raised substantive grounds which were canvassed in the Memorandum of Appeal dated 20th December, 2006.

At the hearing of the appeal, learned counsel, Mr. Peter Kingara made submissions on behalf of the appellant while learned counsel, Mr. Muriuki Mugambi, submitted on behalf of the respondent. Learned counsel had both filed written submissions prior to the hearing of the appeal.

On the school fees claim, the appellant's counsel submitted that the learned Judge erred in awarding KShs.260,000.00 being school fees for the respondent's daughter. The appellant asserted that the payment of fees was not expressly provided for in the respondent's contract of employment. The appellant claimed that all variations to the respondent's contract were always reflected in writing and the respondent failed to produce evidence of a written agreement indicating that the appellant had agreed to pay fees for the respondent's daughter. The appellant contended that the learned Judge's decision to infer such an agreement from the disputed informal talks between the appellant's Managing Director and

the respondent was a modification of the respondent's contract of employment, which was contrary to the parol evidence rule. This rule prohibits the importation of extrinsic evidence to

modify a written agreement. The appellant cited *PRUDENTIAL ASSURANCE COMPANY OF KENYA LIMITED V. SUKHWINDER SINGH JUTLEY AND*

ANOTHER, CIVIL APPEAL 23 OF 2005, where the court cited a passage in Odgers Construction Of Deeds And Statutes (5th edn) at p.106 noting in respect to the rule that:

> "*It is familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all* ***forms of extrinsic evidence".***

This position is also reiterated in Halsbury's Laws of England (4th edn) vol. 9 (1) where para 622 partly states that:

> "*Where the intention of parties has in fact been* ***reduced to writing, under the so called pa****rol* ***evidence rule, it is generally not permissible to*** *adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms*".

On removal expenses, learned counsel argued that it is not in dispute that the appellant undertook to pay reasonable costs of shipping a limited quantity of the respondent's personal effects. What is in contention is what may be considered as limited quantity and reasonable costs for the same.

Counsel submitted that the learned Judge failed to take into account that the respondent exceeded the agreed limit of *1x20* foot container. The appellant contended that the learned Judge when assessing what were reasonable costs failed to take into account the evidence of the appellant's witness, DW 1 John Robert T. Sawers *[Mr Sawers]*, who testified that the expenditure of USD 11,000 for a 20 foot container was unreasonable and instead suggested a sum between USD 1,500 to 2,000 as acceptable. The appellant argued that the learned Judge failed to consider that it was in fact the respondent's wife who entered into a contract with AGS and not the appellant. Counsel submitted the learned Judge's assertion that the term 'reasonable costs' is vague, arguing that the law is clear on how 'reasonable' should be interpreted, citing the case of *JOHN GITATA MWANGI & 3 OTHERS V. JONATHAN NJUGUNA MWANGI AND 4 OTHERS, CIVIL APPEAL NO.213*

OF 1997 p.4 where the Court of Appeal held that:

> ***"…each*** *case has to be looked at in the context of its peculiar circumstances. What is reasonable* ***in one case may not be reasonable in another…so*** *reasonableness has to be considered in the light of the applicable circumstances as at the date of the hearing.****"***

Counsel further argued that the learned Judge erred by not looking at the intention of the parties and instead chose to apply the *contra proferentem* rule. The appellant submitted that the learned judge should instead have attempted to establish the intention of the parties and the history of the appellant company regarding removal expenses. The appellant cited Chitty on Contracts, General Principles, Vol. 1, 012-042, which recognizes that "*the object of all construction of the terms of a written agreement is to discover therefrom the intentions of the parties to the agreement"* and asserted that this is the guiding principle when interpreting a contract that is apparently vague. Counsel further submitted that the respondent failed to submit quotations from various companies within reasonable time to enable the appellant identify a cost effective removal company. Instead, the respondent's wife by way of single sourcing, chose AGS whose quotation was extremely high in comparison to other companies in the market. Counsel submitted that this was not reasonable.

Counsel further submitted that the learned judge erred in law in finding the appellant liable for the

respondent's alleged loss of goods worth KShs.4,550,000/= that were auctioned by AGS to recover its claim against the respondent. Counsel further submitted that the value of the appellant's goods was never proved and the learned Judge, therefore, erred by relying on AGS's insurance valuation report whose maker was never called as a witness. Counsel submitted that it was in any case, not obliged to pay the shipping costs by AGS as it did not enter into any contract with AGS but it was the respondent's wife, a 3rd party in this transaction, and who had no legal relationship with the appellant, who contracted AGS. Counsel submitted that the appellant cannot be held liable for the loss of the respondent's goods following their auction by AGS as that claim was never instituted against the appellant, nor was it privy to the contract between the respondent and AGS.

On mitigation of loss, the appellant submitted that the respondent had a duty to mitigate his loss as established in *AFRICAN HIGHLANDS PRODUCE LIMITED V. KISORIO, KLR (2001) 172* where the Court of Appeal held:

> ***"****It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequently upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured on breach of contract or tort, and he is then bound to act, as best he may, not only in his own* ***interests but also in those of the Defendant…The*** *question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular* ***case…****"*

Counsel for the appellant argued that the respondent could have mitigated his loss by paying AGS the amount due and owing to it and then seeking compensation from the appellant. Counsel further argued that the respondent could have further mitigated his loss by collecting his un- auctioned goods, having been requested to do so by AGS's lawyers.

On the issue of bias, counsel for the appellant submitted that the learned Judge was biased against the appellant which was evident from the following: that the learned Judge rushed the proceedings; failed to include points for determination in his judgment; ignored the appellant's evidence; that the judge made findings including that the appellant instigated the deportation of the respondent yet evidence disclosed that the appellant only acted as directed by law, by informing the Immigration Office that the respondent was no longer its employee; and that the learned Judge gave an excessive award to the respondent. To support its position the appellant cited Halsbury's Laws of England (4th edn) vol. 1(1) para 89, which states that:

> "*It is generally unnecessary to establish the* ***presence of actual bias…it is enough to establish*** *a real likelihood that in the circumstances of the case the adjudicator will be biased. Alternatively, it may be sufficient to establish that a reasonable person acquainted with the outward appearance of the situation would have reasonable grounds for suspecting bias*".

Counsel for the respondent opposed the appeal. On the claim for school fees, he submitted that the employment contract contained both express and implied terms. He supported the learned Judge's finding that although the contract was silent on the question of school fees, the appellant proceeded to pay fees for the respondent's daughter and did not make any repayment demands from the respondent. Counsel further asserted that the payment for his daughter's school fees was made from an Educational Trust Fund, which was also used to pay school fees for the children of other employees in senior management positions like the respondent. Counsel submitted that the evidence of payment of school fees from the appellant's Educational Trust Fund for children of employees at the senior management positions was never rebutted. The respondent cited the case of *J. EVANS & SON (PORTSMOUTH) LTD. VS. ANDREA MERZARIO LTD, (1976) 2 All E.R 930* where the court recognized that oral evidence can be incorporated into a contract as a representation of a term in the contract particularly where the written agreement was not intended to be the whole agreement.

The respondent asserted that clause 1 of the contract of employment between the parties indicated that particulars of other terms and conditions of employment may be obtained from the appellant's management. In counsel's view, the learned Judge rightly found that the other terms included school fees for the respondent's daughter. Counsel submitted that during the subsistence of the respondent's contract of employment the appellant paid his daughter's school fees without seeking any refund of the same from the respondent, and it was only after the respondent's contract was terminated that the appellant sought to deny the fact of these payments. To further support the learned Judge's reliance on extrinsic evidence to show particulars of the contract of employment, counsel relied on Halsbury's Laws of England, 4th edn, vol. 16 (reissue) paragraph 54 (at p. 57) which states that:

> ***"[a]rguably therefore, orthodox contract of law*** *on the implication of terms may need to be stretched in the context of employment, in particular by placing more emphasis on what would be reasonable terms and by allowing the* ***court to look at the parties behavior during the*** *employment but subsequent to the entering of* ***the contract of employment".***

In response to the claim on removal costs, counsel supported the learned Judge's findings that the goods the respondent intended to ship were in fact contained in a 20 foot container, and that the appellant was well aware that the respondent had contracted AGS to ship these goods and made no objection. Counsel averred that the evidence during trial established that the appellant's Managing Director and other staff were present when the respondent's goods were packed into a 20 foot container by AGS. Counsel averred that the appellant had an obligation to ship the respondent's goods and it could not claim that its obligation was discharged because it considered the shipping costs unreasonable. The respondent submitted that the appellant's failure to make payment or make alternative shipping arrangements constituted a breach in respect of which loss was suffered by the respondent. Counsel submitted that having suffered loss arising from the appellant's breach of its contractual obligations, the law dictated that he was entitled to damages that:

> "*May fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.***"**
>
> See *Hadley & Anor vs. Baxendale & Others* [1843-1860] All ER 461.

Counsel submitted that the auction of the respondent's goods resulted naturally from the appellant's breach of contract and the learned Judge was correct in making a finding that the appellant was liable for the sum of KShs.4,550,000.00 being the value of the goods. Counsel submitted that the insurance value of the goods was the best evidence that was available at the time of filing the suit having been admitted through *sections 65 and 67 of the Evidence Act, Cap 80 Laws of Kenya*. In his view, the learned Judge was, therefore, right in establishing that this sum was payable. Counsel agreed with the learned Judge's observation that for the appellant to avoid liability it should have authorised the shipment and then debited any additional amount into the respondent's account.

On the issue of mitigation of loss, the respondent's advocate submitted that the respondent could not mitigate his loss as he had been deported from Kenya.

On the issue of bias, the respondent in opposition, asserted that the requirements under which one may allege bias and succeed in its claim are well settled, citing *PORTER & ANOR. VS. MAGILL, (2002) 1 ALL E.R. 465*

where the court held that:

> ***"In determining whether there had been*** *apparent bias on the part of a tribunal, the court should no longer simply ask itself whether, having regard to all relevant circumstances, there was a real danger of bias. Rather, the test was whether the relevant*

> *circumstances, as ascertained by the court, would lead a fair- minded and informed observer to conclude that there was a real possibility that the tribunal had* ***been biased in the instant case."***

Counsel for the respondent submitted that the court did not rush the proceedings and asserted that if this ground was permitted, it would subject judges to allegations of impropriety every time they expeditiously dealt with matters which would be contrary to public interest. Counsel for the respondent further submitted that the arithmetic error that the Judge made in his judgment was duly corrected in the decree and cannot be taken as evidence of bias. Further, that the learned judge made a correct observation on the circumstances that led to the respondent's deportation and this does not suffice as evidence of bias.

We have carefully considered the appeal, the written and oral submissions and the law. The main issues that arise for determination are:

> *1) Whether the learned judge erred in law in making a finding that among the benefits due to the respondent was the school fees claim of KShs.260, 000. 00.*
>
> *2) Whether the learned judge erred in law in making a finding that the appellant was liable for the respondent?s loss of goods for the value of KShs.4,550,000.00.*
>
> *3) Whether the learned judge erred in failing to make a finding that the respondent should have mitigated his loss.*
>
> *4) Whether the learned judge was biased in his judgment.*

This being a first appellate court, we are tasked with the obligation to re- examine the record afresh, re-evaluate the evidence of the parties and draw our own conclusion with regard to this appeal as was decided in the case of *SELLE VS. ASSOCIATED MOTOR BOAT COMPANY, [1968] E.A. 123 at*

126, when the Court of Appeal held:

> ***"……..*** *this Court must reconsider the evidence, evaluate 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 that respect…"***

As to findings made on matters of fact, this Court will only interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the learned Judge is demonstrably shown to have acted on wrong principles in reaching the finding - See *MWANASOKONI V. KENYA BUS SERVICES LTD, [1985] KLR 931*.

This court must, therefore, establish whether the learned Judge was correct in making a finding that among the terms of the contract of employment between the appellant and respondent was the payment of fees for the respondent's daughter. It is clear from the evidence on record that the written contract of employment did not include this benefit nor was there any other written document as between the parties to show that the appellant would pay school fees for the respondent's daughter. However, as was noted by the learned Judge and as has been submitted by counsel for the respondent, the contract of employment did not contain all the terms of employment. Clause 1 of the Contract of Employment dated 14th March,

1996, stated in part:

> ***"you will keep the working hours for the time*** *being fixed by Twiga and will adhere to its rules and practices including those covering statutory and public holidays and absence through sickness or accident. Information on these points and particulars of other terms and conditions of employment may be obtained from the management of*

Twiga Chemicals Industries Nairobi.” [Emphasis added]

This clause clearly left room for the admission of extrinsic evidence to give particulars of the further terms of the contract. The parole evidence rule is a well-grounded rule in law, the circumstances prevailing in this case, however, exclude its application. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. As quoted in

the case of *SAVINGS AND LOAN KENYA LIMITED V MAYFAIR HOLDINGS LIMITED, [2012] e-KLR:*

> **“…***the object of construction of terms of a written agreement is to establish there from the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract.***”**
>
> (See *Investors Compensation Scheme Ltd. vs West Bromwich Building Society (1998) 1 W.L.R at 912)*

It can be discerned from clause 1 of the contract of employment that the parties intended that other terms of the contract would be communicated in the course of the employment. In view of the fact that the written contract did not have all the terms, restricting an interpretation of the contract to only the written terms would clearly be contrary even to the express terms of the contract of employment between the respondent and appellant.

The respondent adduced evidence that in July 1996 prior to his daughter's arrival, he made arrangements with the appellant's Managing Director, Mr. Sawers, that the company would pay for his daughter's school fees. The respondent's daughter came to Kenya in August, 1996, joined Hillcrest School, and the appellant paid her school fees during the existence of the contractual term.

The respondent testified that school fees was actually charged to the appellant’s Educational Trust Fund, which was used by the appellant to pay the school fees of the children of its staff in senior management positions. The appellant’s evidence through Mr Sawers, was that school fees was paid for the respondent’s daughter without his knowledge. The appellant maintained that any other variation to the respondent’s contract was communicated in writing and there was none indicating that the respondent would have his daughter’s fees paid. The question to be answered is whether this disputed course of events is proof that payment of school fees was among the respondent’s other benefits as provided for in clause 1 of the Contract of Employment.

The appellant did not refute the respondent’s evidence that it had an Educational Trust Fund for payment of school fees for the children of its employees at the senior management level.

The learned trial judge went on to find the appellant liable to pay KShs.260,000/- for school fees for a period that a notice of termination of the contract should have run and the issue is whether the respondent was actually entitled to the KShs.260,000.00 awarded for the period that the notice would have run, when his daughter only attended school until 3rd October, 1997. It can be inferred from the conduct of the parties that this school fees benefit was only valid for as long as the respondent’s contract was operational and as long as his daughter was schooling in Kenya. Since the respondent’s daughter only attended school in Kenya until 3rd October, 1997, the appellant was only liable to pay fees until then. The benefit could only accrue as long as there was school fees payable. The respondent’s claim for KShs.260,000/=, therefore, fails.

On the removal expenses, it is not in dispute that the appellant undertook to pay reasonable costs of shipping a limited quantity of the respondent’s personal effects. Regarding removal arrangements, clause

9 of the letter of employment dated 14th March, 1996 provided in part:

> ***"… in addition, the company will pay removal*** *expenses for a limited quantity of personal* ***effects."***

The letter of termination of contract dated 3rd October, 1997 provided:

> ***"… you and your wifes return flight to Cape*** *Town will be paid by the company as will the reasonable costs of shipping a limited quantity* ***of your personal effects. …"***

What is in contention is what may be considered as limited quantity of the respondent's personal effects and the reasonable shipping costs of the same. In disposing of this issue the learned judge considered that the term reasonable was ambiguous and preferred to use the *contra proferentum* rule.

It should nonetheless, be noted that at the time of the trial, the question of outstanding shipping costs was no longer an issue but rather whether the appellant could be held liable for the respondent's loss of goods that were auctioned by AGS. The appellant asserted that it should not be held liable for this loss as it was not privy to the contract between AGS and the respondent's wife, as it had no legal relationship with her. It is important to note that since the respondent had been deported from the country, it follows that he could not personally contract AGS to remove his goods.

The issue of contention is whether the failure to pay shipping costs by the appellant precipitated the respondent's loss. The evidence on record shows that the appellant was aware that the respondent's goods were in the custody of AGS. Herman Brand, [PW2], in his testimony stated that he was present when the goods were packed. He testified that, Mr. Sawers and other staff from the appellant company were also present together with a representative from AGS. We agree with the learned Judge that if the appellant had not agreed with AGS's quotation, the most reasonable thing to have done was to authorize the shipment of the respondent's goods and then debit respondent's account with excess charges to avoid accumulation of the storage charges.

Another issue that is in contention and flows from the loss of the respondent's goods is the value of the goods. The learned Judge established the value of the goods from AGS's insurance valuation report. The appellant argued that this was improper, preferring that the respondent should instead have specifically proved the value of these goods and the maker of the report should have been called to adduce evidence. We, however, note that at the time of adducing evidence on the respondent's loss of goods most of the goods had already been auctioned. There was, therefore, no other value to guide the court. Accordingly, the learned Judge's reliance on the insurance valuation report as the most reliable evidence of the value of the respondent's goods was proper. On mitigation of loss, it is now a well settled principle of law as was noted by Lord Haldarne in *BRITISH WESTING HOUSE ELECTRIC AND MANUFACTURING COMPANY V. UNDERGROUND ELECTRICITY RYS CO. OF LONDON [1912] A.C 673* at 689 that:

> ***"****The law imposes a duty on the Plaintiff to take reasonable steps to mitigate the loss caused by the breach of contract, and debars him from claiming compensation for any part of the damage which is due to her neglect to do so.****"***

This position is also supported by the case of *AFRICAN HIGHLANDS PRODUCE LIMITED V. KISORIO, KLR (2001) 172* cited by the appellant.

We, however, note that the respondent had been deported from Kenya at the time when his wife made arrangements for removal of their goods. We further note that a *FILE NOTE* dated 29th January, 1998, made by Riaz Pesnami *[RP]* of the appellant company that the removal of the respondent's goods to South Africa was agreed. Paragraph 1 of that note reads in part:

> ***"AR*** *[the respondent] & RP agreed upon following. In case the goods are in container, we shall take back our goods and ship the container to Durban for onward transportation to Cape* ***Town."***

From the evidence on record, we find that the appellant was in breach of the terms of the contract of employment and was liable for the loss that the respondent incurred. As a result, of the said breach, the respondent suffered financial loss. Accordingly, in our view, the respondent is entitled to be placed in the same position he would have been had the contract of employment been complied with. On the basis of the best evidence rule, the respondent is entitled to payment of KShs.4,550,000/-.

On the issue of bias, the Supreme Court of Kenya while addressing the question of a judicial official's bias in *JASBIR SINGH RAI & 3 OTHERS V*

TARLOCHAN SINGH RAI & 4 OTHERS, [2013] E-KLR observed that the test to be applied was:

> "*Whether a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a* ***fair trial for the applicant was not possible".***

Having perused the record of the appeal there is no overt and convincing evidence that the learned Judge was biased. Both parties were subjected to the same circumstances during trial. The language used by the court does not disclose any bias on the learned judge's part. The use of the word 'instigation' to describe the circumstances that led to the respondent's deportation would not be sufficient evidence to impute bias. Further, the wrong amount awarded in the judgment was later corrected in the decree and only discloses that the learned judge made a genuine mistake which cannot be interpreted as bias. We, therefore, find that there was no evidence of bias on the part of the learned judge.

In the result, we allow the appeal in part and order as follows:

1. *The claim of school fees of KShs.260,000/= fails;*

2. *The claim of KShs.4,550,000/= is upheld; and*

3. *Costs of the appeal to the respondent.*

Dated and delivered at Nairobi this 28th day of February, 2014.

D. K. MARAGA

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR