



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 51 OF 2016

MARY WACHEKE THONGOH-MUIA.....CLAIMANT

VERSUS

CENTRAL BANK OF KENYA1ST RESPONDENT

DR. PATRICK NGUGI NJOROGE.....2ND RESPONDENT

JUDGMENT

1. The Claimant was employed by the 1st Respondent as the Director, Human Resources Department for a term of 5 years vide a contract of employment dated 18th January, 2013 and revised on 25th September, 2014. She brought this suit on 20.1. 2016 seeking the following Orders:

- a) Judicial Review order to invalidate the actual and/or implied termination/dismissal of the Claimant from employment;
- b) A Conservatory Order restraining any fresh disciplinary proceedings against the Claimant till the hearing and determination of the suit;
- c) A declaration that the 1st Respondent is in breach of the employment contract entered between the parties and the legal provisions relating to her employment;
- d) A declaration that the Claimant's constitutional right to fair labour practices was infringed by the Respondents and she is therefore entitled to exemplary, aggravated and general damages;
- e) An order that the respondents do calculate the full amount due to the Claimant, pay the Claimant the net sum claimed of Kshs. 136,469,757.19 as outlined in the Statement of Claim;
 - i. Gross remuneration for the unserved period from September 2015 to June 2019 in the sum of 136,469,757.19 less taxes.
 - ii. Unpaid gratuity at the rate of 30% for the Claimant's gross emoluments during the period served and unserved;
 - iii. Cost of the medical premium and insurance; and
 - iv. Amount in lieu of leave
- f) An order that the Respondent remit to the Kenya Revenue Authority such tax which is due and payable in respect of the Claimant's employment for the full employment period.
- g) General damages be awarded for breach of the contract of employment;
- h) General damages be awarded for defamation;
- i) Punitive damages;
- j) Exemplary damages;
- k) Aggravated damages;

- l) Gratuity pay at the rate of 30% of the Claimant's gross emoluments;
- m) Costs of this suit;
- n) Interest on (d) and (l) above
- o) Any other or additional relief (s) that this Honourable Court deems fit to grant.

2. The facts of the case according to the Statement of Claim filed on 20th January 2016, are that the claimant worked for the 1st Respondent for 2 years and 9 months until 21st September 2015 when the Respondent unlawfully and unfairly terminated her through a letter dated the same date. She further averred that the 2nd Respondent issued Circular No. 7 of 2015 communicating to all staff that she had relinquished her responsibilities. She contended that the termination was done without any prior hearing, or notice, and in gross violation of given constitutional provisions and other enabling laws.

3. She further averred that by his letter dated 2nd October, 2015 the 2nd respondent withdrew the letter of termination of contract dated 21st September 2015 and expunged the same from her record. She however averred that the manner in which the 2nd Respondent dealt with her was high handed unreasonable, oppressive and capricious. She further averred that the Respondents failed to honour the contract dated 18th January, 2013 by failing to pay gratuity at the rate of 30%, salary benefits for the remainder of her contract and leave allowance.

4. The Respondents filed a Memorandum of Response on 6th April 2016 denying the alleged unfair termination of the claimant's employment contract. They averred that the Claimant is estopped from alleging that her services were terminated because the termination letter was withdrawn and expunged from her records within the time stated in her demand letter. They further averred that the circulars issued to the staff were made in good faith and on occasion of qualified privilege.

5. The respondents also averred that after the withdrawal of the termination letter, the Claimant absconded duty and requested for a "mutual decoupling". However, they did not accept the request and instead served her with a letter to show cause why she should not be summarily dismissed for absencing from work. They contended that instead of responding to the said letter, the claimant instituted the instant suit. The Respondents further contended that the joinder of the 2nd Respondent is an abuse of court process because all he did was to exercise his statutory capacity as Governor of the Central Bank of Kenya and not as an employer.

6. The 1st Respondent averred that should this Court find her liable to pay any damages to the claimant, the court should set off the sum of Kshs. 3,214,281 being the outstanding car loan offered to the Claimant vide the letter dated 12th September 2014.

7. The main issues for determination arising from the pleadings are whether the claimant's employment contract was terminated by the respondents through breach of her contract, Employment Act and the Constitution or whether she is the one who deserted. To answer the said questions, both parties tendered evidence and filed written submissions which I have summarised hereunder.

Claimant's case

8. The Claimant testified as Cw1 and stated that she was head hunted to work for the Respondent. She stated that on 21st September, 2015 at about 4.55 in the evening, she was called by the 2nd Respondent to his office where he gave her a resignation letter and asked her to sign the same. However, she declined to sign the letter because she did not author it. The 2nd Respondent shredded it and then handed her a termination letter dated 21st September, 2015 which did not cite any reasons for her termination. Thereafter the 2nd Respondent called the Deputy Governor and one of her juniors to whom she handed over to and exited.

9. She further testified that, on the same day at around 7 pm the 2nd Respondent issued Circular No. 7 of 2015 stating that she had relinquished her responsibilities which in her view meant that she had resigned. She denied having voluntarily resigned and maintained that she was terminated. She further testified that, the said Circular also appointed Ms. Ng'ang'a to take over from her.

10. The claimant testified that she instructed her advocates to serve a demand letter dated 29th September, 2015 to which the 2nd Respondent responded by his letter dated 2nd October, 2015 withdrawing the termination letter and expunging it from her records but denied that he defamed her. However, she contended that she was not given any reinstatement or reengagement letter, and the appointment of the acting Director of Human Resource, was never revoked, nor did the 2nd Respondent issue any Circular to staff stating that her termination had been revoked.

11. She further testified that on 5th October, 2015 her counsel wrote an email to the 2nd Respondent asking for "a mutual decoupling" because the employment relationship had broken down. She contended that the request for the mutual separation was never accepted nor was the payment of her dues as demanded.

12. She testified that on 18th January, 2016 armed police officers arrived at her home and served her with a show cause letter dated 15th January, 2016. She testified that the letter charged her with absconding work and careless and poor performance of duty. She however contended that as at that time she was no longer an employee of the Central Bank of Kenya, the 1st Respondent and indeed she had not been paid any salary from September 2015.

13. She testified that as at the time of her appointment, there was a disciplinary policy under which her supervisor, the Deputy Governor was the right person to lodge a complaint against her, followed by a show cause letter, then for her to appear before a disciplinary committee for

hearing and thereafter appeal to the Governor. She therefore testified that the show cause letter served in January 2016 should have been served before her termination on 21st September, 2015. She testified that neither the process set out above was not followed before her termination on 21st September, 2015 nor was she paid her terminal dues plus her salary for the month of September 2015. She further contended that she was defamed, maligned and subjected to financial distress and urged the court to grant her the reliefs sought.

14. In cross-examination, she testified that though her first degree is in Mechanical Engineering but explained that she had 12 years' experience in human resource. She admitted that her contract of employment had a termination clause which provided for 3 months' termination notice. She further admitted that the Employment Act does not provide for payment of the remainder of the contract term but only provides for 12 months' salary compensation for unfair termination.

15. She admitted that the 2nd Respondent attempted to force her to resign and maintained that the 2nd Respondent purported that she had relinquished her responsibilities, which in her view meant that she had resigned. She contended that Circular No. 7 of 2015 stated that she had relinquished her position and contended that relinquishing connotes a resignation. She however admitted that relinquishing a position did not mean sacking.

16. She further admitted that the 2nd Respondent rescinded the termination letter and expunged it from her records and contended that said rescission meant that the 2nd Respondent had admitted that the termination did not follow dues process. She further admitted that she never requested for a reinstatement letter after the rescission of the termination letter since it was presumed that she had been reinstated and that her contract terms remained intact.

17. She contended that she never reported back to work because she was not given a reinstatement letter. She maintained that the employer had the obligation to issue a reinstatement letter after rescinding the termination letter. She admitted that she never responded to the show cause letter indicating that she had not received a reinstatement letter. She admitted that her demand for payment of salary for the remainder of her contract term was not granted but the 1st Respondent insisted on 3 months' salary in lieu of notice.

18. In re-examination, she clarified that under paragraph 10 of her Witness Statement she did state that she was forced to relinquish her position. She further stated that the letter dated 2nd October, 2015 did not use the word relinquish. She contended that the appointment of Ms. Teresia Ng'ang'a was in writing and there was no written revocation of her appointment and that her appointment was for an indefinite period. She maintained that she never responded to the show cause letter because she was no longer an employee of the 1st Respondent. She further maintained that she had not been reappointment by a letter or paid any salary.

Respondents' Case

19. Teresia Wangui Ng'ang'a, testified as Rw1 and stated that she has worked for the 1st Respondent for 30 years. She further stated that the termination letter dated 21st September 2016 notified the claimant that her services had been terminated in accordance with the terms of her contract and salary in lieu of notice was offered. She contended that the Circular No. 7 o 205 was important as it was as a notifying staff that the Claimant was no longer the Director HR. She further contended that after withdrawal of the termination letter, the Claimant never reported back to work and she never demanded to be served with another appointment letter.

20. In cross-examination, Rw1 admitted that she is the Ag. Director HR from 21st September, 2015. She further admitted that there was no circular issued by the respondents stating that she is no longer the Ag. Director HR, that the Claimant was reinstated to her employment or stating that the termination of the claimant had been revoked. She further admitted that the termination letter dated 21st September, 2015 did not cite any reasons for terminating the claimant's employment but made reference to terms of the contract.

21. She also admitted that the letter withdrawing the termination letter dated 2nd October, 2015 did not state that the Claimant had been reinstated, reappointed or given back her job. She confirmed that the 1st Respondent has an elaborate disciplinary policy for all its employees, and that the Claimant fell under Tier 1 of Director which required that she be served with a show cause letter and thereafter accorded a hearing by a disciplinary committee. She testified that that procedure was not followed before termination on 21st September, 2015.

22. According to her, the word "relinquish" as used in the circular to staff meant that the Claimant had voluntarily resigned. She admitted that the claimant was not issued with a reinstatement letter but contended that upon the expunging of the termination letter, she ought to have reported back to work.

23. In re-examination, she admitted that she is only an Ag. Director HR and not the substantive Director HR. She contended that after the letter dated 2nd October, 2015 was issued, both the Claimant and her lawyer never indicated that the information in the said letter was inadequate. Finally, she confirmed that she was not privy to the discussion between the Claimant and the 2nd Respondent.

Claimant's submissions

24. The Claimant submitted that there was a violation of section 45 of the Employment Act as the termination letter dated 21st September 2015 did not state any reason whatsoever for the summary dismissal of her employment contract. She further submitted that her termination was in violation and in total violation of the 1st Respondent's disciplinary procedure in the Human Resource Policy published in November 2014. She cited Clause 14.1.1 of the Disciplinary Procedure in the Human Resource Policy which provides that the bank shall handle disciplinary matters on a fair, consistent and expeditious manner to correct unsatisfactory behaviour.

25. She submitted that section 41 of the Employment Act is couched on mandatory terms. She relied on **Liz Ayany v Leisure Lodges**

Limited [2018] eKLR where the Court held that the Employment Act made a clear and minimum mandatory provision governing the employment relation such as section 41 of the Employment Act. She submitted that the 2nd Respondent vide a letter dated 2nd October 2015 acknowledged that her employment was terminated without following due process by the 1st Respondent.

26. She submitted that even though the letter of termination was purportedly withdrawn, she was not effectively reinstated or reappointed to her former position. She contended that she was constructively dismissed without adhering to the requisite procedure. She maintained that her termination and replacement was communicated to all employees but there was no corresponding circular informing the employees of her reinstatement. She argued that had the 2nd Respondent intended to reinstate her, the same would have been expressly stated in the letter dated 2nd October 2015 or by issuing a circular on her reinstatement.

27. She relied on **Aggrey Lukorito Wasike v KPLC [2016] eKLR** where the court held that an order for reinstatement means that the employee is restored to the position held prior to removal or dismissal. She further submitted that the Respondents made no attempt of reaching out to her to establish the reasons for her absence and purported desertion of employment. She relied on **Stanley Omwoyo Onchweri v BOM Nakuru YMCA Secondary [2015] eKLR** and argued that the Respondent's allegations of desertion of work by her was only meant to misguide the Court.

28. She averred that the fact that the unilateral termination of employment was within the 2nd Respondent's personal knowledge, Rw1 who was the Respondents' sole witness gave hearsay evidence. She therefore submitted that her evidence on the events of 21st September 2015 in the 2nd Respondent's office has not been controverted.

29. As regards the reliefs sought, she submitted that pursuant to paragraph 7 of the Letter of Appointment she was entitled to 3 months' notice or payment of 3 months' salary in lieu of notice at the sum of Kshs.3,180,631.35. She further submitted that under section 49 of the Employment Act, she is entitled to compensation for unfair termination of her 5 years contract before the expiry date and urged the Court to award her 12 months' salary.

30. She submitted that she was never paid salary for the days worked in September 2015 and urged the court to award her salary for the sum of Kshs.742,141.02. She further submitted that she was entitled to 35 days leave in a year as well as leave allowance at the sum Kshs.141,610 and urged the Court to award her a sum of Kshs.3,684,699.65.

31. In respect of gratuity, she submitted that she is entitled to gratuity of 30% of the gross pay and which was payable at the end of the contract period and the gratuity earning accruing per month was 30%. She argued that having worked for 32 months she was entitled to gratuity at the sum of Kshs.10,177,934.40.

32. She submitted that it was her legitimate expectation that she would serve the 1st Respondent for the full contract term up to 30th June, 2019. She further submitted that she has never been employed by virtue of the pendency of this case. She urged the Court to award her Kshs. 86,394,459.70. In support of this, she relied on the case of **Meshak M. Saboke v Chairman Board of Directors & 2 Others [2015] eKLR**.

33. She submitted that this Court had jurisdiction to grant damages under section 12 (3) (iv) of the Employment and Labour Relations Court Act.

34. She submitted that Article 47 of the Constitution as read with section 4 (1) of the Fair Administrative Action Act binds the 2nd Respondent in performance of his administrative action which include the employment and termination of the 1st Respondent's staff. She submitted that the procedure followed in terminating her employment was unfair and irrational and the 2nd Respondent's actions were contrary to section 4 (1) and (2) of the Fair Administrative Action Act.

35. She relied on section 5 (3) of the Employment Act and Articles 27 and 41 of the Constitution and submitted that the Respondents' discriminated against her by preferring a different form of disciplinary process disguised as summary dismissal. She argued that she was dismissed past working hours and that the notice to show cause was served upon her by policemen, which disparaged her character in the eyes of potential employers. She submitted that she suffered damages as a result of the malicious acts by the Respondents and urged the Court to award her Kshs. 10,000,000 as damages.

36. She submitted that the Respondents have not proved that she had a car loan of Kshs. 3,214,218 and that they did not attach evidence of any demand issued to the Claimant for the payment of the outstanding loan. She further submitted that an employer had no right to recall any loan facility advanced to an employee and that the right of set off is unavailable to the Respondents. To buttress this position, they relied on the case of **Abraham Nyambane Asiago v Barclays Bank of Kenya Limited [2013] eKLR**.

Respondents' submissions

37. The Respondents submitted that the suit is misguided because the letter dated 21st September, 2015 terminating the Claimant was withdrawn and expunged from her records in the bank and she was free to resume work or terminate the contract. They submitted that they accepted the claimant's request for an "amicable mutual decoupling", but no agreement was reached after the parties differed on the terms and by their advocates letter dated 13th November, 2015 they advised the claimant to choose between resuming her services or terminating the same. Accordingly, they contended that the Claimant's contract of service was not terminated by them as alleged and blamed her for absconding duty after the termination letter was withdrawn and expunged.

38. They further submitted that the Claimant did not at any time state that the 2nd Respondent's letter dated 2nd October 2015, withdrawing the termination letter, was inadequate and insufficient in meeting her demands. They maintained that the withdrawal of the termination letter and expunging of the same from the Claimant's record reinstated the Claimant to her position but the Claimant absented herself from work

leading to the issuance of the show cause letter.

39. As regards the joinder of the 2nd respondent to the suit, they submitted that the 2nd Respondent wrote the termination letter dated 21st September 2015 in his capacity as governor of the central Bank of Kenya and not in his personal capacity.

40. They submitted that in the her letter dated 29th September 2015, the claimant stated that if the termination letter dated 21st December 2015 was rescinded then she was not to file a suit. They therefore argued that the Claimant is estopped from going against the representation in the said demand letter by filing this after the termination letter was withdrawn. They relied on section 80 of the Evidence Act and the Court of Appeal decision in **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** and submitted that the doctrine of estoppel precludes a person from doing something contrary to what is implied in a previous action.

41. They submitted that the claimant's action in filing the suit after the withdrawal of the suit and having absented herself from work amounts to approbation and reprobation.

42. They submitted that it is not enough for the Plaintiff to plead that falsehoods were published about him and that the same amounts to defamation. They submitted that for the Claimant to prove that she was defamed, she must have tendered evidence to prove that the published words caused other people to shun or treat her with contempt. In their view they contended that the Claimant did not lead any evidence to demonstrate which part of the documents was defamatory. They relied on **Miguna Miguna v Standard Group Limited & 4 others [2016] eKLR** and further submitted that it is upon the person seeking damages for defamation to show or establish how he was exposed to public hatred, contempt or ridicule.

43. In response to the claimant's submissions on the appropriate remedies, the respondents submitted that the Claimant did not plead in her Statement of Claim any prayer for salary in lieu of notice, 12 months' salary compensation for unfair termination, unpaid salary for September 2015 and accrued leave and leave allowance. They submitted that parties are bound by their pleadings and contended that a party can only be granted a relief that is sought in their pleadings. They relied on various authorities in support of this position.

44. They further submitted that the Claimant was not terminated and as such she is not entitled to damages for unfair termination. They however urged that, should the Court find that the Claimant is entitled to damages for unfair dismissal it should be guided by **Robert Kimutai Rutto v Hotel Cathay Limited [2018] eKLR** where this Court followed the Court of Appeal decision in **Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR** that 12 months' statutory compensation ought to be reserved for the most egregious cases.

45. In respect of prayer for allowances and other benefits after the separation, the Respondents submitted that employee benefits and allowances are tied to a job and once someone is no longer an employee, they are not entitled to benefits and allowances. They relied on **D. K. Marete v Teacher Service Commission [2013] eKLR** where the court held that it would be unconscionable to grant anticipatory salaries.

46. They further relied on **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] e KLR** where the court held that employees whose contract of employment have been terminated should not wait to enjoy remuneration which they have not worked for.

47. They submitted that this Court cannot award exemplary and aggravated damages as sought by the Claimant and relied on **Sonye v Siaya Teachers Co-operative Savings and Credit Society and another (1999) 2 EA 311**. They further submitted that general damages cannot be awarded for breach of contract. Finally, they maintained that as at the time of filing the suit, the Claimant's contract of employment had not been terminated.

Analysis and determination

48. There is no dispute that the Claimant was employed by the Respondent as a Director, Human Resources Department, vide the letter of appointment dated 18th January, 2013 and terminated by the letter dated 21.9.2015. There is further no dispute that she served a letter dated 29.9.2015 demanding immediate withdrawal of the said termination and the 2nd respondent withdrew the termination letter and expunged it from the claimant's employment records, vide the letter 2.10.2015.

49. The issues for determination are:

- a. Whether the claimant's employment contract was unfairly terminated and or breached by the respondents; or she is the one who deserted work.
- b. Whether the claimant is entitled to the reliefs sought

(a) whether the claimant's employment contract was unfairly terminated by the respondents.

50. To answer this question, the court must determine whether termination notice can be withdrawn, and also whether after the withdrawal of the said termination, the parties agree to separate mutually.

51. Under section 45 of the Employment Act termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) related to the employees conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed.

52. The termination letter herein dated 21.9.2015 stated as follows:

“I am informing you of the termination of your contract with the Central Bank of Kenya, effective immediately, according to the terms of that contract. In lieu of notice, you will be paid the equivalent of three month’s salary.

Sincerely,

Dr. Patrick Njoroge”

53. The claimant being aggrieved by the said letter, served a demand letter dated 29.9.2015 through her lawyer contending that the said termination was unlawful and demanded the following:

“... In the foregoing, we demand, which we hereby do, your immediate rescission of the said termination.”

54. The 2nd respondent responded to the demand letter by the letter dated 2.10.2015 as follows:

“I note the allegation that your client was not afforded any due process by the bank. In view of the same, I have decided irrespective of the merits thereof to withdraw my letter dated September 21, 2015 and expunge the same from her record with the Bank.”

Sincerely,

Dr. Patrick Njoroge”

55. I have considered the foregoing correspondences coming at the heels of the termination letter dated 21.9.2015. It is common sense that the demand by the claimant to have the termination rescinded was not for the sake of it. It was intended to restore the employment relationship between her and the 1st respondent before the termination letter was served. The demand was granted by the 2nd respondent vide his letter dated 2.10.2015 and the dispute about that cause of action ended. Consequently, I hold that cause of action founded on the termination letter dated 21.9.2015 is now water under the bridge and it cannot be a proper basis for this suit.

56. It is trite that a termination notice or letter or even a resignation letter cannot be unilaterally withdrawn. Such an act requires mutual agreement between the employer and the employee. In **Birrell v Australian National Airlines Commission (1984) 9 IR 101(1984) 9 IR 101** the Court held:

“The giving of notice of termination of a contract, in accordance with the terms of that contract, is a unilateral right. Its exercise does not depend in any way on the acceptance or rejection of the notice by the other party to the contract. The giving of such a notice operates to determine the contract by effluxion of the period of notice. It is clear that such a notice could be withdrawn by the consent of both parties to the contract; it seems unnecessary to determine whether, in the case of withdrawal of a notice by consent, the existing contract continues or a new contract comes into being. A question does arise, however, whether unilateral withdrawal of a notice is possible. There is surprisingly little authority on this question. It has been assumed in some quarters that *Emery v. Commonwealth of Australia (1963) V.R. 586* decided that unilateral withdrawal of a notice is not possible.”
[Emphasis Added]

57. In this case, the rescission of the termination notice was demanded by the Claimant vide her letter dated 29th September, 2015 and accepted the 2nd Respondent vide his letter dated 2nd October, 2015. It is therefore evident that the withdrawal of the said termination letter was not unilateral but through a mutual agreement between the parties. It is my view, therefore, that the claimant’s status of the 1st respondent’s employee was restored from the date the letter dated 2.10.2015 was served on her and as such she ought to have reported back to work immediately.

58. The question that arises is whether the claimant deserted her employment. The answer to the question lies in the correspondences that followed the rescission of the termination letter dated 21.9.2015. The claimant, through her Lawyer wrote to the 1st respondent the letter dated 5.10.2015 which stated as follows:

“We acknowledge with thanks receipt of yours dated 02.10.15.

We note the contents.

Are you amenable to amicable “mutual decoupling” to enable us advise our client appropriately?

Yours sincerely,”

59. On 6.10.2015, the claimants Lawyer wrote to the respondents’ lawyer stating as follows:

“We acknowledge with thanks receipt of yours dated 6.10.2015.

By amicable mutual decoupling we mean that: -

i. Our respective clients agree to mutually part ways.

ii. Our client be paid for the balance of the fixed period contract.

iii. That each party shall not make any adverse allegations against the other, either in work or deed. CBK is venerable 50 year old institution, and our client is a highly respected human resource professional with hundreds if not thousands of certificates of recognition, achievements and awards.

If agreeable to the above, we will give our: -

i. Draft Separation Agreement.

ii. Computation of the payment due.”

60. The respondents' Counsel responded to the foregoing letter the same day as follows:

“RE: PROPOSAL FOR MUTUAL TERMINATION

MS. MARY WACEKE MUIA

Thank you for your prompt reply in connection with the above matter, our comments thereon are as follows: -

(a) CBK agrees to consider mutual separation as a basis for mutual termination of your client's employment contract.

(b) The same may be effected through the provision of her contract, which provides for mutual termination and payment for any accrued benefits. Our client being a state organ, is bound by both the provision of the Constitution particularly Article 10 and the law. Accordingly, it cannot justify a request for payment of a balance of her fixed term contract, unless there is a provision therefor.

(c) Our client confirms that it does not make adverse allegations against any of their employees including your client without valid evidence and justification therefor.

However, as your client has concerns, the same may be addressed as part of a settlement between the parties.

Kindly let us have your comment to enable us finalise the above.”

61. Several other letters were exchanged between the counsel for the two sides the last one being written by the respondents' Counsel dated 13.11.2015 which stated that: -

“RE: PROPOSAL FOR MUTUAL TERMINATION

MS. MARY WACEKE MUIA

We are in receipt of your letter dated 12th November, 2015.

As stated by our past correspondence, our client withdrew its letter of termination at your instance, thereby providing your client with an election of either continuing with her services or terminating the same.

You requested for termination on mutual basis which our client conceded to. Under her contract of employment dated 26th September 2014, it is provided at clause 7 that: -

“Either party may terminate the services by giving three (3) months' salary in lieu of notice.

Our client has in the past confirmed its acceptance of termination on a mutual basis under the contract, taking into account all the provisions thereof. It does not however accept that your client is entitled to compensation for the unexpired term of her contract as alleged or at all as that is not provided for therein.”

62. In view of the said correspondences, it can be discerned that, in principle, the parties had reached a mutual agreement to separate and the only issue pending was whether the claimant was to go home with three months' salary in lieu of notice or salary for the unexpired period of the fixed contract term. It follows therefore that there was a good cause for the claimant not to report back to work after the termination letter dated 21.9.2015 was rescinded on 2.10.2015. Accordingly, I return that the claimant never deserted her employment but rather agreed mutually with the 1st respondent to terminate the contract from 6.10.2015.

63. Another question that arises is whether the claimant was bound to respond to the notice to show cause dated 15th January 2016 which accused her of absenteeism and other misconduct mentioned in the findings in the audit report. The notice required the claimant to respond by 22nd January, 2016 and further suspended the claimant pursuant to Clause 14.1.6 (ii) (b) of the Disciplinary Policy in the Human Resources Policies and Guidelines of the Central Bank of Kenya.

64. The Claimant admitted that she never responded to the show cause notice because she was no longer in the 1st respondent's employment. In view of the chronology of matters discussed above, I find that the claimant was right in treating the contract of service to have ended by the time the notice to show cause was served on her on 18.1.2016. It follows therefore that the contemplated disciplinary process against the claimant was already overtaken by events. In fact, the said notice to show cause, in my view, had the effect of implicating the 2nd respondent who had all along concealed the fact that the unilateral termination of the claimant's contract of service was for a cause, but he had denied her the due process provided under Section 41 of the Employment Act, which requires that an employer must afford his/her employee an opportunity to respond to the reasons upon which termination of employment is contemplated.

(b) Whether the Claimant is entitled to the reliefs sought

65. Having found that the Claimant's contract of service was terminated through a mutual agreement between her and the 1st respondent, I decline the request to invalidate the termination. For the same reason I decline to make declaration that the 1st respondent breached the said contract, and to restrain her from conducting fresh disciplinary proceedings against the claimant.

66. The prayer for exemplary, aggravated and general damages for violation of the claimant's constitutional right to fair labour practices is dismissed because the alleged violation was not pleaded with precision and proved by evidence.

67. The claim for Kshs.134,469,757.19 being salary for the unexpired period of her fixed term contract is dismissed because the contract provided for premature termination by three months' notice or payment of three months' salary in lieu of notice. In this case the 1st respondent offered three months' salary in lieu of notice upon mutual separation while the claimant insisted on the salary for the remainder of the contract term. To be fair to both parties, I grant the claimant salary for September 2015 which was not paid according to her, plus three months' salary offered by the employer because that was her offer from the beginning when she triggered the separation process under the termination clause in the contract. Accordingly award the claimant Kshs.1,060,201.45 x 4 = Kshs.4,240,805.80.

68. The claim for gratuity at the rate of 30% succeeds because under paragraph 6 of the Claimant's Letter of Appointment, gratuity was to be earned during the full contract or the part worked. The Claimant is therefore entitled to gratuity at the rate of 30% for the period she had worked being from 18th January, 2013 to 2nd October 2015 being 32 months. Hence Kshs.1,060,201.45 x 30% x 32 months = Kshs. 10,177,933.92.

69. The claim for amount in lieu of leave, medical premium and insurance fails for lack particulars and evidence.

70. The claim for damages for defamation also fails because the claimant did not prove that the circulars sent to staff injured her reputation.

71. The Respondents contended that the Claimant had an outstanding car loan of Kshs.3,214,218.00. The Claimant submitted that the Respondents did not prove the existence of the car loan. However, the letter dated 12th September, 2014 informed the Claimant of the approval of her car loan which was payable in 22 equal monthly instalments. These terms were varied in the internal memo dated 7th October, 2014 with the repayment period being 56 months. The Claimant exited the Respondent before the lapse of the 56 months, and according to her payslip for August 2015, the loan balance stood at Kshs.3,214,281. I therefore find that the Respondent is entitled to recover the outstanding amount which will be deducted from the amount awarded to the Claimant herein above.

Conclusion and disposition

72. I have found that the termination letter dated 21.9.2015 was effectively rescinded and the claimant reinstated to her employment by the letter dated 2.10.2015. I have further found that the reinstated contract of service was terminated through a mutual agreement between the claimant and the 1st respondent on 6.10.2015. Finally, I have found that the claimant is not entitled to salary for the unexpired period of her fixed term contract but awarded her salary for September 2015, three months' salary in lieu of notice offered by the employer, plus gratuity on pro rata basis. Consequently, I enter judgment for the claimant against the 1st respondent, in the sum of Kshs.14,418,676.72 plus costs and interest at court rates but less statutory deductions and car loan balance of Kshs.3,214,218.00.

73. The claim against the 2nd Respondent, is dismissed entirely for misjoinder because in this case he was acting in his capacity as the Governor of the 1st Respondent and not in personal capacity.

Dated and delivered at Nairobi this 29th day of November, 2019.

ONESMUS N. MAKAU

JUDGE