



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT NAIROBI
CAUSE NUMBER 1601 OF 2011
BETWEEN
PAMELA K. BUTALANYI.....CLAIMANT
VERSUS
THE UNIVERSITY COUNCIL FOR THE KENYA
POLYTECHNIC UNIVERSITY COLLEGE.....RESPONDENT

Rika J

Court Assistant: Edward Kidemi

Ms. Judith Guserwa instructed by J.A. Guserwa & Company Advocates for the Claimant

Mrs. Tongoi instructed by Tongoi & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Pamela K. Butalanyi was employed by the Respondent College, as a Technician on or around 30th March 1989. Her first salary was Kshs. 1,950 per month. She rose to become a Senior Technician, teaching Chemistry at the Respondent College, earning a monthly salary of Kshs. 54,592.

2. She applied for and secured a government scholarship to undertake post-graduate studies in the United Kingdom, for the period 1st December 2004 to December 2007. She was for some reasons, compelled to go beyond the study period ending in 2007. While in the UK studying, the Government advised her on 24th November 2008, that it had withdrawn its funding of the Claimant's studies. On 26th February 2009, the Respondent arbitrarily cancelled her study leave.

3. On 16th April 2009, the Respondent agreed to extend the Claimant's study leave, but made no payments to the Claimant in terms of her study leave requirements. On 9th June 2009, the Respondent wrote to the Claimant asking her to show cause why disciplinary action should not issue against her, for failure to report back to duty. The Claimant was away in the UK; had not completed her studies; but was required to show cause within 7 days. In a letter dated 21st August 2009, the Respondent summarily dismissed the Claimant alleging she had failed to report back to work. The Claimant holds this decision was unfair and unlawful and filed the Statement of Claim on 22nd September 2011, seeking orders against the Respondent for:-

[A] Reinstatement

[B] Full compensation by way of damages for wrongful and/ or unlawful termination

[C] In the alternative:-

I. Pay in lieu of notice at Kshs. 54,592;

II. Service pay for 20 years worked at Kshs. 545,920;

III. Outstanding leave allowance [unspecified];

IV. 21 days' salary for August 2009;

V. Money in respect of arrears of rent in the UK at British Pound Sterling 4,420;

VI. Refund of the cost of the air ticket [UK to Kenya] at Pounds 450;

VII. Living expenses for 15 months at Pounds 778 per month amounting to Pounds 10,570;

VIII. Refund of the transportation of luggage from UK to Kenya at Pounds 537;

IX. Unpaid per diem for the time spent in the UK at Pounds 2,700; and

[D] Costs

4. The Respondent filed its Statement of Response on the 5th March 2012. It is conceded the Claimant was an Employee of the Respondent, in the capacity pleaded in her Claim. The Claimant was granted a Government Scholarship to study at the University of Manchester, running from 1st September 2004. It was for an initial 3 years. She left Kenya on 1st December 2004, having been granted study leave by her Employer, to undertake a PhD course in Instrumental and Analytical Science at the University of Manchester, from 27th September 2004 to 30th September 2007.

5. The Respondent states the Claimant's University required the Claimant to extend her study by 1 year. The Respondent agreed upon consultation with the Ministry of Public Service, to extend the Claimant's study leave for 6 months from January 2008 to June 2008. The Ministry advised there would be no further extension beyond the 6 months. The University wrote on 3rd December 2007 indicating the Claimant's course would be ending in 2009, while oral assessment would be in March 2010. The Ministry wrote to the Claimant informing her it would not be able to sponsor her for the period after December 2008. It was the Government which declined to grant the Claimant additional funding. The Respondent acted in accordance with the directives of the Government. The Respondent was within its mandate to ask the Claimant to show cause why disciplinary action against her should not be taken. She blatantly refused to return to work. The opportunity for fair hearing is not mandatory in cases of summary dismissal. The Respondent has always been ready to pay to the Claimant her terminal dues once she has cleared from the Respondent. She had previously, in 1998, been granted study leave for her M.sc course at the University of Warwick; there was no malice on the part of the Respondent in summarily dismissing the Claimant on

15th July 2009. The Respondent prays the Court to find summary dismissal was in accordance with the Claimant's terms and conditions of service, and the Employment Act 2007, and dismiss the Claim with costs to the Respondent.

The Claim

6. The Claimant gave evidence, and closed her case, on 12th November 2012. Mr. Cleopas Ondieki Nyachieo, Director Centre for Education, and Former Registrar of the Respondent College, gave evidence for the Respondent, bringing the hearing to a close on the 9th May 2014. Parties confirmed the filing of their Closing Arguments to the Court on 7th October 2014. The matter was transmitted to the Trial Judge in Mombasa on 16th February 2015 for the preparation of the Award.

7. The Claimant testified she was employed by the Respondent in 1989 as a Technician. She initially worked at Mombasa Polytechnic, and transferred to Nairobi Polytechnic in 1992. She obtained a Government of Kenya Scholarship to study M.sc. in Analytical Chemistry, in the University of Warwick in the UK, in 1996. She came back upon completion of the study and was promoted to job group L, teaching Analytical Chemistry to Diploma Students. Her gross salary was Kshs. 54,592 per month on termination.

8. She requested for funding from the Government to pursue her Ph.D. This was granted and study leave authorized. She was to leave for the University of Manchester in September 2004, but was delayed to December 2004 as the University had closed. She commenced her studies in January 2005. It was to last 3 years.

9. Pamela fell sick and her learning was interrupted. She expected she would now complete her PhD course in December 2009. She requested for extension of her study leave. The Respondent wrote to her on 12th November 2008, acceding to her application for extension. She was allowed extension for 1 year up to December 2009.

10. On 26th February 2009, the Respondent wrote to the Claimant informing her that the Ministry of Public Service had clarified to the Respondent it could no longer continue sponsoring the Claimant. The Respondent had therefore reviewed the extension of study leave granted to the Claimant, cancelling that extension. The leave was revoked with immediate effect, and the Claimant was required to return to the Polytechnic, with immediate effect.

11. The Claimant was not able to return to the Polytechnic as advised. She wrote back to the Respondent explaining that:-

- She had not completed her PhD study, which study was the main reason the Government of Kenya had sent her to the UK for;
- Even was she to comply with the demand for her premature return, the Government had not processed her air ticket to enable her travel.
- She was just one among other students who were taking longer than expected, to finish her study.
- She was within the timeframe allowed by the study regulations to complete the PhD study.
- An Officer from the Ministry of Public Service had at the outset blocked her scholarship saying the Polytechnic did not require persons with PhD degree.

12. The Directorate of Personnel Management in the Ministry of Public Service, and the Respondent, were to work together in managing the scholarship. The Respondent was not supposed to do it singlehandedly. The 2 should not have abandoned the Claimant in a foreign land. The Respondent

stopped her salary. After she was summarily dismissed the Claimant appealed to the Respondent on 30th September 2009 for reinstatement, so as to enable her convince the DPM to continue its funding, and assist her in completing her PhD study. The Respondent wrote back on 16th November 2009 advising that its summary dismissal decision, still stood.

13. Butalanyi then instructed her Advocates to demand for reparation from the Respondent before initiating this Claim.

14. The refund of the air ticket comprises what she spent to come and see the Respondent's Principal. There was no discussion whether the Respondent would pay. She claims living expenses. Her final air ticket was paid for by the DPM. She expected a positive answer from the Respondent. She was ill-treated by the Respondent and prays her Claim is allowed.

15. She told the Court on cross-examination that her study was to take 3 years, and 1 more year in write up. It was from 2005 to 2008. The write up period was not captured when she left Kenya for the UK. This was taken care of by the extension. Initially extension was for 6 months. She requested DPM for upkeep allowance because the study leave had been granted. She was sacked before DPM could sort out the issue of upkeep. The DPM wanted to know from the Respondent who would meet the Claimant's cost of the study from 1st January 2009 to December 2009. The Respondent revoked the extension in reaction to the query by the Government on the funding.

16 The Claimant testified she was outside Kenya, and was required to show cause why disciplinary action should not issue, within a very short period. She referred to an Officer who had tried to block her scholarship. The issue had been resolved and scholarship granted. DPM and Kenya Polytechnic were to work together. The Claimant's salary was stopped. She unsuccessfully appealed for reinstatement after the summary dismissal. She claims refund for the cost of the air ticket for the period when she came to Kenya to see the Respondent's Principal. It was not agreed that the Respondent would pay. The last air ticket was paid for by the DPM. She received a negative reply from the DPM on her appeal.

17. Butalanyi explained on redirection that she expected a fair answer, be it negative or positive. The Ministry informed the Respondent it was no longer granting scholarships; it had not asked the Respondent to revoke the extension. The Claimant was already on scholarship at the time the Ministry communicated it would no longer grant scholarships. When she wrote to the Respondent on 9th June 2009, she was not requested to supply documents supporting her position. She was last paid her salary in July 2009. It would not have made sense to return to Kenya without her PhD.

The Response

18. Cleopas Ondieki confirmed the Claimant was granted a scholarship and study leave, to pursue her PhD at the University of Manchester. The practice was that the Employee would continue to earn 80% of her salary, while 20% was sent to the Government.

19. The Government which sponsored the Claimant could no longer continue doing so. This was communicated to the Claimant. She completed the initial period, and requested for extension. Extension was granted for 6 months, while the Finance Officer in the Ministry required the Respondent to continue remitting the 20% of the Claimant's salary. She wanted more extension to write her thesis. Cleopas testified extension could not go on endlessly.

20. The extension was granted up to December 2009. The Ministry enquired on the funding for the period of extension. The Respondent replied, stating the Respondent had revoked the extension. The Claimant was asked to come back home.

21. It was not the responsibility of the Respondent to meet the costs of the Claimant's study. The Respondent's role was to grant the Claimant study leave, for the duration of the scholarship. This explains why the Respondent revoked the Claimant's study leave; she no longer had funding for her scholarship.

22. She failed to report for duty after her study leave was revoked. She was required to explain her absence, or her salary would be stopped and summary dismissal considered. Her husband instead went to see the Respondent's Management, stating that the Claimant did not receive the letter calling on her to explain. He was given a copy of the letter from the Respondent to forward to his Wife. She wrote asking for funds from the Ministry. The Respondent waited for the response to her request from the Ministry. There was no response. The Respondent summarily dismissed her on 17th July 2009. The decision was not actuated by malice. It was based on Section 44[4][a] of the Employment Act 2007. The Claimant had been asked to show cause in the letter dated 9th June 2009, which lapsed on 16th June 2009.

23. The Respondent is not liable to pay any of the claims. Butalanyi was given a fair hearing. The Respondent was pushed to the wall. She refused to return to work. She never presented herself physically for a physical hearing. The period of the study leave was indicated. The Respondent was bound by the instructions of the Government. The Claimant has not made any attempt to initiate the process for terminal benefits. She has to clear with the Respondent. Per Diem is paid to Employees working outside their normal station; the Claimant was on study leave.

24. After the summary dismissal, it was her prerogative to meet her expenses. The Claim has no merit. Terminal benefits shall be paid upon the Claimant clearing with the Respondent. Summary dismissal is final. Re-instatement cannot be made.

25. Cross-examined, Cleopas testified he joined the Respondent in early 2005. The Claimant was already on study leave. He met her after she returned from the UK. He could not recall the date, but reckoned it was sometime after she was summarily dismissed. She had come to see the Vice- Chancellor.

26. Cleopas did not converse with the Claimant. She was to study up to December 2008. The Respondent accepted to extend the study period up to December 2009. The Respondent had at the time received the Claimant's Supervisor's letter on the need for extending the study period. The Respondent received a letter from the Ministry enquiring about the funding of the Claimant's study for the extended period. The Respondent replied, saying the extension had been cancelled. The Respondent had not been asked to revoke the study leave.

27. The Claimant wrote to the Respondent explaining why she would not be able to return to Kenya. She did not have an air ticket. Cleopas conceded the Claimant could not walk from the UK to Kenya. All the involved Parties would lose by the cancellation of the scholarship. Unless she had other means to support her study, the Ministry's letter saying there would be no approval for further funding meant the scholarship was at an end.

28. The Respondent wrote to the Claimant asking her to show cause why disciplinary action should not be taken. It had not sent her an air ticket to facilitate her appearance in Nairobi. She was to respond within 7 days. The Respondent was aware the Claimant was still in the UK. She had not finished her study. There were no instructions to the Respondent from the DPM, to terminate the Claimant's contract of employment. The Respondent was the Employer. The Ministry did not advise the Employee be recalled. The Respondent was not malicious in dismissing the Claimant. It is over 5 years since the summary dismissal decision was made. The Claimant was bound to clear with the Respondent before she could be paid her terminal dues. It is likely the Respondent owes her money. Cleopas would have to get the details from the respondent's Human Resource Office. He did not agree that what she lists in her Statement of Claim, are the correct dues.

29. Cleopas closed his evidence on redirection, with the clarification that communication on the revocation of the study leave was made to both the Ministry and the Claimant. The Claimant solicited for the scholarship; it was not the Respondent which sent the Claimant to the UK. She was asked to show cause through correspondence; it was not necessary she travels. She did not require an air ticket to respond. She did not have the courtesy to respond. There is always a requirement for clearance. There is no requirement for notice on summary dismissal. The Respondent is willing to pay what is due to the Claimant; there is no malice on the part of the Respondent.

Submissions

30. The Claimant submits the issues in dispute are:-

- i. Whether the Claimant was fairly, justifiably, lawfully and /or wrongfully dismissed by the Respondent?; and
- ii. What remedies are available to the Claimant?

31. She submits she was on study leave in the UK. The Respondent was aware she was stranded in the UK, and she had obtained study leave, therefore Section 44 [4] [a] of the Employment Act 2007, was inapplicable. The provision would only apply if the Employee is absent without leave or other lawful cause, from the place appointed for the performance of his work. There was no valid reason shown by the Respondent justifying termination under Section 45 of the Employment Act 2007. She was not given an opportunity to defend herself. The Respondent was actuated by malice.

32. The Claimant asks the Court to find persuasion in the ***Industrial Court at Nairobi Cause Number 716 of 2011 between Peter Mureithi Ngata v. The Hon Attorney General*** and ***[same Court] Cause Number 1510 of 2010 between Zachary Ochako v. Kenya Broadcasting Corporation***, in which the Court found Employees were unfairly dismissed and granted orders of reinstatement. In the first Cause the Employee was suspended and subsequently dismissed while on authorized study leave abroad, in circumstances the Claimant argues are not dissimilar to her own. She primarily seeks to be reinstated.

33. In the alternative she submits she is entitled to full benefits pleaded in paragraph 13 of her Statement of Claim and compensation. In this regard she cites ***Industrial Court at Nairobi Cause Number 665 of 2011 between Beatrice Achieng Osir v. Board of Trustees Teleposta Pension Scheme Co. Limited*** and ***Cause Number 361 [N] OF 2009 between Francis Lawrence Oyatsi v. Nzoia Sugar Company Limited*** where the Court found the Employees were unfairly and unlawfully dismissed and granted generous awards in compensation for unfair and unlawful dismissal. In the first Cause, the Court granted the Claimant the option of re-engagement without loss of benefits, or the Employee is paid prospective earnings.

34. The Respondent submits its support of the Claimant's study was not in a vacuum; it was tied down to the Ministry's direction. The Ministry did not approve the Respondent's decision to extend the study leave. The Respondent could not financially support the Claimant. With no scholarship, her study leave was cancelled. Her decision to remain in the UK was unilateral. The Respondent cannot be condemned to pay the costs attendant to her extended stay in the UK; it was never the responsibility of the Respondent to meet the costs of her study. She has not in any event given the Court details of the expenditure claimed, to justify the figures pleaded.

35. She absented herself from work, without lawful cause and without the leave of the Respondent. The Respondent was justified in summarily dismissing her under Section 44 [4] [a] of the Employment Act 2007. There were several notices issued by the Respondent, requiring her to return to Kenya. She did not respond to the letter requiring her to show cause why disciplinary action should be taken against her. Employees are bound to obey the lawful instructions of an Employer as was held in ***Nairobi High Court Civil Case Number 452 of 1981 between Omondi v. Secretary General Kenya Management Staff Association***. Section 45 of the Employment Act 2007 does not apply to summary dismissal. The Respondent was within its right to refuse to reinstate the Claimant. Finally the Respondent submits that the Court be guided by the ***Nairobi High Court Civil Case Number 373 of 1988 between Cathleen Tulloch Biget v. The International School of Kenya***, which the Respondent considers, is very similar to the instant Case. The decisions relied upon by the Claimant are inapplicable in this dispute, the Respondent argues.

The Court Finds

36. The issues in dispute are as summarized by the Claimant in her Closing Submissions, replicated in

paragraph 31 of this Award.

37. The Claimant was employed by the Respondent University College, as of then a Polytechnic Tertiary College, on 30th March 1989. She was employed as a Technician earning a monthly salary of Kshs. 1,950. She rose to become a Senior Technician. She was teaching chemistry at the College. She was summarily dismissed on 15th July 2009 while in the University of Manchester in the UK, undertaking a PhD course in Instrumental and Analytical Science. Her last salary was Kshs.54,592.

38. Her summary dismissal followed the failure by the Government of Kenya, to fund her study beyond the period the Government had offered to fund, at the time the scholarship was granted. The Respondent felt its obligation was to grant the Claimant study leave for the duration of the scholarship. Without funding, the Respondent felt there was no obligation to accommodate the Claimant further. She was recalled to her job before she could finish her study.

39. There were a number of letters exchanged amongst the involved Parties. A scrutiny of these letters is crucial in understanding the terms upon which the Claimant took her study leave; the study leave cancelled; summary dismissal process conducted; and in understanding the overall responsibility of the Parties to one another.

40. The letter dated 19th October 2004 from the Permanent Secretary in the Ministry of Education, Science and Technology, to the Claimant through the Principal Kenya Polytechnic, informed the Claimant that the DPM had approved the Claimant's study at the University of Manchester. The DPM would meet the cost of her study. The College was advised to remit to the DPM 20% of the Claimant's salary in lump sum, for the duration of the study.

41. By a letter dated 30th November 2004, the Ministry of Education granted the Claimant authority to travel to the UK from 1st December 2004. The authority covered the period 1st December 2007 to 31st October 2007. The letter emphasized the costs pertaining to the training, would be met by the DPM.

42. The Claimant did not complete her course by 31st October 2007. On 20th March 2007 and 16th April 2007, her University wrote to the DPM stating that its Student had made good progress, but required 1 year extension, in order to achieve the course objectives. Based on the recommendation, the Claimant wrote to the Principal of the Respondent on 25th April 2007, requesting for extension.

43. The Respondent replied to the Claimant on 2nd May 2007, advising that it would consider her request, once DPM extended her scholarship. It was for her to follow up continued funding with the DPM.

44. DPM wrote to the Respondent on 23rd May 2007, acknowledging receipt of the Claimant's request. The Directorate sought to have the views of the Respondent, as the Claimant's Employer, before taking any action.

45. The Respondent wrote back on 25th July 2007. It had no objection to extension, but informed the DPM extension should be for an initial period of 6 months, beginning January 2008. The DPM approved the arrangement in its letter to the Respondent dated 9th August 2007. DPM emphasized it would not indulge the Claimant further after the lapse of the 6 months, on 30th June 2008.

46. On 3rd December 2007, the University wrote again, To Whom It May Concern, stating that the Claimant had been granted an extension in her period of study, due to a serious illness. She was expected to submit her thesis by December 2009, make her viva in March 2010, and graduate in July 2010.

47. The Claimant communicated this new position to the Respondent in a letter dated 13th October 2008.

48. On 24th September 2008, the DPM wrote to the Claimant advising it would not be able to continue funding the Claimant beyond the period of 6 months ending on 30th June 2008.

49. The Principal of the Respondent however wrote to the Claimant on 12th November 2008, granting the Claimant extension of 1 year, running up to December 2009. The letter of the DPM to the Claimant dated 24th September 2008 advising there was no more funding, was copied the Principal Kenya Polytechnic.
50. The DPM then wrote to the Respondent on 24th November 2008, demanding to be told who would fund the Claimant's further extension for the year 2009. The Respondent was asked to urgently respond, to avoid inconveniencing a Student in a foreign land.
51. This compelled the Respondent to write the letter dated 24th February 2009 to the Permanent Secretary in the Ministry of Public Service, misrepresenting that the Respondent had already revoked the Claimant's extended study leave, and directed her to report back to the Respondent with immediate effect. It was a misrepresentation, because the letter to the Claimant revoking the extension to December 2009 is dated 26th February 2009.
52. The Claimant responded through her letter dated 3rd March 2009, whose contents have been discussed in paragraph 11 of this Award.
53. The Respondent wrote back on 16th March 2009, informing the Claimant that as the Ministry of Public Service had withdrawn her scholarship, the Respondent had no obligation to grant any further extension of her study leave.
54. Butalanyi did not give up. She wrote to the Respondent on 16th April 2009, appealing against cancellation of her study leave; revealing she had been surviving on her salary since the Government declined further funding of her study; and requested the Respondent for Sterling Pounds 6,000 to see her through the write up period to December 2009. She wrote other letters asking to be paid per diem.
55. The letter dated 7th May 2009 from the Respondent to the Claimant declined to grant the Claimant any more extended study leave, unless she was able to show clearly, who would meet the cost of her study.
56. The letter dated 9th June 2009 required the Claimant to show cause why disciplinary action should not be taken against her, for failing to report back to work. The Claimant testified she did not respond to this letter. She did not receive it. The Respondent's position is that the letter was dispatched, and the Claimant's husband was availed a copy, on a routine visit to the College.
57. In her letter dated 3rd August 2009 to the DPM, the Claimant reveals she had travelled to Kenya in April 2009. She had met DPM Officials, who advised it was in the interest of the Government of Kenya, having already invested in the Claimant, to have her complete her PhD. She was advised to appeal for funds from DPM to enable her complete what remained of her study.
58. The Respondent summarily dismissed the Claimant on 15th July 2009, basing its decision on Section 44 [4] [a] of the Employment Act. The letter of summary dismissal is dated 21st August 2009.
59. Butalanyi applied for reinstatement in a letter dated 30th September 2009. She informed the Respondent that the Permanent Secretary in the Ministry of Public Service Titus Ndambuki, had advised the Claimant the Government was willing to extend funding, so long as she was on the pay roll of the Respondent. Reinstatement would therefore have, according to the Claimant, ensured resumption of the Government funding to completion of the study.
60. The last straw was the letter from the Respondent to the Claimant dated 16th November 2009 informing her that her appeal for reinstatement had been rejected, and the decision to summarily dismiss her sustained.
61. Did the Respondent have a valid reason in summarily dismissing the Claimant? The Respondent, and

the Ministry of Public Service which was sponsoring the Claimant through its Directorate of Personnel Management, are or were sub-divisions of the same Government.

62. The Claimant was employed by the Respondent, a Government of Kenya Institution of Higher Education under the Ministry of Education. Her study was financed by the Ministry of Public Service. She was serving the Respondent and was to return from the City of Manchester at the end of her PhD, better equipped to serve the People of Kenya. She was a Public Servant, at the mercy of Government Bureaucrats, and ultimately, a victim of Government villainy.

63. There was poor management by the Government of its sponsorship program. It is not unusual for post-graduate studies to extend beyond the time expected at the inception. The Respondent granted the Claimant study leave, for the duration of the course, intended to last for 3 years, from December 2004 to October 2007. There appears to have been no thought given at the outset, that there could be ground necessitating extension beyond the end of 2007.

64. When the need was confirmed by the University, the Government and the Respondent were unprepared. The 2 Institutions, that is to say the Respondent and the DPM, started tossing the Claimant around, and behaving as if they were serving different objectives. The Respondent was wrong in recommending the initial extension of 6 months ending 30th June 2008 while all information available, pointed to a prolonged PhD study. The DPM acted on this recommendation and pegged its last funding to 30th June 2008. This lack of imagination and flexibility by the 2 Institutions was the cause of the problems that faced the Claimant.

65. The Respondent may have foreseen the situation where the DPM would decline further funding. In its letter of 30th November 2004, it was emphatic that all costs pertaining to the Claimant's study would be met by the DPM. This was emphasized in other letters.

66. The Respondent conceded to the Claimant's plea for extension to December 2009. The Court does not think the Respondent intended to derail the Claimant in completing her study. It was however unsettled by the DPM, when the DPM demanded to know, who would fund the additional period of the study. It was then that the Respondent started to act rather like the DPM- irrationally.

67. The Respondent replied to the DPM's letter hastily, misrepresenting it had revoked the Claimant's study leave. Revocation happened 2 days later. It demanded the Claimant returns to work immediately. She had not completed her study, which the Government of Kenya sent her for in the UK. When she explained the need for extended stay in the UK, the Respondent was unmoved, holding that the DPM had declined further funding and the Claimant must return.

68. A responsible Institution of Higher Learning, well versed with the challenges attendant to funded studies in foreign countries, would have been expected to implore the DPM to indulge the Claimant further. True, the DPM was the sponsoring entity, but between the 2, the Respondent would have been expected to have a greater appreciation of the challenges facing its Employee. Government Apparatchiks tend to operate at an arm's length, and would perhaps not fully appreciate the value of a PhD to the Kenya Polytechnic. The Respondent as an Employer whose core business is education, would know the value a Lecturer holding a PhD degree from the University of Manchester, would bring to the Institution and the Nation at large. Why not write to the DPM, and intercede for the Claimant? Instead, the Respondent stood its ground, insisting the Claimant must return, without her PhD, regardless of the time and money already invested by the 2 Institutions in the undertaking, and the good progress made by the Claimant.

69. The Respondent's conduct went from the irrational to the downright bizarre. It wrote to the Claimant on 9th June 2009, requiring her to show cause why she should not be dismissed for failure to return to work. She was to do so within 7 days of the letter. Cleopas testified her days to show cause, lapsed on 16th June 2009. It was not possible for the Claimant to comply. The letter would take some days to reach her. She would require some days to respond. Her return mail would take some days. It was unreasonable to ask the Claimant to respond within 7 days of the letter. The Claimant did not respond. The Respondent went on to stop the Claimant's salary, denying her any chance for self-sustenance in the

UK in the absence of the Government sponsorship.

70. The Respondent summarily dismissed her on the 15th July 2009. It cited Section 44[4][a] of the Employment Act in justification. The Court agrees with the Claimant that this Section was inapplicable. The Claimant was not absent in a foreign land without the leave of the Respondent; leave was granted way back in 2004. Leave was even extended by the Respondent to December 2009, before the hasty turnaround prompted by the DPM query on continued funding. She was not, assuming leave had been recalled, absent without lawful cause. She was in the final stages of completing her study. She could not abandon her study, and return to work after all the resources put in the undertaking by herself and the Government of Kenya. Her return depended on the completion of her study, and the availability of the air ticket for the return journey. She had not completed her study and did not have the air ticket at the time the Respondent demanded the Claimant returns to work. These were, even in the absence of leave, lawful causes for the Claimant's absence from work. The argument by the Respondent citing the High Court Case of **Omondi**, is that Employees have a duty to obey the lawful command of their Employers. Section 44(4)(e) of the Employment Act 2007, as discussed in the **Industrial Court at Nairobi Cause Number 1073 of 2012 between Abraham Gumba v. KEMSA**, requires such command is lawful and proper. The commands by the Respondent to the Claimant to show cause, and to return to Kenya without completing her study, do not fit the description of lawful and proper.

71. There was a chance the situation could be remedied at the time the Claimant consulted the Permanent Secretary in the Ministry of Public Service Titus Ndambuki. There is evidence which was not contradicted by the Respondent, that the Ministry advised it would resume funding so long as the Claimant was in employment. The Respondent does not appear to have sought the confirmation of the DPM on this renewed hope, or even asked the Claimant to provide proof. It insisted its summary dismissal decision was cast in bronze, there was no going back, and the Claimant would not be reinstated.

72. In terms of valid termination reason, in terms of substantive justification of the termination decision, the Respondent fell far short. It is not correct that summary dismissal under Section 44 of the Act is not subject to the requirements of Section 45. Summary dismissal is a form of termination, and the rules applying to fair termination under Section 41, 43 and 45, are applicable even on summary dismissal on gross misconduct. Termination-at-will, as an offspring of employment-at-will, is as dead as a dodo in the Kenyan employment space.

73. While it may not have been possible to hear the Claimant in person, she was not as seen above, granted time to respond to the letter to show cause. After she failed to respond, there was no attempt even through Skype, to hear her on the charge for which she was summarily dismissed. There was no hearing. She was not invited for a hearing, and availed the means to be present for that hearing. When she appealed to be reinstated, the appeal was dismissed offhandedly, without any hearing, or consultations involving the other players. Procedural justice was absent. Substantive justice was lacking.

74. The Claimant informed the Court she eventually was able to finish her studies through her own effort. That was commendable. The Court must turn to consider the remedies she has sought in this Claim, for the employment wrong.

75. The Respondent prays for reinstatement or payment of terminal benefits and compensation for unfair termination. The Respondent does not concede the prayer for reinstatement, but states it would be willing to pay the Claimant terminal benefits. The Claimant would have received her terminal benefits but has not cleared with the Respondent.

76. The Court is satisfied that reinstatement is the remedy preferred by the Claimant, it being the primary remedy pleaded. Reinstatement in Kenya is becoming a rarely given remedy, because prevalent jurisprudence holds it must be given sparingly. It is a remedy which is given by Section 49 of the Employment Act 2007, but which is not favoured in a majority of Court decisions.

77. The Claimant lost her position with the Respondent Institution through the mismanagement of her sponsorship by the Government. She managed to complete her study on her own. The intention was to

build her capacity, and bring her back to benefit the People of Kenya. She should not suffer career derailment, or be denied the opportunity to continue serving, through the actions of the 2 bungling Government Institutions. To deny her the right to return, even after she put her own resources in her study in the face of being abandoned by her own Government, would be very unjust of this Court. It would deny the People of Kenya the benefit of investing in her.

78. Her summary dismissal took place effective from 15th July 2009. It was in the legal era of Section 15 of the Labour Institutions Act Number 12 of 2007, which read with Section 49 of the Employment Act, granted reinstatement. There was no time limit on the grant of the remedy seen against the date of termination. 3 year time limit from the date of termination in considering the remedy, came with the Industrial Court Act 2011, which itself has recently been severely mutilated by the Attorney General of Kenya. It is a little bit unnerving how rapidly the Kenyan labour law, both statutory and judge-made, is moving. Even the name of this Court is not clear to many Kenyans. The remedy of reinstatement is therefore available to the Claimant under the repealed Section 15 of the Labour Institutions Act and Section 49 of the Employment Act 2007.

79. *The prayer for reinstatement is allowed. The Respondent shall reinstate the Claimant with effect from 1st June 2015, without loss of salaries, benefits and privileges. The back pay is to be calculated from 1st August 2009.*

80. The alternative prayer is for the monetary Award. The Respondent gave the Claimant no notice before taking the summary dismissal decision. ***She is granted 1 month salary in lieu of notice at Kshs. 54,592.***

81. She had worked for 20 years by the time of dismissal. She pleads service pay at Kshs. 545,920. There was little argumentation on this. Her letter of appointment stated that her terms of employment would be subject to any agreement completed between the Government and the Workers Union. No CBA was shown to the Court supporting the claim for service pay. It was not even told to the Court whether the Claimant was enrolled with the N.S.S.F. It is unlikely a Lecturer in a Public Institution would not be. Her claim for service pay is not supported by evidence, and little or nothing, in the recollection of the Court, was said about this item in the submissions filed by the Parties. The multiplier in arriving at Kshs. 545,920 was not disclosed.

82. The date of termination was 15th July 2009. The Claimant seeks 21 days' salary for the month of August 2009. In the view of the Court, the prayer has no merit. The effective date was 15th July 2009. The prayer is rejected.

83. The rent paid in the UK for the period during which her study was extended; the refund of air ticket to Kenya; the living expenses while in the UK; and the costs of transportation of the luggage, are not claimable from the Respondent. These could probably be pursued against the DPM, which was the sponsoring entity. The Employer was restricted to affording the Claimant study leave. If there were costs incurred by the Claimant under the disciplinary process leading to her dismissal, such would in the view of the Court have been claimable from the Respondent. Costs associated with her study however, cannot be placed on the shoulders of the Respondent. These prayers are rejected.

84. The claim for per diem is rejected. The Claimant was not out in the UK working for the Respondent. There is merit in the Respondent's submission that per diem is paid to an Employee who is actively working out of station, not one on study leave.

85. Compensation in lieu of reinstatement is merited. The decision by the Respondent was flawed on both substantive justification and procedural fairness. ***The Claimant is granted 12 months' salary in compensation at Kshs. 655,104 for unfair termination.***

86. The Court has studied the decisions of the various Courts supplied to it by the Parties in their Closing Submissions in considering the alternative prayers sought. The decisions were helpful. The Court would however like to restate as it has done in its past decisions that employment remedies must be

proportionate to the injury sustained by the Employee. They are not aimed at advancing any Parties desire for unjust enrichment. The decision of the High Court in **Biget** related to an Employee who was on sabbatical leave, and who was on a fixed term contract, which expired during such leave, without expression of interest for renewal. It is a case of an Employee who was found to have technically resigned. It is distinguishable from the Claimant's case, the Claimant having been a Public Servant on pensionable terms, sponsored by the Government for further study, and who had not expressed any intention to stop working for the Respondent.

87. Lastly the Court grants the prayer for costs, but no order on the interest.

IT IS ORDERED:-

a. The Summary Dismissal of the Claimant was unfair.

b. The Respondent shall reinstate the Claimant to her previous position with effect from 1st June 2015, without loss of salaries, benefits and privileges. The back pay is to be calculated from the 1st August 2009.

IN THE ALTERNATIVE,

c. The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 54,592 and 12 months' salary in compensation at Kshs. 655,104- total Kshs. 709,696.

d. The Claimant must communicate her option to the Respondent within 30 days of the delivery of this Award.

e. Costs in either case to the Claimant.

f. No order on the interest.

Dated and Signed at Mombasa this 11th day of March 2015

James Rika

Judge

Dated, Signed and delivered at Nairobi this 20th day of March 2015

Jorum Nelson Abuodha

Judge