



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1001 OF 2012**

**FREDRICK ODONGO OWEGI ..... CLAIMANT**

**VERSUS**

**CFC LIFE ASSURANCE LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. On 13<sup>th</sup> June 2012 the claimant Fredrick Odongo Owegi filed his memorandum of claim for unfair termination and unlawful termination of his employment by the respondent CFC Life Limited. The defence was filed on 23<sup>rd</sup> July 2012 admitting that the claimant was their employee and was terminated for wilful neglect of his duties and after applying fair procedure. The claimant gave his sworn evidence in support of his claim while the respondent called four witnesses in support of their defence being Elina Masite, Alex Amollo, Juliana Nguli and Musili Kivuitu. After the hearing both parties filed their written submissions filed on 25<sup>th</sup> February 2014 and 10<sup>th</sup> March 2014 for the claimant and respondent respectively.

**Claimant's case**

2. On 2<sup>nd</sup> August 1978 the claimant was employed by the respondent as a Card Filing Clerk and was promoted through the ranks over the years becoming the Supervisor, Assistant Manager Marketing and eventually as the Manager for Premium Processing/Agency Services (PPD). The salary was adjusted over the years to Kshs.308, 862.00. All along the claimant was under a contract which stipulated that his employment could be terminated upon giving reasons and reasonable notice. On 29<sup>th</sup> November 2011 the claimant received a caution letter from the respondent claiming that he was not responsive towards work and lack of awareness of what was happening in the department the claimant headed. He was suspended as a result on 6<sup>th</sup> February 2012 when the claimant received a letter from the respondent stating that he had been negligent in his duties leading to loss of company funds. That the claimant had not done his duty to ensure a strong control environment in the department he headed. In response the claimant denied the claim of negligence of duty and stated that he had informed his supervisor about the loss of cash through cancellation of receipts. On 26<sup>th</sup> March 2012 the respondent terminated the claimant from his employment with them after persuading him to resign. There was no hearing prior to the termination which breached the contract between the claimant and the respondent with regard to his employment.

3. The claimant also states that his employment was on permanent and pensionable terms but was terminated without any justifiable cause or a hearing. He had served for 33 years and the unlawful termination was thus malicious, in bad faith and unfair. The particulars of malice are that the respondent unfairly accused the claimant of authorising vouchers without confirming the source of funds, that the

claimant did not disclose any issues with the superiors touching on the matter yet the raised issues of cancellation of receipts with his superiors, upon suspension the claimant was immediately replaced in his position and also that his termination was for reasons that were not articulated as what he was suspended for was not similar to what he was terminated for. Other reason that indicates malice is that the claimant was said to have shared his pass words which was not the case.

4. These malicious allegations caused the claimant loss and damage. The particulars of loss and damage are that the claimant lost a promising professional career, salary, allowances inclusive of benefits and increments for the remainder of the duration of his term to retirement, pension dues noting the claimant had have to work until retirement. The claimant is thus seeking the following;

- a declaration that the claimant dismissal by the respondent is unlawful and unfair
- reinstatement of the claimant to his previous post without loss of any benefits
- in the alternative, payment of the following benefits
- compensation for unlawful and unfair termination
- severance pay of 1 month for every year worked
- salary inclusive of allowances and benefits for the remainder of the period the claimant would have worked until lawful retirement at kshs.32,121,164.80 expected retirement being November 2020 at the age of 60 years
- entitlement to yearly increments covering the remainder period to retirement
- CFC Life pension contribution to the kitty calculated at the rate of 10% of the monthly salary for the remainder of the working period i.e. Kshs.3,121,164.80
- Annual bonus at the rate of Kshs.308,862.00 for the remainder of the working period Kshs.3,088,620.00
- Club annual subscription at Kshs.31,500.00 for the remainder of the period Kshs.283,500.00
- Annual leave allowance at Kshs.77,215.50 for the remainder of his period Kshs.694,939.50
- Any order for costs and interest.

5. In his sworn evidence the claimant stated that he is currently without a job after he was terminated by the respondent. He was employed on 2<sup>nd</sup> August 1978 as a Records Clerk and for 34 years he diligently served the respondent in various capacities his last position being the Manager Premium Processing Department (PPD). This followed promotions which came with a salary increment and in 2006 he was recognised for his sterling performance and was sent to Cairo, all expenses paid. In 2007 he was again recognised for good performance and was sent to South Africa for training on a new system the respondent wanted to introduce.

6. In March 2012, the claimant was terminated. This followed events that started on 2<sup>nd</sup> November 2011, the claimant was called by Juliana Nguru and his supervisor Amollo who indicated to him that there were complaints against him from the Director of Sales and Distribution an expatriate from South Africa and a new employee of the respondent. The complaints were that;

- Agents fees for some months were not done due to claimant's laxity
- There were issues with regard to premium dues remitted to CFC Stanbic bank that the claimant never informed management
- Some personal policies had lapsed
- The claimant was not in touch with staff in his department
- The claimant had failed to ensure minimum receipts into the suspense account as the department manager; and
- The claimant had failed to give facts as they are however bad they may be.

7. The claimant had no notice of these complaints before this date. Most related to routine matters. As a result of this meeting, the claimant was given a caution letter for lack of being responsive in his areas of responsibility. This was the first caution letter in the career of the claimant. This was noting the claimant's duties in PPD as;

- to ensure healthy relations with other institutions

- sustained efforts in suspense account
- bank reconciliations
- management reports
- performance management and motivation for staff

8. These as the core duties of the claimant and to the best of his abilities, he did well.

9. Following the caution letter issued to the claimant, he was to be reviewed by his supervisor on 16<sup>th</sup> December 2011. Upon this review the supervisor noted that the claimant had met expectations with an overall score of 2.5 out of the 5 key performance indicators set. On this score the claimant was entitled to a pay increase but he was terminated.

10. The claimant had staff working under him who had each a job description and a set key results areas for each year. There was a Deputy Manager and a Team Leader who took care of staff while the claimant was at a higher level of management of the department.

11. On 6<sup>th</sup> February 2012, the head of Risk Department called the claimant, got into a vehicle and off they went to the Reinsurance Regulatory Authority offices and were directed to meet Corporal Kanake of insurance Fraud and the claimant had to record a statement. The claimant had no prior notice of knowledge as to why he had to go to the Insurance Fraud police but he complied and did a statement based on questions posed to him. This took place from 9.30am to 2.30pm. Upon return to the office, the claimant found his office profile had been disabled and when he contacted the ICT department they could not help. When the claimant made an Enquiry from human resource office, he was issued with a letter dated 6<sup>th</sup> February 2012, a suspension letter. The suspension was a result of what the respondent said to be the claimant's loss of premiums and pending investigations on the same. The claimant was also asked to hand over all respondent's property and to vacate the respondent premises and 3 security officers followed and led him out.

12. On 22<sup>nd</sup> February 2012 the respondent called the claimant to attend a disciplinary Enquiry committee. At the meeting, different issues were addressed but the claimant was never issued with any report with regard to the investigations that were being conducted on the loss of any premiums that related to his letter of suspension. On 9<sup>th</sup> March 2012, the claimant was issued with a Notice to Show Cause (NTSC) which outlined 8 issues that he was supposed to give a response all with regard to negligence of duty leading to loss of company funds;

- The first was that he approved corrections on vouchers that credited policies while debiting others that were not related and authorised the vouchers without confirming the source of the funds without giving explanations to the reversals and the claimant responded that this was a general statement without details and or particulars and he could not be able to give a good response;
- The second issue was that the claimant failed to disclose his concerns to his supervisor and superiors on customer complaints with regard to cancellation of receipts whose payments were made in cash and the claimant responded that he had discussed the issue with his supervisor Alex Amollo and sent an email as follow up seeking guidance on the matters;
- The third issue was that the claimant failed to apply controls in reconciliations of cash and cheques receipts for purposes of their being uploaded and thus there were overriding of controls by the staff in the claimant's department which was negligent and an indication that the claimant was not in control of his team and the claimant responded that he had a team leader who was responsible for all reconciliations of cash and cheques and the function of uploading was to be done by the team leader and the deputy manager;
- The fourth issue was that the claimant did not enforce punctuality and time management of his team where the cashier used to report to work late and leave any time without caring and the claimant did nothing about it and failed to caution, warn or escalate the matter to the supervisor or superiors and the claimant responded that he never received any reports of lateness to work or lack of time management by any cashier from the team leader or the deputy manager in his department;
- The fifth issue was that the claimant transferred the cashier from processing check offs to the

cashier duties to avoid his sneaking in and out and did so without consideration of the cashier competence and integrity this being a sensitive position and failed to document the cashier behaviour and seek approvals of the human resource department and the claimant responded that he was not conversant with the complaint as the subject cashier had not been named and with regard to Duncan, the cashier in his department, he had been appraised by the deputy manager and found to be effective;

- The sixth issue was that the claimant neglected his duties when he failed to ensure proper reconciliations of the cashier's journals and banking by not signing the log book on a daily basis or failing to ensure it was signed as the supervisor and thus an omission that caused the cashier to reverse payments made in cash without accounting to where these cash went causing huge losses to the respondent in terms of reputation and cash losses and the claimant responded that the team leader was responsible for signing the log book on a daily basis and the criminal acts by the cashier were not undertaken on behalf of the claimant. the claimant also noted that at this time in 2011 the respondent was doing business reengineering and there were experts from South Africa undertaking this process that involved the claimant and there was time he never checked or reviewed the logs which was noted in his appraisal for 2011 by the supervisor ;
- The seventh issue was that the claimant abetted irregularities by the cashier by allowing him to call for cancellations or receipts contrary to the requirements that emails be sent prior to such cancellations and thus failed to apply controls which required all documents be done regarding cancellation of receipts and the claimant responded that he did not abet any irregularities as there are cashiers from Nairobi, Kisumu, Nakuru, Eldoret and Mombasa all who called to request for cancellation or receipts issued in error as all cancellations were to be processed at from the Head Office and where one cashier decided to be dishonest, the claimant had no way to know. At this time the claimant and the team leader had new computers that were not loaded into the system and hence the uploads were done by the deputy manager and the ICT department was aware of this fact; and
- The eighth issues was that the claimant the staff in his department were sharing passwords contrary to company policy and the claimant responded that he was not aware of the practice as passwords were personal and confidential.

13. The claimant also gave evidence that after the NTSC was issued and he submitted his responses thereto, there was no further communication to him. He was never called to address his defences. On 28<sup>th</sup> March 2012 he was given his termination letter. Prior on 9<sup>th</sup> march 2012 the Human Resource manager Juliana, called the claimant and asked him to resign but he could not do that as there were staff who had been found with more serious issues like fraud and had not been forced to resign and therefore the claimant refused to tender a resignation. To take the action of resignation would be an act of coercion yet the claimant felt he had not been heard after the NTSC was issued to him.

14. In the letter of termination, the reason was not indicated. The cashier who committed fraud was charged in criminal case No. 164 of 2012 which case is still pending and part of the evidence the respondent and the Anti-Insurance Fraud department is relying on is the statement the claimant wrote with them. The claimant was not charged and for the respondent to use this reason to terminate him was an act in malice. This malice can be outlined from the fact that when the claimant received his NTSC letter dated 9<sup>th</sup> March 2012 he was supposed to respond by 15<sup>th</sup> march 2012 which he did on 12<sup>th</sup> March 2012 3 days in advance and by this time the respondent had issued a circular in the entire office indicating that there was a new person appointed in his place as PPD and indication that a decision had already been arrived at to terminate him. Also other staff in the claimant department who committed fraud was never terminated. At this time the claimant was 51 years old and had hoped to retire at 60 while in the employment of the respondent where he had already served for 33 years. His monthly salary at the time was kshs.308, 862.00

15. The claimant is therefore seeking for orders that the respondent should pay him for loss of salary for 9 years not completed until retirement; seek the court to declare that he was terminated unfair and compensation for unfair termination. The claimant also lost various allowances due to the termination that should be paid to him for the 9 more years he had expected to serve the respondent.

16. The claimant also states that the respondent shred al email to all staff which has damages his reputation in the entire industry. He has met former colleagues in court during the hearing and they refuse to greet him which has made him feel unwanted. He is unable to get another job due to this email circulation and this has greatly aggrieved him. He is advanced in age and may never be able to realise his dream to get a job in the sector he has served all his life. He should be compensated for this damage.

17. In cross-examination the claimant confirmed that until 2<sup>nd</sup> November 2011 he had worked well in his department and his team at PPD. He was called for a meeting to which he had no prior notice as to the agenda and was surprised that the meeting was set to discuss him after a staff had complained against him. All the issues raised were addressed especially the premiums processed at the time of cut off; payments from banks orders with regard to various banks were not all processed and there was a good reason for this as it would not have been possible to process all at the time of cut off. This was information within the knowledge of the respondent. The respondent was receiving credits but needed to review all bank statements for the details especially the policy numbers to facilitate allocations but in some instances money was deposited without all the details and the claimant had to make follow ups with each bank to follow the deposits vies-a-vies the premium and policy number details. There were so many cases of this kind and where the claimant failed to trace all the details, the funds were placed in the suspense account pending more investigations. The claimant had been able to raise this issue with the Kenya Bankers Association as an issue that affected insurance industry. The respondent kept a long list of unidentified funds from various banks into the suspense account as there was no policy number.

18. The claimant also stated that all agents were paid their commissions and even where the premiums are not collected and processed, their dues are not lost. This was eventually traced after reconciliations. These payments were affected by the cut-off date. Due to increased work the human resource office hired casuals to help while the claimant was involved in the business reengineering process that the respondent was going through in 2011. Before the claimant got the caution letter there had been not prior issues with regard to his performance or work. Under him there was a team leader and deputy manager who had specific tasks and the claimant was overall supervisor. When a complaint was done the team leaders was to address before escalating to the claimant.

19. In the case of cash losses and the complaints by an agent that the receipts had been cancelled, it involved a cashier Duncan and when the claimant commenced investigations, this cashier resigned. The claimant informed the Risk Department as the team leader was to handle the matter under the claimant's directions as he was not the direct contact with this cashier. That after the caution letter, the claimant was never called for a hearing of his case, there was a NTSC followed by a termination letter.

### **Respondent's case**

20. The defence case is that the claim for unfair termination of the claimant is denied. There were weighty issues in the claimant's performance of his duties in his department and upon investigations it was found that there were deficiencies and negligence by the claimant and thus the termination was lawful and justified. The respondent called 4 witnesses;

Elina Masite from the Forensic Audit Department;

Alex Amollo head of Operations;

Juliana Nguli the Human Resource Manager; and

Musili Kivuitu from the Risk Department.

21. In the statement of defence, the respondent stated that the claimant was their employee since 1978; he rose through the ranks to become the Head of PPD with duties of;

Collecting premiums through branches and cashiers at the head office;

Check off collections, bank orders, direct debits and MPesa;

Sending short messages to customers whose unsuccessful collections had been rejected

Working closely with the retention department;

Ensuring healthy relations with banks, government and other institutions for timely collection of premiums;

Ensuring that there was sustained effort in reducing funds in system suspense account;

Ensuring bank reconciliations are done on daily basis;

Ensuring effective performance management for all staff in order to maintain the required level of motivation and staff development;

Update the premium processing manual;

Investigate cases of premium impropriety and give reports to the finance Manager;

Ensure general complaints from the field force are acted upon within 48 working hours;

Ensure log books are up to date;

Ensure that banks reconciliations are done daily; and

Review suspense balances daily.

22. The respondent also stated that the claimant was not working hard; he displayed a lazy and hands-off attitude towards his duties and effectively lost touch and control of his department. The PPD deals with receipt of money, highly sensitive requiring a person to closely monitor and lead the members of staff under the department to avoid cases of impropriety. As the head the claimant was to ensure that all controls were in place and where these controls lacked, he was to address the same with respondent management which he failed to do leading to fraud and losses. The claimant was terminated due to neglect of his duties which showed incompetence or failure to apply professional judgement resulting in the tarnishing of the respondent's name.

23. The respondent also stated that the claimant wilfully neglected to perform his duties, was careless, failed to put in checks and balances as controls in his department to curb cases of fraud. While knowing that Duncan Ngwae had integrity issues, the claimant moved him irregular to the cashier position where he operated without supervisor or monitoring causing cancellation of receipts, concealed complaints, the claimant failed to reconcile accounts and check on the log books to keep it up to date leading to loss of funds. Had the claimant been diligent and performed his duties are required, fraud would not have been avoided.

24. Before the claimant was dismissed the respondent applied fair procedure. Investigations by forensic audit released a loss of kshs.1,032,818.84, on 22<sup>nd</sup> February 2012 the claimant went through a hearing process, on 9<sup>th</sup> march 2012 the claimant was issued with a NTSC to which he gave his responses and the same found unsatisfactory hence termination on 28<sup>th</sup> March 2012. The respondent did not act in bad faith and there was no malice against the claimant. There were weighty issues that related to the claimant's neglect of his duties that caused loss to the respondent. The claim should therefore be dismissed with costs to the respondent.

25. In evidence Elina Masite gave her sworn statement that she is the respondent Regional Manager in Forensic Audit. On 16<sup>th</sup> November 2011 she was instructed by Head of Risk Department, Musili to

commence investigations of suspected misappropriation of funds paid as premiums by clients. An agent had complained to the team leader in PPD upon failure to get due commissions on paid policies. Within this time the cashier responsible Duncan Ngwae resigned without notice and without allowing full investigations to complete. A client Valarie Wambu had paid Kshs.14, 600.00 in cash and her agent came to complain about her unpaid commission. The client had a receipt but the respondent receipt had been cancelled. She was to look at this transaction but go further and investigate all cancelled receipts running from August to November 2011. They were to address the circumstances of the losses and potential loss of cash and the extent these losses were being hidden; to qualify the amount lost; establish if there was fraud involved and staff level of complicity; established whether respondent policies were applied; and to assess whether the controls in place were adequate to prevent fraud. They were to investigate the activities of the cashier Duncan Ngwae, Morris Oondo the Deputy Manager PPD, the claimant as the head and Grace Karige the team leader in PPD.

26. The investigations noted various discrepancies where cash had been paid but the receipt later cancelled by the cashier and when complaints were lodged to the team leader she informed the deputy manager and then the claimant. The banking slips were not attached to the journals used for banking and the cancelled receipts were not accompanied by email to confirm authorisation. Some back up hard copies were also missing. Some receipts that went to ICT for upload were backdated. The cashier log book was not signed by the department manager on a day to day basis for most of August to October. The cash and cheque collection were processed by a cashier whom was to be supported by the in-house system which was not done and it became impossible to trace any errors. The only staff who had authority to authorise cancellation of receipts were the claimant and his deputy but this role was not done well. All collections for the day were to be verified using the cash receipts, cancelled receipts banking slips and an analysis for reconciliation then uploaded to the internal system which was to be done daily.

27. After the investigations, it was established that 64 receipts had been cancelled irregularly while the cashier sent for upload wrong policy numbers and amount of policies whose receipts had been cancelled and the cashier had incompatible duties that enabled him to circumvent procedures and manipulate the contents of files that he extracted from his work station once he received cash payments from clients. He did these irregular acts by manually inserting policy numbers and vouchers of cancelled receipts which differed with the required details. He deleted his mail box. No reconciliations were done on a daily basis while the deputy manager cancelled most of the receipts.

28. When the team analysed the documents they made a finding that there were instances of documents manipulation by the cashier by manual insertion of figures and dates. There were in total 11 cashiers who issued 319 receipts that were eventually cancelled. Duncan Ngwae issued 164 of these receipts. The impact of this is that the respondent was in potential danger of cash loss and reputation damage.

29. The root causes of these problems were staff circumventing of controls in processing data, all staff sending documents for upload, not signing the cashier logs, no performance checks and head of department was not alive to the risks attendant to the cash receipting function and failed to detect overrides of controls. After the investigations the forensic audit recommended that there should be daily reconciliations, a background check on staff handling cash be done, surprise visits by head of departments to supervise their staff, daily reconciliations by the supervisor, supervisors to sign receipts for accountability once it has been cancelled and to keep a separate log for audit, end of day reports and CCTV cameras in cash office to monitor all activities. They also recommended disciplinary action against Duncan Ngwae, Morris Oondo and the claimant for negligence of duty in his department.

30. The second witness was Alex Amollo the respondent head of Operations and the claimant was reporting to him. He appraised the claimant who was doing well but his last score was 2.5 as he was between the range of having 'fully met his expectations' and 'met expectations'. Each employee did his job description and discussed with supervisor for confirmation. There were also annual key result areas (KRA) and for the claimant his were;

To ensure all check off Payments are receipted within two days and records updated within three days;

Engage with BPR team to ensure shut down of OLAS;

Manage suspense balances;

Make at least two visits to every agency during 2011;

Review log books to ensure accuracy and completeness;

Concert banker's orders to direct debits where direct debit arrangement exists;

Ensure bank reconciliations are up to date; and

Encourage premium processing staff to take necessary steps towards professional qualifications.

31. The claimant performed well but there were issues with cancelled receipts when clients paid in cash and the staff in PPD misused these funds or failed to account for them. The regional director for Distribution also complained that agents were not getting their commissions as premiums were not being processed and when the witness asked the claimant, he got misleading information. On collection of premiums from Stannic Bank, the claimant reported that all was well but upon investigations there was so much deposit into the suspense account. Also those agents who had paid for their policy premiums did not get commissions on time and upon asking the claimant he learnt that 9000 premiums had not been processed which had not been raised with him as the claimant's supervisor.

32. The witness decided to hold a meeting with the claimant and Mr Hendricks on 2<sup>nd</sup> November 2011 where he noted that the management was not being informed on what was happening in PPD. The claimant admitted at the meeting that there were challenges in his department and thus a caution letter was issued to him and he was to report and be reviewed after one month. The witness noted that at this time there was no report of fraud but one crucial role that the claimant was to play was to ensure reconciliations were done as this would inform the respondent and policy holders of the current status of premiums on a daily basis.

33. After the caution letter, the claimant improved on his work especially in premium processing and collections from the bank. Later in November the witness learnt that there was a client who paid premiums and was issued with a receipt but was later cancelled and the commission was never processed as a result. He got the forensic report and there were findings indicating that the controls were weak. This affected the claimant's work as the person responsible in his department. Had he put in proper controls there would not have been losses. The claimant may not have had all the details but when losses were detected he failed to take action. He did not do daily reconciliations to confirm what was taking place to avert these losses. There was also override of duties. The significance of this was that the respondent had lost funds, damaged reputation and at risk of losing business to competitors.

34. The respondent thus decided to suspend the claimant in February 2012. This was to facilitate more investigations of the losses in PPD. Other staffs were also suspended. The subject cashier Duncan Ongwae had resigned and the suspension affected the team leader and the deputy manager.

35. The claimant was called to the disciplinary hearing as recommended from the forensic audit. This was to address the allegations of fraud and the role the claimant played as the head of the department. From the hearings it was established that the claimant moved the cashier without proper procedure; the claimant was aware that this cashier lacked integrity but did nothing and the finding was that the claimant was negligent of his duties but had not committed fraud. In the circumstances and based on respondent policy on negligence on duties was to give caution, verbal warning, written warning and final warning with termination. The failures of the claimant were of misconduct and the sanction was dismissal.

36. The third witness was Julian Nguli the respondent Head of Human Resource. That she worked closely with the claimant who consulted her on issues of staff as the human resource officer but in this case with regard to the activities of Duncan Ngwae, the claimant did not consult. When Duncan resigned

she called the claimant to know the reasons when the claimant indicated that he was investigating a case of lost cash. As the person responsible for hiring staff she had not been informed that Duncan had been moved in to the PPD as a cashier as there was no record. Before her office had been consulted in the hiring of the team leader in PPD and Duncan had been a candidate who ranked first but the claimant rejected him stating that he had a bad reputation and poor attitude to work and thus the third placed interviewee Grace Karige was taken as PPD team leader.

37. The witness also stated that the claimant was the responsible person in PPD; he worked closely with the cashier. Apart from failing to apply due process in transferring the cashier the claimant had other issues following complaints. On 2<sup>nd</sup> November 2011 the Managing Director asked the witness to have a meeting with the claimant which was held together with his supervisor Alex Amollo, Musili and the regional Sales manager Hendricks. The meeting covered several areas on collection of premiums with CFC Bank, lapsed policies and the suspense account, uncollected premiums that were received at the bank, concerns that the claimant was not fully aware of what was going on in his department, the claimant failure to escalate a case where a client had not been allocated a policy yet payments had been made. At the meeting the claimant confirmed that he had been too busy with the BPR process that related to all departments and apologised for the delays in policy allocations and agreed to attend to his duties diligently. A caution letter was therefore issued following this meeting.

38. On 17<sup>th</sup> November 2011, Duncan the cashier resigned and submitted his letter to human resource dated 15<sup>th</sup> November 2011. She rejected the letter and called him back to change the dates. In the meantime she called the claimant seeking for more information on the cashier but the claimant had no information on the resignation but noted that he was investigating cash losses related to the cashiers work. The Risk and Compliant department were already aware and were also doing their investigations. This was followed with a forensic audit on cancellation of receipts, manipulation of records and manual insertion in vouchers.

39. The witness updated the managing director and it was agreed that a disciplinary committee be constituted to address all the issues from the forensic report audit. The claimant as the head of the PPD was taken through the hearing process. He was found to be negligent of his duties. By transferring the cashier whose integrity was questionable to which the claimant was aware, the claimant was held responsible for neglect of his duties as his actions caused the respondent to loose funds and reputation. Also questioned was the team leader and the deputy manager.

40. The findings with regard to the claimant were that he was not personally involved in any acts of fraud but he was negligent as the head of the department, PPD. He was found as too trusting of his team while his KRA were to check the log book which he failed to do and had he checked, he could have detected the losses. It was also established that there were cancellation of receipts by the deputy manager and the claimant did not take any action. It was also established that the claimant placed Duncan as the cashier in PPD without prior consultations with human resource office. It was further established that the transfer of Duncan to cashier function was as a result of being ineffective in his previous department yet there was no caution, warning or record of these events. Thus the claimant had failed as a manager and the impact of it was that the respondent incurred losses of 4.1 million.

41. Following the hearing process the claimant was placed on suspension and was later issued with a NTSC, the claimant gave his responses which were mere denials. While the claimant was on suspension, it became necessary to appoint another staff in an acting capacity to take over the claimant duties as the PPD was a key department to the respondent.

42. In cross-examination the witness also stated that the claimant as the manager of PPD had a responsibility to do a background check of staff in his department and follow the day to day work to ensure that all was well and each staff was performing as required. The claimant had specific KRA that he had to deliver on and could not be delegated. When the issue of loss of funds through the cashier was reported to the claimant by the team leader, an issue that related to fraud, the claimant took too long to manage the issue noting the policy was to immediately escalate such matters to Risk and Compliance department. The claimant's termination was therefore based on his lack of attention in the discharge of his

duty. He abetted irregularities when he failed to sign the log books and ensure bank reconciliations on a daily basis. When the claimant was unable to handle issues in his department he failed to escalate to his supervisor for assistance.

43. The fourth witness was Musili Kivuitu the respondent head of Risk and Compliance. He worked closely with the claimant especially on internal controls. In 2009 the respondent closed two branches in Thika and Kisii the clients were asked to pay premiums through CFC Stanbic Bank with branches in these two towns. The claimant was involved as he was the person to ensure collection of the premiums. In 2011 the respondent stopped CFC Stanbic Bank from collecting the premiums due to operational challenges and the claimant was very helpful in managing the issues. He was to monitor the accounts of premiums given that he had the most experience with the various banks and the nature of respondents work interests.

44. Later the claimant admitted there were problems. When the witness checked through the monitoring system, he noted the collections from Thika and Kisii were not done as expected. The claimant indicated that all was well but when he was confronted in a team meeting he admitted all was not well. This was in October 2011 and in November 2011 there was a follow up meeting where the claimant was given a caution letter. This was also followed by a disciplinary hearing following a case of loss of funds by a cashier under the PDD where the claimant was responsible. A client had complained over a cancelled receipt, the agent responsible followed it up with the team leader and this was escalated to the claimant who did not take immediate action. The ICT team also noted there were anomalies in the uploaded documents from PPD and informed the witness. The complaint and the subsequent issues were brought to the attention of the witness on 15<sup>th</sup> November 2011 by the team leader and he directed for investigations by the forensic audit team. Only one case had been reported but the forensic audit and the finance department noted 63 other cases.

45. The matter was also reported to the Anti-Insurance Fraud unit on 22<sup>nd</sup> January 2012. Several employees of the respondent went and wrote their statements. The requirement was not to give prior information on these investigations to avoid staff collusion.

46. On 6<sup>th</sup> February the managing director of the respondent called a management meeting to discuss the recommendations from the forensic audit report and it was agreed that the claimant and others in his department should be suspended to facilitate investigations. By 14<sup>th</sup> February 2011 the investigations were complete while the Anti-Insurance Fraud Unit investigations were still ongoing and they charged the cashier Duncan Ongwae. The claimant was to answer on negligence of duty as head of PPD that had led to breakdown of controls leading to fraud by the cashier.

47. The claimant was called for a hearing. This followed the respondent establishing that the claimant had failed in his duties to ensure effective controls were in place to prevent fraud. There were no log book reviews to ensure all funds were accurate. The logs were reviewed by the deputy manager but the claimant failed to follow up as the head of department and as per his KRA. Bank reconciliations were not up to date and had this been done the fraud could have been detected immediately in August 2011 when it started and not in January 2012 when the finance department made investigations. The disciplinary committee hearing was therefore proper in their finding the claimant to have been negligent in his duties. It recommended his case be dealt with per company policy. A NTSC was issued and the claimant replied with mere denials. The respondent then decided not to dismiss the claimant for gross misconduct but issue a termination and pay in lieu of notice in recognition that the claimant had served the respondent for long. This followed the respondent employment policy.

48. When the claimant was suspended another employee took over his duties in an acting capacity as this was a critical department of the respondent and could not remain vacant. There was no malice in taking this new person to act. That the respondent is not liable for any malicious acts against the claimant and there should be no pay as claimed by the claimant the only benefit upon retirement is to get pension without the percentage from the respondent. The claimant is not owed any service pay and the contract of employment had a termination clause.

## Submissions

49. In submissions the claimant advocate stated that the claimant as the manager in PPD was suspended on 6<sup>th</sup> February 2012 and was to be reviewed after two months, he was never reviewed and on 9<sup>th</sup> March 2012 he was issued with a NTSC following forensic audit investigation which had not been shared with the claimant as he was still on suspension. The claimant respondent to the best of his knowledge, the respondent head of human resource called and tried to coerce him to resign and when he refused, he was terminated on the grounds that he lacked attention to his duties whereas he had been suspended for negligence of duty.

50. That in November 2011 the claimant had received information from his team leader that a cashier Duncan Ngwae had cancelled a receipt and there was a complaint from a client and the agent. The claimant took over the matter but the cashier resigned before the matter could be concluded. This was escalated to Risk manager within two days since the claimant got the information. The subsequent forensic investigations audit revealed that indeed the cashier was fraudulent, the deputy manager was negligent in his duties by cancelling receipts, never checked log book, failed to uploads correct information, failed to raise concerns with the Manager as head when he noted the cashier was not doing his work properly and failed to seek background information on cancelled receipts before his approval. The claimant had several officers below him, they never reported any case of impropriety upon which he could base his intervention or escalate to his superiors.

51. The claimant also submitted that the process applied in his termination was not procedural, upon his caution he was given time to address several areas in his department and was to be reviewed and before this could be done he was suspended and then issued with NTSC and then terminated. That this was a process commenced for witch-hunt with the sole purpose of removing him from his employment. This was contrary to the provisions of section 41 of the Employment Act. The functions that the claimant is alleged to have failed on were duties already assigned to other staff in his department and despite being the overall person responsible for the PPD, he cannot be held liable for the inaction of staff tasked to undertake these function and who failed. This also failed the test to be applied under section 45 of the employment Act where the reason of termination must be valid, fair and reasonable.

52. On the remedies the claimant is seeking, he submitted that he should be reinstated to his previous position as he is unlikely to get another job in the Insurance industry where he has worked all his life. The claimant relied on the case of ***Peter Mureithi Ngatia versus the AG Cause No.716 of 2011*** where the court reinstated a magistrate who was terminated while he was on leave. In the case of ***Zachary Ochaka versus KBC Cause No 1510 of 2010*** the court reinstated the claimant back to his position after a finding that the termination was unfair. In the alternative the claimant is seeking compensation for unlawful termination, severance pay of one month for each year worked, salaries inclusive of allowances for the remainder of the period the claimant would have served until retirement at kshs.32,121,684.00, yearly increments, life pension contribution, annual bonus, club subscription and leave allowances together with costs. The claimant should also be paid for three months' notice in lieu of notice

53. The respondent on their part submitted that the claimant was terminated from the employ of the respondent on 28<sup>th</sup> March 2012 for lack of attention in discharging his duties assigned to him as the Manager PPD. There was a job description for the claimant's position as well as KRA which he neglected occasioning the respondent loss of finances as well as reputational loss. On 29<sup>th</sup> November 2011 the claimant was cautioned following complaints from his department and was given two months to improve on his responses to issues arising from his department with regard to collection of premiums and lapsed policies. This followed two previous meetings with his superiors on his deteriorating performance.

54. On 16<sup>th</sup> November 2011, the forensic services were instructed to undertake an audit to investigate suspected misappropriation of funds following client complaints. This following a report by the team leader under the claimant's department, Grace Karige and the immediate resignation of the subject cashier, Duncan Ngwae. The investigations revealed that the respondent had lost Kshs.1, 032,818.84 between August and November 2011 through a scheme of irregular cancellation or receipts for cash payment. It was the duty of the claimant to trace and identify these cancellations, address them or escalate

to the management for action which the failed to do.

55. On 6<sup>th</sup> February 2012 the claimant was suspended to pave way for investigations on the loss of premiums. This was as a result of the forensic audit report that identified misappropriation of funds was due to override and circumvention of controls in data processing in PPD, cashier logs not being signed, there were no checks hence manipulations, the subject cashier had been moved irregular, and the claimant was not alive to the risks attendant to cash receipting as he had failed to detect override of controls. That the claimant had been negligent.

56. On 21<sup>st</sup> February 2012 the respondent held a disciplinary enquiry where the claimant was given an opportunity to make out their cases. On 9<sup>th</sup> March 2012 the respondent wrote to the claimant with details of complaints against him and as discussed in the disciplinary enquiry. In his response the claimant feigned ignorance and gave evasive answers. On 28<sup>th</sup> March 2012, the claimant was terminated.

57. The respondent also submitted that the termination of the claimant was fair and followed the provisions of section 41(1) of the Employment Act. Respondent also relied on the case of ***Alphonse Machanga Mwachaya versus Operation 680 Limited [2013] eKLR*** where the court held that for an employer to meet the legal requirements of legal fairness set out under section 41, the employer must demonstrate that they explained to the employee in a language he understood the reasons why termination was considered, there was another representative of the employee, a hearing was conducted and the internal disciplinary procedures were complied with. The respondent conducted an investigation where losses were noted, the claimant was heard on 22<sup>nd</sup> February 2012, a NTSC was issued to him where he replied and the respondent found the reply not satisfactory hence termination. This followed the respondent internal policy where there was gross misconduct. Due process was followed and since there claimant was on a contract which he failed to properly execute, he was cautioned to give him time to improve but there were intervening circumstances and no review was done, he was suspended and then terminated.

58. On the remedies sought by the claimant, the respondent submitted that on the question of reinstatement, the claimant was under a contract that stipulated that the same could be terminated upon notice of one month. The respondent relied on the case of ***Kenneth Karisa Kasemo versus Kenya Bureau of Standards, court of Appeal No.19 of 2012*** where the court held that employment does not envisage where an employee is forced upon an employer. That reinstatement is a remedy that should be directed in very exceptional cases and this is not one such case.

59. On the question of compensation, the respondent submitted that the termination was lawful and fair. Compensation only arise with regard to payment of wages due at the time of termination and the contract of the claimant provided for one month notice of payment in lieu. The claimant has admitted to receiving all his dues. The claimant for severance pay is not due as the respondent complied with section 35 of the Employment Act. The claim for salaries, benefits and allowances until age of retirement is denied on the basis that section 12 of the Industrial Court Act give the Court specific mandate which do not include the orders for payments for periods not worked. To so order would be to reinstate the claimant but without rendering any service to the respondent. The respondent relied on the case of ***D.K. Njagi Marete versus the Teachers Service Commission [2013] eKLR*** where the court held that an award for anticipatory salaries is not a reasonable remedy.

### **Analysis of the issues**

There are several questions that emerge in this case which can be addressed as follows;

**Whether the claimant committed misconduct or gross misconduct;**

**Whether the termination was unfair; and**

**Whether there are any remedies due to the claimant.**

60. The law now requires that before the termination of an employee the procedure applicable for termination of employment be followed. This is what would amount to procedural fairness as outlined under section 41 and 43 of the Employment Act. Upon an enquiry by an employer of the misconduct, poor performance or capacity questions against an employee, fair procedure must be followed. Where the question regard to an employee performance, an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews. It is not just enough to say that an employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the status required by an employer. This does not only affect new employees, the same standards apply to all employees. New employees require learning and being comfortable in their new work environment whereas old employees need to be updated with new and emerging labour demands at the work place. Hence training, on the job learning to improve performance is an ongoing process. See **Industrial Cause No. 1491 of 2011 Jane Frances Ominde Munyakoh versus Imaging Solutions Limited**. In **Ivetta mkala versus Nation Medial Group, cause No. 2367 of 2012** the court held;

*Subsection 41 (1) of the Act provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity the employer shall explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation. Subsection 41(2) requires the employer, before terminating the employment of an employee or summarily dismissing an employee under the section to hear and consider the employee's representations which the employee may have to make in view of the alleged misconduct or poor performance.*

61. poor performance in this case can be seen as the unsatisfactory job performance, a gap between the employee's actual performance and the level of performance required by the company. But for the company to rely on such a reason as the cause for termination the same must conform to Section 45 (2) (b) that the reason is a fair. This must be looked at in the context of each case noting the measures an employer has put in place to address the *poor performance* and the failure eont he part of the affected employee to improve or show a willingness to accommodate periodic review with regard to good performance.

62. Related to the employees conduct, capacity or compatibility, in this scenario, the burden of proof that there was a fair ground based on capacity rests on the employer. Was there an employment policy or practice to deal with poor performing employees that had been put in place for the claimant? Most employers put in place performance evaluation systems to ensure that this best practice is used to evaluate staff performance and that a fair process of review is guaranteed to each employee who is given an opportunity to improve their poor record. 'non-performance' on its own and without an outline as to the measures taken by an employer is not a valid ground for termination of an employee. This was the holding of this court in the case of **David Witachita Luhombo versus Kenital Solar Limited, Cause No. 833 of 2010**. I note in this case, the respondent had an appraisal system where the claimant scored 2.5, there were key results indicators he had to meet every year but these must be looked at in the context of the caution given to him on 2<sup>nd</sup> November 2011, the disciplinary enquiry he was taken through, the NTSC and the reason for his termination. The comments made in the claimants appraisal, those made for his caution and the eventual termination are not related. Each process was done on its own and to rely on the same to cite poor performance would be to defeat the purpose and milieu within which section 45 (2) (b) must be looked at.

63. With regard to an employee misconduct, the particulars of such acts of misconduct must be outlined clearly to an employee in a language the employee understands best and in the event such an

employee is unable to understand the same, a fellow employee/colleague must be called and in the presence of both, the same acts of misconduct explained to such an employee. In this case, on 28<sup>th</sup> March 2012, the claimant received his letter of termination. The reason for termination was noted at paragraph one as;

*Further to your suspension from employment and the subsequent disciplinary hearing held on 22<sup>nd</sup> February 2012, and your response to our letter dated 9<sup>th</sup> March 2012, the company has reviewed your employment contract and found that there was lack of attention in discharging the duties assigned to you as Manager Premium Processing. Consequently, your employment has been terminated with effect from the date of this letter.*

64 .Hence from this letter it can be surmised that the reason for termination was due to *lack of attention in discharging the duties assigned to you as Manager Premium Processing*. The respondent has cited the suspension of the claimant which was on 6<sup>th</sup> February 2012, which suspension was for the reason;

*I regret to inform you that a decision has been taken to suspend you from your employment with immediate effect pending investigations on losses of premiums.*

65. After the suspension, on the 22<sup>nd</sup> February 2012, the claimant was called for a hearing. At the hearing several issues must have been discussed but the final verdict of it was the issuance of a NTSC to the claimant as to why disciplinary action should not be taken against him. This notice was dated 9<sup>th</sup> March 2012.

66. I take it then until 9<sup>th</sup> March 2012 when the claimant was issued with his NTSC, the respondent had employed several processes to address the caution letter issued to the claimant on 2<sup>nd</sup> November 2011 when his performance was found wanting and was to be reviewed after two months. This is so because, until 9<sup>th</sup> March 2012, there was no prior notice as to any disciplinary action being commenced, the suspension earlier issued having the purpose to facilitate investigations and the hearing of 22<sup>nd</sup> February 2012 being a forum for the claimant to address the concerns that arose in his department. The hearing on 22<sup>nd</sup> February 2012 was not to address any disciplinary notice against the claimant, there was an ongoing investigation and the claimant was required to inform into the process. Only the NTSC of 9<sup>th</sup> March 2012 commenced the disciplinary process against the claimant. This notice had an outline of the specific issues that the claimant was required to answer to failure to which appropriate action applicable could be applied. The procedure as outlined in the respondent's Disciplinary Policy at 4.4.4 on the steps of termination of employment;

*Termination of employment is appropriate when an employee's actions are considered to be gross misconduct or when an employee's misconduct/performance has persisted exhausting all other lines of disciplinary procedure. The employee will be provided with a written statement detailing the reasons for the termination, the date of which the termination will take effect and the right to appeal.*

...

#### *4.5 Appeal Procedure*

#### *4.6 Categories of Misconduct*

##### *4.6.2 Gross misconduct*

*This constitutes a fundamental breach of contract by the employee, such that the necessary bond of mutual trust and confidence between employer and employee is broken and the possibility of continued employment is in grave doubt ...[where there is gross misconduct] the employee is suspended at the appropriate rate of pay pending investigations and*

*hearing...what may constitute gross misconduct ...wilful neglect to perform work which it is your duty to perform or careless or improper performance of any work which is your duty to perform carefully and properly... incompetence, failure to apply sound professional judgement that results in the tarnishing of CFC Life's reputation.*

67. The evidence of the respondent was that the claimant was negligent in the performance of his duties. To prove this, it was not necessary to import the exactness required in criminal charges to disciplinary proceedings as held in ***Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others (2006) 27 ILJ 1644 (LC)***. When an employee is charged with poor performance and he is found guilty of misconduct in the form of negligence this is a species of poor work performance in that it relates to negligence in the performance of his duties. However, the claimant submitted that this obscures the real issue – that it is not fair or appropriate to elevate a charge during a disciplinary proceeding from poor performance to misconduct and then to rely on the lack of prospects of restoring the employment relationship to justify dismissal as a sanction. The claimant was charged with lack of attention to his duties and presented mitigation in respect of this, he was cautioned and was to be reviewed after two months. The charge for which he was dismissed was not put to him at the disciplinary enquiry nor was he given an opportunity to respond thereto. Furthermore it is trite that in the context of the provisions of section 41 and 43 of the Employment Act there is a vast difference between misconduct and poor performance/incapacity both conceptually and practically. In this context the sacrosanct principles of natural justice were violated and the respondent's decision was unjustifiable and eminently unreasonable.

68. Once an employee is issued with a NTSC the disciplinary process has begun and only then can the provisions of section 41 be pursued. Have a hearing in the presence of a union representative or where the employee is not unionised, before another employee of the employee's choice. This is the correct interpretation of the court decision in ***Alphonse Machanga Mwachaya versus Operation 680 Limited [2013] eKLR***. The submission by the respondent that the holding in the above case was followed is essentially different with what the respondent did to the claimant. The claimant was allowed to respond to the NTSC but was never called for a hearing in the presence of an employee of his own choice nor was he given the right to appeal the decision of the respondent against him. This is the correct reading of the decision.

69. Was the claimant then terminated for his poor work performance or due to negligence of his duties which was taken as misconduct?

70. In drawing a distinction between poor work performance and misconduct, Professor B. Jordaan in his article ***Poor Work Performance (Incapacity) vs***

***Misconduct*** stated the following:

*Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer's standards. In this case the problem lies with the employee's aptitude: although willing to do what is required, s/he is*

*Unable to because of some factor linked to the employee that s/he has little or no control over.*

*A dismissal for misconduct is based on the employees fault i.e. intentional or negligent noncompliance to company rules or standards. A degree of blameworthiness is therefore ascribed to the employee. In respect of misconduct, the employer must prove that the employee contravened a rule, was aware of or could reasonably be aware of the rule, that the rule was valid and there was consistency in the application of the rule (substantive fairness).*

*The employer is required to give the employee an opportunity respond to the allegations (procedural fairness). This may take the form of a disciplinary hearing or an interview for lesser transgressions.*

[Emphasis added]

71. In this case, the sequence of events was;

- 2<sup>nd</sup> November 2011, claimant was cautioned to be reviewed in two months;
- 16<sup>th</sup> February forensic audit commenced
- 22<sup>nd</sup> February 2012 disciplinary enquiry was conducted;
- 9<sup>th</sup> March 2012 the claimant was suspended for investigations;
- 28<sup>th</sup> March 2012, the claimant was terminated

72. As at 28<sup>th</sup> March 2012, the work performance of the claimant had not been reviewed to ascertain how far his performance had improved based on the identified weak areas. There is nothing on record to show the kind of support, training and evaluation given to him. The submission by the respondent that there were intervening circumstances that arose after caution period came to a close is not an enough expatiation to give where the issue at hand relate to poor work performance. The employer must do more. Not just to cut short the process and terminate. Even in the case where negligence was the case, apart from substantive fairness the employer must ensure procedural fairness. This was not the case with the claimant; he was not accorded procedural fairness with regard to his work performance and the allegation of negligence of his duties. The requirements to show that the dismissal for misconduct was fair are different to what has to be shown in the case of dismissal for incapacity. See South Africa Labour Court at Appeal ***Landsec and Another v Commission for Conciliation, Mediation and Arbitration and Others*** (JR 819/07) [2009] ZALC 12 (29 January 2009) at para 26.

73. In a case like this one, where there is procedural unfairness the substantive issue faced by the employee is muzzled in the process. Where there was an opportunity to address the core concerns that an employer may have, once due process is not applied the possible outcome is already eschewed against the employee. The emphasis here is on process, and not result. That being the case, it serves no purpose for the court to consider and analyse every issue raised by the respondent in the NTSC to the claimant as the failure by the respondent to consider all or some of the issues *albeit* material as rendering the claimant's responses unsatisfactory should have been given further thoughts through a hearing where the claimant should have been heard in the presence of a fellow employee of his own choice. Once that was done the internal procedures of the respondent allowed for time for appeal, which should have been notified to the claimant at the time of termination. To evaluate every factor individually and independently is to defeat the very requirement set out in section 41 of the Employment Act which requires the employer to deal with the substantial issues of each case of non-performance with the minimum of legal formalities and to do so expeditiously and fairly. This is also confirmed in the South Africa Constitutional Court decisions of ***CUSA v Tao Ying Metal Industries 2009 (2) SA 204 (CC)***. Where the employer fails to follow proper process he or she may produce an unreasonable outcome (see also ***Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)***). These were processes that were ignored in the rush to have the claimant terminated. This is not what is contemplated by the law as outlined in section 41 and 43 of the Employment Act. The termination of the claimant was therefore rendered substantively and procedurally unfair for failure to comply with mandatory provisions of the law.

## **Remedies**

74. On remedies, the claimant is seeking reinstatement. As a general rule, in terms of section 45 of the Employment Act, but subject to the exceptions listed in section 49 (4), where an employee's termination is substantively unfair the court must grant reinstatement or re-employment. Where the court does not order reinstatement or re-employment then in terms of section 49(1) (c) it may order the employer to pay compensation to the employee. Section 49(1) (c) limits the amount of compensation payable to an amount

which is just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration in the case of ordinary unfair dismissals. These orders for reinstatement or compensation can be made together with any other orders that the court may consider just noting orders to reinstate or re-employ the employee can only be made where it is not unreasonable or impractical for the employer to do so.

75. Reinstatement, re-employment and compensation, as the exclusive remedies for unfair dismissal, (now provided for in section 49(4) of the Employment Act), were introduced into labour legislation to remedy the absence of satisfactory relief for the unfair termination of the contract of employment by employers. At common law the only remedy available to a dismissed employee was an action for wrongful breach of contract. As in all cases of breach of contract, the injured party could elect to sue for specific performance or for damages. A claim for specific performance in terms of a reciprocal obligation will succeed only where the party claiming performance has performed or at least tenders performance. In the context of an employment contract, a claim for specific performance is a claim for reinstatement on the same terms and conditions of employment that existed at the date of dismissal and must be accompanied by a tender by the employee to resume services or at least to fulfil the principal obligation under the contract to make his services available. The employee's entitlements under a contract of employment are dependent on the availability of his services to the employer and not the actual rendering of services.

76. Prior to the 2007 our courts rarely awarded specific performance of a contract of employment on the ground that it was inadvisable to compel one person to employ another whom he does not trust in a position which imports a close relationship. This meant that an employee in the event of a wrongful termination of employment was restricted to a claim for damages to remedy the breach. Where damages are sought as a surrogate for performance they relate to the monetary value of the performance agreed upon but not received. Such damages in the employment context were normally of a limited amount because of the application of the general principle that an injured party is only entitled to his or her positive interest. The basic principle in the assessment of damages is that the claimant should be placed in the position he would have been in had the contract been fully performed. All that is required for the lawful termination of a contract of employment, for there to be full performance, is notice of termination in an indefinite term contract and the expiry of the period in a fixed term contract. Damages for breach in the employment contract accordingly will be either the amount payable as notice pay in an indefinite term contract or the salary payable for the unexpired period of a fixed term contract, less any sum the dismissed employee earned or could reasonably have earned during the notice period or the unexpired period of the contract, such being the actual loss suffered by him. Hence a claimant's damages could never be more than the notice pay due under the contract or the salary owing in respect of the unexpired fixed term.

77. The unfair dismissal regime was introduced in 2007, following a review of labour laws in Kenya precisely in recognition of the fact that contractual principles and remedies offered employees insignificant protection. Since then employees can sue on a wider cause of action for unfairness rather than wrongful breach, and the statutory remedies of reinstatement re-employment and compensation are available. In the case of ***Equity Aviation Services (Pty) Ltd v CCMA and Others, the Constitutional Court of South Africa*** explained the meaning of the word reinstate as follows:

*The ordinary meaning of the word 'reinstate' is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards worker's employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.*

*(Emphasis added)*

78. Reinstatement may be ordered from a date later than the date of dismissal and thus may be of

limited retrospectively. Re-engagement implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken. In both instances, as in the case of the common law remedy of specific performance, the employee must make his services available if the remedy is to be maintained; there must be a willingness to resume employment. Aside from the requirements of the common law, that much follows in part, it would seem to me, as the corollary arising from the provision in section 49 of the Employment Act that reinstatement or re-engagement should be ordered unless the employee does not wish to be reinstated or re-engaged.

79. Compensation is the remedy available to an employee who is found to be unfairly dismissed but not granted the remedy of reinstatement or re-re-engagement. As noted above, in terms of section 45 read with section 49 of the Employment Act, compensation is payable where the employee does not wish to be reinstated or re-engaged, where the continuation of the employment relationship would be intolerable, where reinstatement or re-engagement is reasonably impracticable or where the dismissal was only procedurally unfair. Importantly, the Employment Act does not grant an employee a remedy to sue for damages for unfair dismissal. In most cases an award of compensation that is capped at 12 months remuneration for unfair dismissals will be more than an award of damages at common law, especially where the contract is for an indefinite period. On the other hand, it could be less in the case of a fixed term contract, depending on the balance of the period remaining after dismissal. An employee seeking damages for termination of employment in excess of the statutory amount of compensation will accordingly have to sue the employer for a wrongful breach of contract. The claim by the claimant for payments for work he would have been paid for until retirement fails as there is no claim for breach of his contract.

80. Based on the circumstances of each case, the court has the power as under section 12 of the Industrial Court Act to order for any other relief as the court may deem fit to so grant. The claimant also made this plea in his claim. Reinstatement will herein be awarded. This is in consideration of the facts herein and the applicable law. In this case the claimant has served the respondent for 33 years. He had 9 years to retirement. It was the claimant's evidence that he had hoped to continue serving the respondent until retirement. In evidence it was not stated as to whether the respondent has now made a replacement to the position occupied by the claimant save that this is a crucial position to the respondent that required somebody else to be appointed in an acting capacity. On the finding that there was procedural and substantive unfairness in the termination of the claimant and that the prayer for reinstatement is the valid remedy, the court will put the above facts into account. Therefore the claimant shall be reinstated and or re- engaged back into the respondent employment until the legal retirement age unless otherwise lawfully terminated earlier. The reinstatement shall be with all back salary, allowances, benefits, and any other legal dues to date. The effective date for such reinstatement or re-engagement is the 1<sup>st</sup> of April 2014.

81. Further to the above and failing the reinstatement or re-engagement the respondent will be responsible to pay compensation for 12 months together with all due salaries, allowances, benefits and other legal entitlements from 29<sup>th</sup> March 2012 to date [31<sup>st</sup> March 2014]. In making others orders that this court deems fit and just to grant and based on the proportionality of the case, where the claimant is not reinstated, noting the claimant has not been able to secure new employment, the respondent to make a payment of three (3) years salary to the claimant, all based on his last basic pay. This to be done within 30 days after the 1<sup>st</sup> of April 2014.

## **Conclusion**

Judgement is entered for the claimant against the respondent for:

- **A declaration that the termination of the claimant by the respondent was unlawful and unfair;**
- **The claimant is reinstated to his job or an equally suitable job with the respondent, with all his back salary, allowances, benefits, and any other legal dues;**
- **The claimant to be reinstated or re-engaged by the respondent to the office he held or to an equally suitable position with effect from 1<sup>st</sup> April 2014 until his legal retirement unless**

**otherwise lawfully terminated or in the alternative, the respondent to pay to the claimant compensation of twelve (12) months' salary; all salaries, allowances, benefits and any other legal dues from 29<sup>th</sup> March 2012 to date, 31<sup>st</sup> March 2014; and three (3) years basic salary the claimant would have earned save for the reinstatement or re-engagement within 30 days from the 1<sup>st</sup> of April 2014;**

- Mention within 35 days from the date hereon to confirm compliance;**
- Amounts payable in (b) above shall be paid with interest; and**
- Costs herein awarded to the claimant.**

Delivered at Nairobi and dated this 31<sup>st</sup> day of March 2014

**M. Mbaru**

**JUDGE**

In the presence of

Lilian Njenga: Court Assistant

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