REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 933 OF 2013

DAVID OTUNGA KENANI ……...…… CLAIMANT

VERSUS

OFFICE OF THE CONTROLLER AND AUDITOR GENERAL……..… 1ST RESPONDENT

THE ATTORNEY GENERAL …… 2ND RESPONDENT

JUDGEMENT

1. Issue in dispute is wrongful dismissal of the Claimant from his employment and refusal to pay him his terminal dues.

2. ON 19TH January 2013 filed his claim against the Respondents in their capacity as the former employer of the Claimant and the chief legal advisor of the government respectively. The claim is that the Claimant was dismissed from his employment with the 1st Respondent which dismissal was wrongful. The Claimant testified in support of his case and filed his written submissions on 10th February 2015. The Respondents through the office of the 2nd Respondent filed a Defence on 12th July 2013 and denied the claims on the grounds that the dismissal of the Claimant was justified. No evidence was called by the Respondents and they filed written submissions dated 6th January 2015.

Claimant's case

3. The Claimant was employed as Auditor II in the office of the 1st Respondent until 29th September 1999 when he was suspended, was arrested and charged in **Criminal Case No.2698 of 1999, Republic versus Jeremy Kyeva Nzioka and 4 others** with five counts of stealing by persons employed in the public service contrary to section 280 of the Penal Code. During trial, the state was unable to call any witness despite several adjournments waiting for them leading to a *nolle prosequi* on 26th June 2001 and with it the Claimant was discharged.

4. On 6th October 1999 the 1st Respondent through the director of Audit wrote to the Claimant and suspended him from duty on the allegations that the Claimant had been arraigned in court on charges of theft by servant and with effect from 27th September 1999 the Claimant was suspended from duty. On 11th February 2003 the Claimant received a letter to show cause why action should not be taken against him over the matter he had been charged with. On 27th February 2003 the Claimant replied noting that he never colluded with staff from the Attorney General's Chambers and the Internal Auditor to make erroneous payments of khs.1, 608,450.00 as this was a fabrication against the claimant.

5. On 7th July 2003, the Claimant received a letter of dismissal from service on gross misconduct on account that he had colluded with other staff from the Attorney General's Chambers which occasioned a loss of Kshs.1, 608,450.00 and further that he had a right of appeal in terms of the Public Service Commission Act. The Claimant thus avers that his dismissal was unprocedural as he was never given a hearing before the same contrary to the natural justice. At the time of dismissal, the Claimant was earning Kshs.14, 358.00 per month. The Claimant appealed on 10th July 2003 on the grounds that he was innocent and was never involved in any fraudulent activities or gross misconduct and from the criminal charges *nolle prosequi* had been entered. The Claimant appealed for reinstatement.

6. On 18th April 2006 the Claimant wrote to the 1st Respondent on his appeal for reinstatement and on 5th February 2008 he got a reply where the 1st Respondent noted that the his file had been closed for the reason that the Claimant had given a notice to sue which notice the Claimant had revoked. On 17th January 2011 the Claimant wrote to the secretary, Public Service Commission and appealed against his dismissal and sought to explain the facts surrounding his revocation of notice to sue as he had been adviced by officers of the 1st Respondent that in order to facilitate the re-consideration of his case he should revoke the notice. On 1st March 2011 the Auditor General wrote to the Claimant noting that his application for review had been dismissed and the file closed.

7. The Claimant thus avers that the decisions to reject his appeal and review of the same were arbitrary and his dismissal from service without a hearing when he had been discharged from the criminal charges was wrongful and unfair. After receiving letter that his review application had been rejected on 1st march 2011, the Claimant filed suit against the respondents.

8. The Claimant is seeking that his dismissal should be set aside and be reinstated to his position without loss of benefits and continuity of service and further the court to make a finding that the dismissal was wrongful and unfair and in the alternative the Claimant to be paid his terminal dues with compensation for wrongful termination, general damage. Costs and interests.

9. In evidence, the Claimant testified that upon his employment in January 1993 he was deployed to the office of the 2nd Respondent with duties to examine books of accounts, do audits at the end of each financial year and to examine all payment vouchers. On 29th September 1999 the claiming was dismissed on alleged gross misconduct that he had colluded with other officers to make payments. There were payments of honoraria to various officers at the Attorney General's office. The Claimant was arrested together with other officers and while in court the prosecution was directed to give original statements of the beneficiaries of the issued honoraria from the Attorney General's officer and sine these were senior officers and prosecution did not want to disclose their names and hence a *nolle prosequi* was entered and the Claimant was discharged. He appealed for reinstatement as he had been suspended but he received a letter of dismissal. The Claimant lodged an appeal noting that he had been discharged as he was innocent and never colluded with other staff as he could not do so in his positon as the Auditor II and in his assessment of the alleged fraudulent payments, there were proper records to show which officers had been paid as beneficiaries of the honoraria and there was no irregularity. He had a supervisor and an auditor who could confirm what had been paid but the appeal was rejected.

10. The Claimant also gave evidence that at the time of termination he was earning Kshs.23, 000.00 per month. He was 36 years old at the time and has since been unable to get another job and thus seek reinstatement. The actions of the Respondents caused him great constraints in taking care of his family, he has undergone mental torture as his name was tarnished and could not get another job in a sector that require integrity and despite the criminal court discharging him, the Respondent used similar reasons to dismiss him and so he cannot get another job on the basis that his was a dismissal. This was wrong and unfair and where reinstatement is not possible damages and terminal dues should be paid.

11. On cross-examination, the Claimant confirmed that he was dismissed on 29th September 1999 and filed the suit on 19th June 1013. The Claimant was on suspension but upon being charged, he was discharged under *nolle prosequi*. On 28th May 2001 the Claimant was issued with a notice to show cause;

on 23rd May 2003 he got a reminder on the show cause letter to which he did a reply; on 11th February 2003 the Claimant replied but on 7th July 2003 the Respondent confirmed the decision to dismiss the claimant. The Claimant lodged an appeal and on 22nd October 2009 the Respondent replied that the appeal had been rejected. The Claimant applied for a review, and on 1st March 2011 the Claimant received notification that his review had been rejected.

Respondent's case

12. In defence the Respondents stated that the Claimant while in the service of the 1st Respondent was suspended for good cause upon arrested following investigations by officers outside the control of the Respondents and thus not responsible. The *nolle prosequi* does not entitle the Claimant to a civil claim whereby a probable and reasonable suspicion had been drawn to him having committed the alleged offences as the police carried out their investigations with due diligence ascertaining the truthfulness of the allegations before prosecuting with the motive to vindicate the course of justice. That the claims by the Claimant are a Shum and the dismissal of the claiming followed due process and within the principles of natural justice as under the Employment Act and the Public Service Commission Act. This was not a case for wrongful termination and the claim should be dismissed.

13. The Respondents opted not to call any evidence.

Submissions

14. In submissions, the Claimant stated that he was an employee of the 1st Respondent and by operation of section 74 of the Employment Act, the 1st Respondent as the employer should have kept all the records of employment. The termination and loss of employment of the Claimant was not valid or justified. Upon suspension on 29th September 1999 the salary and allowances were withheld. The basis for the suspension was that the Claimant was arraigned in court in criminal case No. 2698 of 1999, a show cause letter was issued and despite giving a detailed explanation of the circumstances of the case and innocence; the Claimant was dismissed from employment with the 1st respondent. He appealed and this was rejected and then he applied for a review which was also rejected without being heard or the Respondents seeking to re-examine the fact that a *nolle prosequi* had been entered and the Claimant discharged.

15. The Claimant also submitted that the procedure followed in his termination was unlawful and wrongful. Despite being dismissed on 29th September 1999, the Claimant was only informed of the dismissal on 7th July 2003. The reason for termination was collusion with other staff of the Attorney General offices that occasioned the loss of Kshs.1, 608,450.00. Section 41 of the Employment Act requires an employer who terminates an employee of grounds of misconduct to give such an employee a hearing which was not the case for the respondent. This resulted in unfair termination and thus the Claimant is entitled to the reliefs sought. The Claimant was suspended for over 15 years and should be compensated. The Claimant should also be compensated for the psychological torture he has undergone since he was suspended only to be informed of his dismissal 15 years later and despite appeals and review, the Respondents confirmed the dismissal.

16. The Respondent on their part submitted that the Claimant was employed by the 1st Respondent on 20th December 1993; on 29th September 1999 he was placed on suspension and his salary attached following an allegation that he colluded with the other staff of the 2nd Respondent between 19th August 1977 to 3rd November 1977 and occasioned a loss of Kshs.1, 608,450.0 and was charged with the offence of stealing by person employed in the public service contrary to section 280 of the Penal Code. A notice of *nolle Prosequi* was entered discharging the Claimant of the offence but this notwithstanding; the 1st Respondent proceeded to take administrative action against the Claimant and finally was dismissed from the service. The claims for unfair termination do not therefore arise and the Respondents are not liable.

17. The Respondents also submitted that the suit is statutory time barred and offends the mandatory

provisions of section 3(2) of the Public Authorities Limitation Act, which guides this court as the cause of action arose on 7th July 2003 when the Claimant was informed of his dismissal and he filed this claim on 19th June 2013. No leave was obtained to file the suit out of time. The *nolle prosequi* entered did not stop the Respondents from taking administrative action against the Claimant as his actions occasioned the loss of Kshs.1, 608,450.00.

18. the Respondents rely on the provisions of section 3(2) of the Public Authorities Limitation Act where no proceedings based on contract against the government or a local authority shall be taken after the end of three (3) years from the date the cause of action accrued. In this case the Claimant was on an employment contract with the 1st Respondent and was dismissed on 7th July 2003 and the suit was filed on 19th July 2013 thus the suit is statutory time barred as held in **Iga versus Makerere University, Civil Appeal No. 51 of 1971.** Further the court has no discretion to extend time in case of employment contracts as held in by **Court of Appeal, Divecon versus Samani [1995-1998] 1 EA 48.** Time limitation is not a mere technicality which can be easily tackled under article 159 of the constitution as there is a legal provision with regard to limitation.

19. The Respondents also submitted that the *nolle prosequi* entered in favour of the Claimant does not stop the 1st Respondent from taking administrative action against the Claimant as held in **Republic versus Public Service Commission of Kenya ex Parte James Nene Gachoka.** In the case of the Claimant he committed acts of negligence, collusion and failed responsibility that led to the loss of Kshs.1, 608,450.00 as he was the auditor with duties to examine books of account, audit reports, vouching and or preparing vouchers and liaison with accounts department to ensure that all the duties were effectively undertaken. Under the claimant's watch there were voucher payments that were irregular and led to huge losses.

20. The Respondent also submitted that due process was followed in this case before he was dismissed;

> 0n 6th October 1999 the Claimant was placed on suspension after he was charged in a criminal case;
>
> On 28th May 2001 a show cause was issue don the claimant;
>
> On 26th June 2001, notice of *nolle prosequi* was entered in favour of the claimant;
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> On 24th August 2001 the Claimant responded to the show cause;
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> On 11th February 2003 the Claimant was told his show cause reply was not sufficient;
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> On 27th February 2003 the Claimant responded again to the show cause;
>
> On 7th July 2003 the Respondent wrote to the Claimant noting that his reply was disallowed and thus allowed to appeal;
>
> On 10th July 2003 the Claimant appealed against a decision to dismiss him;
>
> On 9th August 2004 the Claimant served the Respondent with notice to institute proceedings against the government;
>
> On 18th January 2008, the Claimant appealed seeking reinstatement;
>
> On 5th February 2008 the appeal was disallowed and the Claimant was adviced that he could apply for a review;

On 1st March 2011, the Claimant was informed that his review application was disallowed.

21. In this case therefore, the Claimant is not entitled to the orders sought especially a reinstatement can only be allowed 3 years after dismissal and general damages sought have not been explained. The suit should be dismissed as there are no merits.

Determination of he issues

The issues that arise for determination are;

When does cause of action arise?

Whether there was unfair termination

Whether the remedies sought can be granted.

22. In an employment relationship, any claims that arise therein are largely regulated by law. In a case of dismissal, where the cause of action arose before the enactment of the Employment Act, 2007, such a dispute was regulated by the Employment Act, Cap 226 Laws of Kenya that allowed suits based on the Act to be filed within six (6) years, reading the repealed law together with the provisions of section 4 of the Limitation of Actions Act. However, in case where the cause of action arose after the enactment of the Employment Act, 2007, all such suits must be filed in court within 3 years.

23. In this case, the Respondents contests that that after the Claimant was discharged and a *nolle prosequi* entered, the 1st Respondent retained the right to take administrative action against the Claimant over acts of negligence and collusion with other officers of the 2nd Respondent which led to the loss of Kshs.1, 608,450.00. On the administrative action taken by the 1st respondent, the Claimant was dismissed on 7th July 2003 and that this is the time the cause of action arose. The Claimant on his part submitted that after his termination, he appealed against the decision which appeal was dismissed and further he lodged an application for review which application he got response on 1st March 2011 and that this is the date the cause of action arose.

24. In the letter of dismissal issued to the Claimant dated 7th July 2003, the 1st Respondent stated;

> *… you are therefore dismissed from the service with effect from 29th September 199.*
>
> *You are however informed of your right of appeal in terms of the Public Service Commission Act, Cap 185 of the Laws of Kenya.*

25. Therefore upon the administrative action taken against the claimant, upon dismissal he still retained the right to appeal against such decision and where such an appeal was a success his appeal for reinstatement would have been considered. However in this case the appeal was negative as it was disallowed vide letter dated 5th February 2008 written by the 2nd respondent. upon the rejection of the appeal, the Claimant applied for a review which review the 1st Respondent did consider and delivered its decision disallowing the same vide letter dated 1st March 2011 and noted;

> *APPLICATION FOR REVIEW COMMISSION'S DECISION REGARDING DISMISSAL FROM THE SERVICE*
>
> *I am directed to inform you that the Public Service Commission has considered out of time BUT DISALLOWED YOUR APPLICATION FOR Review of the Commission's Decision regarding your dismissal from the service on account of gross misconduct and decided that the case be closed.*

You are accordingly informed of the Commission's decision.

…

26. Thus this letter closed the case and file with regard to the claimant's case with the 1st respondent. all the internal administrative actions available had been exhausted. By allowing an appeal and also admitting an application for a review of the appeal, the matter was kept alive as by such consideration of the appeal and review, the Claimant was guaranteed of fair administrative action by the 1st respondent. but on 1st March 2011, he was informed of the closure of all such administrative action that were available to him within what was permissible under the Public Service Act, since the Claimant was a public servant.

27. In this case therefore, the **1st of March 2011** became a very crucial and important date for the Claimant as only then could he with certainty say that he had exhausted all the internal available mechanisms where the 1st Respondent was concerned with the issue of his dismissal from the service. It can therefore not be said that the cause of action arose on 7th July 2003 when he received notice of dismissal from service as that notice allowed the Claimant to lodge an appeal which was considered and dismissed but also the fact that a review of the same was allowed and considered though in the negative. As long as the 1st Respondent delayed in their communication ad feedback on the application for review, which decision was communicated on 1st March 2011, the Claimant retained the hope that he was to be reinstated back to his position with the 1st respondent. this hope and expectation is legitimate as the Claimant had issued notice to sue the respondents, was forced to withdraw the same under the misadvise that once he withdrew this notice his application for reinstatement would be considered positively. I take it then even for the Respondent to keep a decision as crucial as the outcome of the application for review; there were various considerations at play which caused the long delay from 2008 to 2011.

28. While the 1st Respondent procrastinated on the application for review filed by the Claimant with them, the law with regard to employee and employer relations changed bringing on board the Employment Act, 2007. With this new legislation, the Claimant enjoys the right to bring any action against the Respondent within 3 years form the time the cause of action arose as under section 90 of the Act. In this case, the Claimant did not file his claim in 2007 or 2008, the reason being, his application for review was still pending and under consideration by the 1st respondent. the Claimant only filed his claim in 2013, two years after his file and case with the 1st Respondent was closed.

29. I therefore find the cause of action arose as of 1st March 2011 and not earlier than this. The submission of the Respondents that the suit herein is statutory time barred does not hold noting the internal administrative action and procedures the Claimant was required to take before he could say that he had exhausted all internal remedies available to him before filing this claim in court.

30. In this case where the Claimant was dismissed and his closed on 1st March 2011, before such dismissal on allegations of gross misconduct, section 45(4) and (5) are important to refer thus;

> *(4) A termination of employment shall be unfair for the purposes of this Part where—*
>
> *(a) the termination is for one of the reasons specified in section 46; or*
>
> *(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*
>
> *(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the* ***Industrial*** *Court shall consider—*

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the*

communication of that decision to the employee and the handling of any appeal against the decision;

b. *the conduct and capability of the employee up to the date of termination;*

c. *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

(f) the existence of any pervious warning letters issued to the employee.

31. Under the applicable law as of 1st March 2011, the Employment Act, 2007 the Claimant was entitled to fair administrative action and further fair labour practices as under article 41 of the constitution as held by this court in the case of **Elizabeth Washeke & Others versus Airtel Networks (K) Limited, Cause No. 1972 of 2012.** In this regard, an employer who terminates and employee without consideration of the provisions of section 46 of the Employment Act, acts unfairly as outlined under section 45 of the Act. The procedure adopted by the employer comes into question and the court must assess how such a decision was arrived at even where the employer such as the 1st resplendent rely on the provisions of the Public Service Act that apply to public servants. Whatever action was taken by the 1st Respondent against the Claimant once he was placed on suspension, such action/procedures/process must comply with the law. The employer is allowed to follow all the internal procedures permissible under policy of applicable law, but such policy and law must comply with the employment law. The appeal of the Claimant was dismissed in 2008 when the Employment Act was already in force. Such a procedure, such as the appeal considered, required that the same be heard by the call of the claimant. in any event, when the Claimant was suspended in 2003 following his being charged in a criminal case, the suspension was to allow for further investigations. A suspension in itself is not an admission of guilt with regard to employment relations, such action is allowed to permit the employer to investigate the subject matter at hand whereupon the employee is then required to show cause where the investigations undertaken result in the finding that there is a good case made against the employee. This was the basis of the holding by this court in the case of **Frederick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR** and also reiterated in a similar case of **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the court held;

> *Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.*

32. Due process thus requires that once an employee is placed under suspension, such an employee must be recalled to show cause and where such show cause is issued, fair administrative action must comply with the provisions of section 41 of the Employment Act. The employee must be heard in person and in the presence is his representative. Such a provision in mandatory and not subject of any alternation by any policy or law that is contrary to the Employment Act, 2007.

33. Also fair action as under section 45(5) of the Employment Act requires that the employer must consider the previous conduct of the employee before dismissal or termination. In this case, I find no evidence that before the criminal charges were levelled against the Claimant that he had a previous poor record at his workplace or with regard to his work performance. The criminal allegations were in any case discharged and this cannot form a proper poor record as under section 45(5) (c). The Claimant gave

evidence that he had performed his duties diligently until her was arrested and arraigned in court, he was young and had hoped to remain in such public service until he retired. He had no previous warnings or disciplinary action against him. such are matters that the employer should consider before terminating an employee which i find was not put into perspective in this case.

34. I note the Respondents opted not to call any evidence in support of the defence herein. Even where the Respondents reserve the right to call or not to call any evidence, section 45(5) (d) requires that in a case such as this one the employer must establish how they have dealt with similar cases as concerns the claimant. What happens when an employee is alleged to have been in gross misconduct? Is it the practice of the Respondents to dismiss such an employee without being heard and without consideration of their conduct and capabilities? This is the duty of the employer to outline to the court. However where such evidence is lacking, this must work to the advantage of the employee such as the claimant. I take it then at the time the Claimant was dismissed, his appeal rejected and also his review application not allowed, no substantive reason or reasons existed that were brought to his attention in compliance with section 41 of the Employment Act. Even at the time the review application was rejected on 1st March 2011, due process was not followed as the Claimant was never called to argue his case and the decision made was not outlined as to the reasons for rejection. Whatever action then that the 1st Respondent and by extension the 2nd Respondent took, it lacked merit and was substantively unfair under the Employment Act, 2007.

Remedies

35. The Claimant is seeking to be reinstated back to his position. It is noteworthy that the claim for reinstatement falls under the operative section of the law that outline the jurisdiction of the Court that is section 12 of the Industrial Court Act. Even where the cause of action arose on 1st March 2011, the last day at work for the Claimant was way back in 1999. This time period is crucial when the court is considering a claim for reinstatement as this is regulated in law. This cannot be granted in this case as to do so would be to ignore the jurisdiction and mandate of the court. That said, the court is not powerless, as there is consideration for alternative and appropriate remedies where a reinstatement is not awarded. Terminal dues that the Claimant is entitled to from the time of his suspension up and until the 1st of March 2011 is due and owing together with all the increments and benefits that arise within this period. This is awarded in place and instead of a reinstatement.

36. On the finding that the Claimant was unfairly terminated, he is awarded his six (6) months' salary that was due as at 1st March 2011.

37. The Claimant is also seeking to be paid general damages. Though the Claimant outlined his pain and suffering during the entire time he has been out of employment, in employment relations, an employee must mitigate any loss that arise out of dismissal even in a case where such an employee is seeking reinstatement. To seat back and say that he will not do anything until the reinstatement is effected or until the court offers compensation or payment in damages is in essence to defeat the very case for an award for special damages. Where the Claimant was a professional trained in his job, had a good career going for him and was at his prime age, diligence dictated that he should seek for alternative employment unless there is evidence that the Respondent as the former employer was interfering with such search for new employment. the Claimant does not find favour in his failure to mitigate any loss or general damages that the court may consider and this will not be considered as a remedy available to the claimant. seeking new employment pending hearing and determination of a matter pending in court is not an offence and is highly encouraged as the employee/litigants remains engaged and sharpening his skills and trade with current knowledge ready for the market and emerging labour demands. Such an employee remains a resource to his country and finds high favour in a case for re-engagement as he is not seating idle. The only exception is where an employee is on suspension or has been interdicted as such an employee remains the employee of the suspending entity, the employer until a sanction such as dismissal or termination is effected. Such an employee cannot go looking to new employment as they must wait for the outcome decision of the cause for their suspension or interdiction. The claimant was suspended and then dismissed. in his case, reason called for him to look for alternative employment.

38. Noting that this is a case of both procedural and substantive injustice as the source of the unfair dismissal, the terminal dues owing to the Claimant shall be paid with interest as this should have been paid as and when they became due that is 1st March 2011.

Judgement is entered for the Claimant against the Respondents in the following terms;

a. **a declaration that the Claimant was unfairly dismissed from his employment;**
b. **the Claimant is awarded compensation at 6 month's salary as at 1st March 2011;**
c. **the Claimant shall be paid his full terminal dues that include salaries not paid and running up and until 1st March 2011;**
d. **the computation of compensation as (b) above and the due salaries owing as (c) above is based on the amounts payable to similar employee and grade as the Claimant was situate and should have been paid as of 1st March 2011;**
e. **amounts due at (d) above shall be paid with interest at current court rates;**
f. **amounts due herein shall be subject to section 49(2) of the Employment Act.**
g. **As the amounts and dues above have to be computed, based on salaries due and comparable terms that the Claimant should have earned as at 1st March 2011, the due computation shall be entered into and the court shall mention the matter in 60 days to confirm the same.**
h. **Each party shall bear its own costs.**

Delivered in open court at Nairobi this 2nd Day of March 2015.

M. Mbaru

Judge

In the presence of:

Lilian Njenga: Court Assistant

Such submission is way out before the Claimant was employed. I take this to be a gross error