



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 635 OF 2010

BETWEEN

DEDE ESI ANNIE AMANOR-WILKS.....CLAIMANT

VERSUS

ACTION AID INTERNATIONALRESPONDENT

Rika J

CCs. Leah Muthaka & Edward Kidemi

Mr. Agwara instructed by Professor Albert Mumma & Company Advocates for the Claimant

Mr. Obura instructed by Obura Mbeche & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed her Statement of Claim on 10th June 2010. The Respondent filed its Statement of Response and Counter-claim, on 5th October 2010. A day before, on 4th October 2010, the Respondent had filed a Notice of Preliminary Objection, challenging the jurisdiction of the Court to hear and determine the dispute. The Court gave a ruling on 11th February 2011 assuming jurisdiction, based on the maxim *lex loci laboris*.

2. The Claimant gave her evidence on 13th April 2011, 18th April 2011, and 19th April 2011. She called 2 other Witnesses, Juliana Makapan and Dr. Joan Akaba, who gave evidence on 24th August 2011 and 5th March 2012, when the Claimant closed her case. The Respondent gave evidence through its former CEO Ramesh Singh, and Chair Irene Ovonji- Odida on 11th March 2013, when the hearing closed. The Advocates requested for, and were allowed 21 days each, beginning with the Claimant, to file and exchange their Closing Arguments. They were not able to do this within the given time, due to the fairly lengthy nature of the proceedings on record, and complexity of the legal briefs. In addition, Mr. Obura for the Respondent was very unfortunately, robbed of his Laptop with his entire Closing Submissions, which had the effect of stretching the filing of the Closing Submissions to the 25th September 2013. It was only on 19th February 2014, that the Parties mentioned the dispute before the Court and confirmed the filing of their Closing Submissions. Delay in conclusion of the dispute can also be attributed to the fact that Witnesses on both sides are non – resident in Kenya. They travelled from various parts of the world to give evidence. The jurisdiction of the Court, as mentioned at the outset, had been vehemently contested, and the Court had to give a ruling at the preliminary stage. Lastly, delay may also be attributed, to the shift of the Court from the Ministry of Labour to the Judiciary. Delay is regretted.

CLAIMANT'S POSITION

3. The Claimant's position is that she was employed by the Respondent on 11th June 2007, as the International Director, West and Central Africa based in Nairobi, at a monthly salary of British Pounds 4,507. The Respondent is an International Agency registered in Den Haag Netherlands, working in over 40 Countries including Kenya, where it has the Head Office for West and Central Africa.

4. Dede was issued a contract of employment on 21st May 2007. Employment commenced on 5th August 2007. The contract was open-ended. The contract, and the Global HR/OD Framework, [Respondent's Human Resource Manual] defined the terms and conditions of the Claimant's employment.

5. Dede performed her duties in Kenya, had a permanent work residence and office in Kenya, and was required to work and reside in Kenya until her retirement at the age of 65 years. The Claimant worked diligently in accordance with her contract. After serving for 3 years, and 13 years before her retirement age, she received an e-mail dated 5th March 2010 from the Respondent's Chief Executive Officer terminating her contract. The Claimant testified that the decision was unfair and unlawful and prays for the following Orders:-

- a. Reinstatement;
- b. Salaries and allowances for the period out of employment;
- c. In the alternative;-
 - i. Reasonable salary in lieu of notice.
 - ii. Salaries inclusive of allowances, benefits and pension for the remainder of the period the Claimant would have worked until lawful retirement.
 - iii. Awards in addition to [b] above to be determined by Court taking into account promotions and salary increments for the remainder of the period the Claimant would have worked until full retirement.
 - iv. Severance pay.
- d) Costs; and
- e) Interest on [b] and [c] until payment in full.

6. Dede testified she was not subjected to any disciplinary procedure, or granted a hearing before termination, in terms of her contract of employment. The contract provided that termination could only take place after the Respondent carried out due process and issued the Claimant with a reasonable and fair

notice period. She was not given notice or paid any salary in lieu of notice.

7. At the time of termination, she earned a monthly gross salary of British Pounds 5,637.83. Other benefits comprised life insurance policy; 10% of the basic salary monthly contribution towards the Claimant's pension and retirement benefits; medical cover and repatriation for the Claimant and her family members; exemption from tax payment and / or 90% or two-thirds tax contribution, i.e. 10% of the Claimant's salary was to be deducted as tax contribution, while the Employer paid the remainder of the tax; relocation allowance, air-tickets, baggage entitlement; house rent allowance and household insurance; school fees for the Claimant's dependent children; furniture storage; holiday entitlement and holiday pay; and time off in lieu.

8. She was compelled to relocate with her 2 Children from United Kingdom to Kenya. She testified she did not have warnings in her employment record. Her problems originated from the perception of her as a threat by the CEO, to his succession plans for the position of the CEO. He had a dislike for Dede's open-minded approach to Respondent's Performance and Policy issues. The CEO Ramesh Singh embarked on a sustained pattern of harassment, fault-finding, racism, focusing on the Claimant's race and origin. The CEO frustrated the Claimant in performance of her duties, in an effort to prevail upon her to resign from the Organization. She was denied permission to attend necessary meetings; her colleagues were allowed to make personalized attacks against her; she was reprimanded on her contributions in the International Directors' and Board meetings; the CEO picked unnecessary and unprofessional quarrels with her; he leveled unjustified allegations against her; and undermined her work in the Organization.

9. Ramesh Singh's term as the CEO was coming to an end. On 28th October 2009, Dede applied for this position, after the Respondent invited interested candidates to apply. Singh responded to the Claimant's application by exerting pressure on her to resign. In a campaign letter dated 17th November 2009, Dede raised management and policy issues focusing on Singh's leadership style, and highlighted how her leadership would be a departure from that of Singh. The letter was addressed to the Chair of the Board, and other Members. The Board established a Panel to investigate the concerns raised in Dede's campaign letter, while Singh continued to apply pressure on the Claimant to quit.

10. On 3rd March 2010, Ramesh Singh phoned the Claimant, demanding she resigns within 24 hours, or would be dismissed. She refused to be intimidated, and made a formal complaint against Singh to the Chair of the Board, on 4th March 2010. On the following day, 5th March 2010, Singh wrote to the Claimant an e-mail, purporting to summarily dismiss the Claimant. Singh informed the Claimant he and the Organization, no longer had trust in the Claimant. She stated this ground had no place in the Respondent's Human Resources Manual. Termination was malicious, discriminatory and made in bad faith.

11. The Claimant particularized details of malice, discrimination and bad faith on the part of Singh/ Respondent to comprise:-

- Termination of her contract contrary to the Respondent's Disciplinary Policy and Procedure;
- Alleging that the concerns raised by Dede against Singh were unfounded, while some of the policy and management issues raised by the Claimant were, upon investigations, adopted by the Board and implemented;
- Unjustifiably reprimanding and warning the Claimant while allowing her peers to criticize the Claimant's race and personality;
- Failure to accord the Claimant equal treatment;
- Denying the Claimant participation in the International Directors' meeting, and curtailing her participation in decision-making.
- Instigating sour relationships between the Claimant and some of her peers;
- Making decisions concerning the Claimant's docket, without involving her;
- Appropriating the benefits of the Claimant's hard work in West Africa, without giving her due recognition.
- Applying irrelevant, personal considerations in terminating the Claimant's contract of employment;
- Engaging in personalized racial discrimination against the Claimant; and

- Terminating the Claimant's contract without giving her the opportunity to defend herself.

12. Dede told the Court she is Ghanaian by birth. She is an expert in Development Economics, with a background in Journalism. She has worked for UNICEF, UNIDO, and UNDP. She wrote the Development Policy for Zimbabwe, and taught at the London School of Economics.

13. She joined Action Aid International in June 2007. She worked with effect from 15th August 2007. She was stationed at Nairobi, and obtained a Kenyan Work Permit in January 2008. She took residence in Nairobi in accordance with the terms of her contract, relocating with her 2 school-going Children. She was in charge of West and Central Africa Region. She covered the Great Lakes Region, Cameroon, Nigeria, Ghana, Sierra Leone, Liberia and Guinea Bissau. In total she oversaw 11 Countries. The other Region was East and South Africa. The two Regions shared offices at Waiyaki Way Nairobi. Officers from the 2 Regions used to meet. The functional offices were in London and Johannesburg.

14. Dede used to hold monthly teleconferences with each of the 11 Country Directors. She held a monthly, physical meeting with the Country Directors. Once every month, she held a teleconference with the International Directors. The International Board of Directors met 4 times in a year. Regional decision making was primarily done in Nairobi.

15. She reported to Ramesh Singh the CEO, who was based in South Africa. She communicated with him mainly through e-mail, and met him during the International Directors' Meetings. On 5th March 2010, she as was her routine, reported to her Office at Waiyaki Way. She opened her computer, and found an e-mail from Singh, informing her, her contract had been terminated. She was shocked. There was no notice, and she was not paid 3 months' salary in lieu of notice, as provided in her contract.

16. She respected the CEO. She had many times debated with him issues of policy calmly. She applied for the CEO's job on the deadline date, the 28th October 2009. She met Singh in South Africa during an International Directors' Meeting on 13th November 2009. He exerted pressure on her to resign. He referred to an informal meeting between him, the Claimant and Stanley Arumugam, where it was alleged the Claimant would take some time off to reflect on resignation. Arumugam asked the Claimant to resign, or agree to a mutual separation. This was made clear in e-mails sent to the Claimant by Arumugam in November 2009. Dede felt her application for the position of the CEO, was a threat to Singh's succession plans.

17. She had heated arguments with the CEO, but was never disrespectful. Her position was that Donors expect their money to benefit recipient communities. International Directors had placed the issue of resource allocation on the agenda. Dede's ideas were incorporated in the resource allocation framework. She complained that most of the resources were channeled to the US, while some African Offices were being closed. She objected to this. She pledged to have fair allocation of resources in her campaign for the position of the CEO. She had 3 of her Region's Countries earmarked for closure, while Asia had only 1 Country. She made a presentation to the CEO and the International Directors. They decided to save the Asian Country and the Democratic Republic of Congo [DRC]. They closed Cameroon and Guinea Bissau. She was not happy with this, but submitted her exit plans for the 2 Countries. She proposed a sustainable exit plan, extending for 2 years, rather than the 2 months suggested by the CEO. A Donor had approached the Claimant from Netherlands, offering to fund a project in Cameroon.

18. After she wrote her letter of campaign, an Investigation Panel constituted to look into her concerns concluded that her rights as an Employee were not altered by the Investigation. Her opposition to closure of African Offices was grounded on sound reasons. There were 5 functional International Directors and 5 International Regional Directors. Her relationship with Directors for East and South Africa, and Asia, was good.

19. The Respondent had no reason to claim refund of boarding fees advanced to the Claimant. She had not asked the Respondent to pay this. Other Employees had their Children's fees paid by the Respondent. She did not know how the Respondent came to the figure of British Pounds 19,000. The Respondent paid rent for the Claimant. There was no basis to seek refund. The Counterclaim was made without any

justification, and the Claimant asks the Court to dismiss the Counterclaim.

20. Ramesh Singh alleged the Claimant had issues with one of her fellow Directors. There were no personal issues, just policy issues. She received a warning from the Respondent claiming she had personal differences with Anne Jellema. There was nothing personal- just policy disagreements. The Claimant was never availed a hard copy of the termination letter. Ramesh was biased against the Claimant. She was left out of critical meetings. She was not invited to the Board Meeting which resolved to close down the Guinea Bissau Office. She had requested that Regional Directors be granted regular slots in the International Directors' Meetings. This was declined. She was not given a hearing, although she had filed a grievance. The issues she raised in her grievance were not formally discussed.

21. Cross-examined at length by Mr. Obura, Dede testified that she is Ghanaian by birth. Before being employed by Action Aid, she was resident and worked in the UK. She has dual nationality. She applied for the Action Aid job through e-mail, after she saw an advertisement. She considered herself suitable for the position. The interview took place at Pan Afric Hotel in Nairobi.

22. The Respondent's Head Office is in Johannesburg South Africa. The General Assembly became the Governing Body of the Respondent in 2010, with the Board subordinate to the General Assembly. There were 9 Board Members, referred to as Trustees. There are Country Programmes all over the World. In Europe, they are known as 'Affiliates.' These collectively make up Action Aid International. They are registered nationally as NGOs. There are different Country Programmes, all with different status. In Kenya, there is Action Aid Kenya, a local Affiliate of the Respondent. Dede was not employed by any of the Affiliates; she was an International Employee of the Respondent.

23. The Chair is selected by the General Assembly. The CEO is appointed by the Board. International Directors are interviewed by the Board. The CEO is an Ex- Officio Member of the Board. Noerine Kaleeba was the Chair, later replaced by Irene Ovonji- Odida, both ladies coming from Uganda. No Trustee was from Kenya.

24. The Secretariat, headed by the CEO, is in Johannesburg. It has a multi-regional aspect, with Branches around the globe. There is a Regional Office and a Country Office in Nairobi. Decentralization was purposed on bringing services closer to the people. The Regional Office had 2 International Directors- Dede for West and Central Africa, and Mr. Chris Kinyanjui who oversaw East and South Africa Region. The International Directors oversaw their respective regions on behalf of Action Aid International. All International Directors were from different parts of the world, and worked under contract. The Claimant's responsibilities were not restricted to one Country. 6 of the International Directors had worked longer at the Respondent than Dede. She was recruited under Clause 2.4.1 and 2.4.2 of the Global HR/OD Framework. Clause 2.4.1 states, "*International positions are recruited from an international pool of staff with the required skills to work in international roles either outside or within their home country,*" while clause 2.4.2 states, "*when an international staff member is recruited on an international contract to work outside their home country, they will be deemed to have been recruited in an expatriate role. Nationality according to passport held by the staff member will be the only means to verify their 'home country.'*" Dede was therefore working in Nairobi as an Expatriate.

25. Two interviews were held in Kenya and others by telephone. She was resident in Britain, teaching at the London School of Economics. She went through the interviews, and did not know the interviewers. She did not campaign for the position. She did not know the Chair to the Board. She was not posted to Nairobi because of the proximity to West and Central Africa; it was an organizational issue. Her contract said she would be expected to reside in Nairobi, with responsibilities at various levels.

26. Continuing to testify on cross-examination, Dede told the Court that she was responsible for the day to day administration of the Regional Office, and presided over routine meetings. She would go to West and Central Africa to troubleshoot. She would go there if the Country was launching a project; visit to further the ideals of Action Aid; or visit to investigate in event of whistle-blowing. Dede's activities were not directed at the Kenyan operations. There were common issues of interest, and there were global issues. The Country Director for Kenya did not report to Dede.

27. Singh was the CEO at the time Dede was employed. The Claimant's salary was quoted in British Pounds. Salary and Pension were paid directly to her account in the United Kingdom. She was an International Employee. She did not need a Visa to work in or from Kenya, but obtained a Work Permit. All her salary accounts were in the UK. Tax deduction in the UK was shown as nil, while British Pounds 563 was shown as the local tax in her pay statement. She did not have a tax certificate. She denied that she paid nothing in tax. It was incorrect to say pay statement showed 'deduction/ adjustment,' but nothing was deducted; the Claimant paid local tax.

28. She agreed her contract was terminated in March 2010. She filed her Claim on 10th June 2010. It was over 3 months after termination. She was a top Executive and teamwork was important. It was a challenge to have teamwork, because each Region had its own teams. There were disagreements among International Directors. It was a competitive team, and people were not afraid to express themselves.

29. Any contract above 5 million Euros called for the consultation of the CEO. Gambia had a contract with the Global Fund for HIV/ AIDS. This called for the approval of Dede as the International Director for the Region. The CEO would also approve, while the functional Directors would not necessarily be involved. Because Dede was very consultative, she informed everyone about the Gambia project.

30. Dede wrote to the Finance Director Nigel Saxby-Soffe, consulting about the recruitment of Head of Finance for the Gambian project. Ramesh Singh responded, saying it was unlikely to find a suitable candidate for the position from Gambia. Nigel had also expressed his reservation. Josephine Oguta who was the Development- In – Charge expressed confusion because of the mixed signals. Ramesh referred to management issues that needed to be sorted out between him and Dede. He was referring to review of the Global Fund project. Josephine was not asking about the Global Fund; she was asking about the Board's inauguration of an Associate.

31. Dede had written to James Beale Head of International Aid Agency, seeking his input on the requirement that the contract be signed by a legal entity. Action Aid the Gambia [AATG] which was set up by the Management was neither an associate, nor an affiliate. She testified that what she sought from James Beale was his input, not approval. Ramesh wrote to Dede on 28th August 2009, stating that the Gambia Global Fund Contract had become a performance issue on the part of Dede. He advised she ceases to engage James or Nigel, until he and Dede had agreed on a solution to the issue. The Contract was signed nonetheless, and Singh expressed his disappointment to the Claimant, in an email written to her on 9th September 2009. She explained that there was a freak storm in Gambia, bringing down telecommunications, and she was therefore herself in darkness, as to when the Contract was signed. The Country Director knew she was not supposed to go on with the signing without the approval of the CEO. Singh perceived this as insubordination.

32. She later wrote to Ramesh Singh on 10th September 2009, explaining that the contract was signed on 20th August 2009. The CEO had given instructions for the execution of the Contract to be stayed, for over a period of 6 months before it was executed. She denied that she colluded with the Country Director to over-rule Singh. The Contract was signed without the approval of Dede and her immediate boss Singh. Subsequent to the execution of the Contract, Singh appointed an Auditor Lanre Amao, to review the project. He instructed Dede to co-operate with the Auditor. Dede exchanged correspondence with the Auditor, where she initially stated that Singh gave instructions on 26th, 27th and 28th August 2009, for the execution of the Contract to be stayed. She conceded Singh had given the instructions as early as 1st May 2009. She did not negligently or deliberately have the Gambian Contract executed.

33. Dede was availed the Auditor's Report, and was called upon by Singh, to show cause why disciplinary action should not be taken, in an e-mail dated 24th September 2009. There were 2 accusations. One, Dede failed to carry out a risk assessment of the project before the Contract was executed; and two, she acted in disregard of the CEO's instructions and reminder not to have the Contract signed without his approval. She responded on 1st December 2009. She explained there was a risk assessment of the project carried out by the Regional Management team. She forwarded handwritten assessment notes. These were not generated when the issue became 'hot' in order to cover her position.

She did not ignore her boss. Writing to Singh on 2nd December 2009 while seeking to have the employment contract of Gambian Country Director Kujejatou Manneh extended, Dede referred to the lapses over the Gambian project as a 'collective failure.'

34. Dede acknowledged receipt of the CEO's e-mail of 4th May 2009, which purported to be a final warning. It warned Dede on her relationship with fellow International Directors, and concerning her attitude in particular, towards Anne Jellema the International Director for Policy and Campaign. It was alleged Dede had persistently attacked Anne Jellema and failed to build a positive working relationship with the rest of the team. She conceded her position was not that of a Labourer; she was a top Executive. She did not agree with the contents of the warning letter. Dede called for a meeting involving herself, Singh, Anne, and Stanley Arumugam. This was aimed at discussing the issues raised in the warning from Singh. Singh agreed to have the meeting, but was non-committal on the presence of Anne Jellema.

35. The CEO had been expressing his concern about Dede's relationship with the International Directors. The Board recruits the CEO, while International Directors are recruited by the Board and the CEO. Stanley did not mention to Dede that Nigel the Finance Director was unhappy with Dede. Dede made attempts to resolve these perceptions.

36. Dede testified that Singh's contract was coming to an end. She felt the Organization needed an African CEO, because there was no African CEO before. She applied on 28th October 2009. Singh had raised issues on Dede's relationship with fellow International Directors. In November 2009, the Claimant's relationship with the International Directors was not unhappy. The CEO and Stanley Arumugam wished to have a meeting in Johannesburg in November 2009. This was after the Claimant applied for the position of CEO. After the meeting which was held on 13th November 2009, Dede prepared a Memo while on her journey back, concerning the meeting.

37. She referred to the divisions in the African team. It was intended to close down the Office in Cameroon and Guinea Bissau. Some Directors were for the proposal. Her Memo revealed Singh and Stanley had concerns over her relationship with fellow International Directors. The meeting discussed a mutually agreed separation between the Parties herein. She agreed in her Memo that her relationship with the other International Directors was not well. She explained that this culture preceded her, but she appreciated the need to work as a team. She testified that Singh used to refer to her Staff as 'slaves.' She was bullied until she cried, and expressed her preference for mutual separation. She was bullied by the 2 men- Singh and Stanley. Stanley had described her as being incompatible.

38. Dede suggested a way forward in her Memo, in view of what transpired in South Africa. Option one for her was to create a crisis; while option two was to pursue a negotiated separation. Dede wrote a campaign letter addressed to the Chair Irene Ovonji- Odida on 17th November 2009. It was in this letter that she stated International Directors were increasing aid to the US; she charged that fellow International Directors were lying; and the CEO was lying. She insisted she was sincere, and the Board had appointed a Panel to investigate her allegations, not to interview her. She disagreed that the Panel found her allegations to be untrue.

39. The Claimant testified that the CEO sits in the Board. The Board entrusts the CEO in the running of the Organization. The CEO runs the Organization with the assistance of the International Directors. Mutual confidence between the CEO and the International Directors was important. The Panel concluded the issues raised by Dede did not merit a full Board hearing. It recommended that management issues be left for the management to deal with. It was stated by the Panel that the Claimant felt excluded; there was a breakdown of trust and confidence between her and the CEO; and that it was for the management to resolve the issue of the relationship between Singh and Dede. She was bullied into discussing some form of mutual separation. She was not coerced into writing the campaign letter of 17th November 2009.

40. The Claimant testified she had a brief meeting in the Gambia with Singh on 23rd February 2010. She was given a hearing on organizational issues. After the Panel Investigated and made its recommendations, there was a feedback session in London. It was confirmed any further issues would be determined by the

Management. Dede insisted her dismissal was not justified. Singh wanted to have Adriano from the Americas as his successor. The new successor chosen by the Board however was one Joanna Kerr from Canada. The Claimant did not know whether the Board expressed its confidence in Singh after her exit.

41. Redirected by Mr. Agwara, the Claimant told the Court she carried out her work mostly from Kenya. Taxes were deducted at source, and remitted to Kenyan Tax Authorities. Her pay statement was prepared by her Employer from South Africa. She filed her Claim 3 months later, because there were ongoing negotiations between the Parties which collapsed. There were decisions she could take, under the Human Resource Manual, without the involvement of the CEO. She did not collude with anyone in the signing of the Gambia contract. She did not sign the contract, or authorize anyone to sign. The Country Director Gambia signed. The Auditor confirmed the contract was a good deal, and also that it was signed against the Claimant's wish. She did not insubordinate her Line Manager.

42. Dede had policy disagreement with Anne Jellema. It was nothing personal. Dede never made any personalized attacks, and only acted in terms of the decentralization policy. The International Directors met quarterly, while the Management Team met more regularly. Dede wrote her campaign letter at a very difficult time, amidst sustained bullying from Singh and Stanley. Creating a crisis was a way of bringing to the attention of the Board, a crisis already in existence. The Investigation Panel did not find the concerns raised by the Claimant baseless. It did not recommend a disciplinary hearing. It was not to investigate grievances. She did not take up any of the proposals made by Stanley in Johannesburg, in the meeting of 13th November 2009.

43. Dede concluded her evidence with the emphasis that she was never disrespectful to her Colleagues. There was a crisis, but the Board opted not to acknowledge it. Singh was racist in his approach. The warning on 24th November 2009 from Singh came after the meeting in Johannesburg on 13th November 2009, and the same issues raised in the letter, had been addressed at the meeting. There was no meeting in Gambia on 23rd February 2010, to discuss the Claimant's issue. There were no documented disciplinary proceedings, where the Claimant was granted the opportunity to defend. She related well with her fellow International Directors. Termination was unfair. There was no notice, no hearing, and the Claimant was asked to resign within 24 hours.

44. The Claimant's first Witness Juliana Makapan is a Citizen of South Africa, resident in Johannesburg, and is a Business Consultant, specialized in Human Resources Consultancy. She runs her own Consultancy Firm under the name and style of Juliana & Associates. She is an alumna of Oxford University.

45. She was appointed by the Respondent in the Human Resources Department from January to August 2008. She stayed an extra month extending to September 2008. She was based at the Respondent's Johannesburg Office. Her role was to ensure there was coherence and consistency of policy and procedure. She was referred to as an Interim International Director. There were 10 International Directors: Makapan, Dede, John Samuels, Chris, Helen, Anne Jellema, Richard, Nigel, Adriano, and John. Makapan first met Dede in 2008 at a team meeting. She described her impression of the Claimant as a friendly, committed Employee, who was strong, and not afraid in confronting the status quo.

46. Makapan found it strange that Dede was not given extra responsibility at the International Directors' meeting, and was isolated. When she spoke, most International Directors kept quite. The CEO would say they would discuss issues raised by her later. At one time, he asked Makapan to talk to Dede and ask her to tone down during the meetings. Makapan did so, although she saw nothing wrong with what Dede said. Dede agreed to tone down and was co-operative. Makapan also talked to Anne Jellema who was responsible for development. The policy disagreement between Dede and Jellema was resolved. It was never a personal disagreement. There was racism at the meetings. Africans struggled to support each other. There were 3 Africans. Others were Asians and Europeans. During Makapan's tenure, the Respondent paid School fees for Expatriates' Children.

47. Makapan testified on cross-examination that she was engaged as an independent contractor, on an interim basis. She negotiated a monthly fee. She did not work with Dede on a daily basis. Dede was in

Nairobi, Makapan in Johannesburg. She was not Dede's Supervisor. The Witness did not know how long Dede worked. There were at least 4 meetings during Makapan's time. Makapan was there for 8 to 9 months, attending 4 International Directors' meetings. It was during this time that she formed an opinion on Dede's character. She did not know what the Claimant did in the years 2007, 2009 and 2010. Dede was being supported by her Colleagues in Nairobi. Makapan was able to identify racism. Whenever Dede asked for extra responsibility, she was ignored. Questions from her were ignored. Makapan would not say that the Claimant's relationship with the International Directors was not good. Disagreement was on policy issues. Makapan was not aware that Dede disagreed with the other International Directors. She did not recall the CEO rebuked Dede at the meetings.

48. Redirected, Makapan testified further that she was employed on a short term contract. Ignoring Dede's contribution at the meetings was unhealthy for the Organization. It was not normal for the CEO to offer to discuss issues raised on the floor privately. The difference with Anne Jellema was occasioned by development policies touching on Dede's Region, which were designed without Dede's input.

49. Dr. Joan Akaba testified she is a Citizen of Ghana, a Nurse by profession, but Sociologist by Training, who served the Ministry of Health in Ghana for over 20 years, finally resigning to set up her own NGO, for which she currently serves as the CEO.

50. She was appointed to serve in the Board of Action Aid Ghana in 2005. She served until 2010. Action Aid International had advised Countries to form Country Boards. Ghana put in place such a Board, to guide the strategic vision of the Respondent. Akaba attended international meetings. International Directors attended Board meetings in Ghana. In 2008, Dede was introduced to the Board in Ghana, and asked to assist in preparation of the Ghana Action Aid constitution. Akaba worked with Dede and found her friendly, focused and intelligent. Dede gave strategic leadership.

51. Dr. Joan Akaba resigned from the Respondent in 2010 in protest, because the dynamic lady Dede was dismissed without the Respondent seeking the views of Country Offices. Dede was responsible for West and Central Africa, and had made Akaba and her Office know, that she was being pressurized to resign. The Ghanaian Board was an affiliate, and was not consulted before Dede was dismissed. The Board asked the International Directors to consider the Board's views. Akaba wondered how Dede could be dismissed for advocating Action Aid values. She was dismissed for her courage of conviction. There was a shift in the Respondent's policy, which disadvantaged West Africa. There were proposals to close some of the West African Offices. The Respondent was using photographs of Poor African Children and diverting the money raised. Dede was innovative and was encouraged by Akaba to apply for the CEO's position.

52. Akaba told the Court on cross-examination she came to know Dede is Ghanaian, when Dede started working for the Board in Ghana. Ghana was an affiliate member, and Akaba attended international meetings as a member of the Board. Dede was responsible for the Region, but stationed in Nairobi. Akaba associated with Dede on matters touching on Ghana, not other Country Offices. She did not work with Dede on day to day basis. Those who worked with her were the International Directors. Akaba resigned because she disagreed with the Respondent's decisions. Decisions at the International Board meetings were taken through voting. Majority carried the day. Akaba agreed she and Dede were in the minority. Dede did not know Akaba was resigning. Dede and Akaba felt it was not right to close certain West African Offices down. They were over-ruled. It was possible to continue working even in the face of disagreement. Dr. Akaba conceded that the Respondent has a policy of mutual understanding.

53. Her position on redirection was that she and Dede had independent views. She was not Dede's mouthpiece. Both ladies advanced their own views. The Ghanaian Board collectively decided not to support the proposal to close down some of the West African Offices. Dr. Akaba did not know what issues Dede took before the International Board, and could not tell if Dede was working well with her fellow International Directors. Akaba resigned because of several issues, including the radical shift in policy implementation. The Claimant prays the Court to uphold her evidence, and grant the Claim.

RESPONDENT'S POSITION

54. The Respondent agrees the Claimant was its Employee. She was employed in the position of International Director, West and Central Africa. She was based in Nairobi, Kenya. Her letter of appointment is dated 21st May 2007, and appointment was effective on 15th August 2007. She accepted her offer and signed a formal contract on 11th June 2007, titled 'Statement of Terms and Conditions of Employment, International Staff Member, Expatriate.' In addition to these, her terms and conditions of service were regulated by the Respondent's Global HR/OD Framework.

55. The contract dated 21st May 2007 constituted the entire agreement; she was employed as the International Director West and Central Africa; she was to reside in Nairobi, but undertake responsibilities at locations outside Nairobi; she reported directly to the CEO in South Africa; her salary was payable according to International Salary Scale in GB Pounds Sterling and credited in her UK Account; her employment was regulated by the laws of England and Wales; she was covered under a British Insurance Scheme; her home base was Accra Ghana; her contract was handled by the International Human Resource Manager in South Africa; she was treated as an Expatriate; she was protected from paying income tax in Kenya; her allowances were payable in GB Pounds Sterling; and was entitled to staff loans in that currency at the interest rates prevailing in England.

56. The Respondent admits it terminated the Claimant's contract on 5th March 2010. Termination was not in breach of her contract, or in breach of the applicable law. Due legal process was observed. The CEO did not have control over who succeeded him, the recruitment of the CEO being the prerogative of the Board. It is a position that is filled through an international recruitment exercise, not restricted to serving Members of the Staff. The CEO did not bully or harass Dede. She was not discriminated against. She was not a team player, and failed to bond with her Colleagues. She had no respect for her fellow International Directors and the CEO. She was counseled to no avail.

57. In July 2009 at Copenhagen Denmark, she was asked by the CEO and the Human Resource Director to mend her ways. Between July and November 2009, the situation became unbearable, with some of the International Directors threatening to resign, if the Respondent failed to deal decisively with the Claimant. On 13th and 14th November 2009, a disciplinary meeting was held between the Claimant and the Respondent's Management. Dede acknowledged her relationship with her peers was untenable. Parties appreciated a mutual separation was the ideal solution. When the position of the CEO was advertised, the Claimant and 2 Other International Directors applied. The Claimant went a step further, writing a campaign letter to Board Members, in which she made disparaging remarks against the outgoing CEO and other International Directors, including her fellow applicants for the CEO's job.

58. Her allegations were the subject of an Investigation carried out by a Panel constituted by the Board. Her allegations were found to be baseless. She was given time to consider amicable separation. She refused to respond to the Respondent's invitation. On 3rd March 2010, the CEO, Director of Human Resources and Dede held a teleconference. She was informed in light of the situation she had created, it was important she voluntarily exits. Dede asked for a day to make up her mind. On 4th March 2010, another teleconference was held. She did not make any commitment to the Respondent, and on 5th March 2010, her contract was terminated. The grounds for termination were communicated to her via e-mail. Termination was fair, the Claimant having been the architect behind her own downfall. Termination was well grounded on Section 44 of the Employment Act 2007.

59. The Respondent paid for her Children boarding fees in advance of GB Pounds Sterling 19,000; advance school fees of GB Pounds Sterling 1,202; and advance house rent of GB Pounds Sterling 494- total GB Pounds Sterling 20,696. This was paid on the understanding that the Claimant would render faithful service, devoid of acts of gross misconduct. Dede acted contrary her contract and the law, and the Respondent counterclaims this amount from her.

60. Ramesh Singh Malla testified he is the Director or Learning, Open Society Foundation, based in New York City, USA. He was at the material time, the CEO, Action Aid International. He first joined Action Aid in April 1984 in the Gambia. He stayed there up to 1988. He joined Action Aid in Ethiopia where he stayed until 1993, when he returned to his homeland Nepal, to serve as the Director there. He then moved

on to Viet Nam, Thailand, London UK, in different capacities, before his ascension to the position of CEO in 2003, seating in Johannesburg South Africa.

61. The CEO explained to the Court, that Action Aid is a Charity, an International NGO, dedicated to working for the poor and the excluded. It is registered in Den Haag Netherlands, funded by individuals, families, foundations, and governments. The Head Office is in Johannesburg, while Nairobi is a Regional Office. The Organization is federated. The General Assembly is the supreme body; below it is the International Board which is equivalent to the corporate Board of Directors. The Board appoints the CEO. The CEO appoints International Directors. Singh appointed Dede in 2007, as the International Director for West and Central Africa. She signed the contract of employment attached to the Claim. Singh testified, like all other International Directors, Dede's contract was governed by the UK law.

62. The International Directors were Dede, Adriano Campolina for Latin America, John Samuel for Asia, Chris Kinyanjui for East and South Africa, Marco Deponete for Europe, Richard Miller for Security based in London, Helen Makika for fundraising and Caroline for Finance both also based in London, Stanley Arumugam and Anne Jellema.

63. The International Directors were responsible for thematic in various fields. Dede did not have a thematic. She was the newest, and the CEO opted to give her time to settle down. Singh explained he did not wish to overload her. His relationship with her at the beginning was cordial. The two worked closely. Gradually, her relationship with the other International Directors deteriorated. She attacked Anne Jellema personally in meetings. She was not in good terms with Helen and Kinyanjui. The Regional Office in Nairobi did not function well. Dede wrote to the International Board making allegations against the entire team. The CEO questioned her integrity. Dede had differences with the entire Organization. Her behaviour was captured in the 180 degrees review of performance, where Colleagues made comments about the subject of the appraisal.

64. The Gambia contract was managed by Dede. It was signed without the benefit of due diligence. It was for Dede to ensure there was due diligence as contracts of this nature carried legal and reputational risks. She ignored various technical persons who were to assist in the process. Singh intervened and directed the contract not to be signed, without his express approval. The contract was signed without the CEO's approval. She alleged that the contract was signed by the Country Director Gambia, without Dede's authority. If this was the case, Dede was grossly negligent.

65. There was a financial crunch in 2008. The Respondent resolved to pull out small operations such as Guinea Bissau and Cameroon. Dede was unhappy and disregarded her responsibility to the Respondent, publicly discrediting the corporate position. This is shown in her letter of 17th November 2009. This brought disrepute to the International Directors and the entire Organization.

66. The CEO convened a meeting on 14th November 2009 in Johannesburg, involving Dede and the Human Resources Director Stanley Arumugam. They discussed how to make the Regional Office in Nairobi functional. Mutual trust between Dede and the Respondent had waned. Singh recommended there be an amicable separation. The Organization values mutual respect. Dede conceded she had difficulties with her Colleagues, but stated she would not quit. Stanley who is a Professional Counselor talked to her, but Dede would not come up with a concrete proposal on mutual separation. She instead wrote to the Chair of the Board disparaging the CEO and the other International Directors. The CEO then, was compelled to suspend the discussion on amicable separation.

67. The accusations made by Dede against the CEO and International Directors were factually incorrect and fabricated. A Panel constituted by the Board discounted the accusations. The CEO was allowed to proceed with the management process. Singh revived the management process. He sought out Dede in Gambia. She avoided him. He talked to her on the phone. He then dismissed her through the e-mail communication attached to the Claim. She was offered the opportunity to be heard. Dede was invited. In her dossier, she devised two ways forward- negotiate or create a crisis. She wrote the letter to the Chair of the Board to avoid coming to a conclusion.

68. Her campaign letter was out of place. Candidates for the position of CEO are not permitted to campaign to the Directors. Her campaign letter was intended to create a crisis. There were other Africans such as Stanley and Chris Kinyanjui. Dede was not discriminated against. Singh had no say in who became the CEO. He was in the end replaced by an outsider from Canada called Joanna Kerr. Dede was entitled to have her Children's fees paid for by the Respondent in full. The Respondent paid the fees in full.

69. On cross-examination, Ramesh Singh testified he became the CEO in 2003, and was confirmed in 2004. The Respondent is federated, meaning it has members in different countries. There were about 23 members by the time he left the Respondent. Members are allowed to raise funds within their territories.

70. The International Secretariat initiated the search for funds in the case of Gambia. The contract had to be signed with Global Fund. The Country Director signed the contract. There were measure gaps in due diligence. Disciplinary action was taken with respect to the Country Director Gambia. The Auditors who investigated the project stated Dede did not consent to the signing.

71. Anne Jellema is no longer with the Organization. Dede exploded, and attacked her in a meeting. It was a verbal onslaught. The whole room was stung. The CEO was not aware that Anne had been asking Dede to sack the Country Director for Nigeria. Anne did not refer to Africans as useless. Anne Jellema had written acknowledging some of the issues raised by Dede were important. Dede sought a four way meeting involving herself, Anne, Stanley and Singh to discuss their differences. Anne did not see any reason to meet Dede and was excused from the meeting. The CEO did not hear Dede discuss Anne's family; it was all about policy issues. The CEO did not really get to uncovering Dede's motive in attacking Jellema. He felt Anne was a victim of Dede.

72. The CEO recruited Dede in 2007. She was placed on probation for 6 months. She could have been sacked during that period if she did not prove herself. Jellema did not make a written complaint about Dede. Jellema was responsible for International Policy, covering the entire Organization. Dede did not complain that Jellema was interfering with Dede's docket. Plans were generated at the international level. Dede would have a say from Nairobi; she served the same Organization. Regional Directors however, did not just do as they wished. She attacked the CEO. Singh felt he was a good Line Manager. There were 10 International Directors, with 3 Africans- Chris, Stanley and Dede.

73. Dede's contract was open-ended. She could leave voluntarily. Either party could terminate the contract. Dede, unlike some other International Directors, was not given extra responsibilities. This was apportioned according to the respective International Director's technical expertise. Dede was not shut out from raising any issue in the meetings. The Chair informed the CEO about Dede's campaign letter. At the time, the idea of amicable separation was already being discussed. The CEO suspended discussion on the advice of the Chair. It was incumbent upon the CEO to take a decision that protected the Organization. Ramesh Singh had a phone conversation with Dede on 4th March 2010, advising her to make up her mind and revert to Management. She did not do so, and the letter of termination was sent via e-mail and on 5th March 2010. A hard copy of the letter was also sent to her. She refused to receive the hard copy in Nairobi.

74. The contract granted Parties 3 months' notice in case of termination. The meeting in Johannesburg on 14th November 2009 was held during the week for International Directors' meeting. Other business is transacted on the side. Many people told Singh Dede had criticized Rights to End Poverty [RTEP] Review Plan. Some contents of the Claimant's dossier were correct, others were not. There was no written complaint against Dede from the International Directors. She had problems with the RTEP, troubled relationship with the other International Directors, and was insubordinate. She was disruptive.

75. Ramesh Singh testified Dede's letter mentioned the position of CEO, not Singh. He took operational decisions, while the Board took strategic decisions. When the RTEP Review team was composed, Dede complained that there was no representative for West and Central Africa Region. It was a legitimate issue. The CEO had the right to constitute the team. The same team recommended closure of Guinea Bissau and Cameroon which fell under Dede. If the CEO had foreknowledge of the Countries to be picked for

closure, he would have acted otherwise. The recommendation for closure was made by the Board. Dede was not in the meeting. The CEO was aware Dede was against closure all long. She totally refused to implement the decision to close Guinea Bissau, and the CEO had to constitute a Committee to implement. The Respondent's Human Resource Manual, recognizes under clause 1.4., mutual respect and diversity.

76. Dede did not stop Kujejatou Manneh the Gambian Country Director, from signing the contract. Dede should have taken disciplinary action against Kujejatou. She ought to have called Kujejatou and prevailed upon her not to sign the contract. Dede gave an exit plan for Guinea Bissau and Cameroon spread out over a period of 2 years. The organization needed to exit within 1 year, which was adopted and implemented. Dede refused to go by the 1 year.

77. If she took amicable separation, the Respondent would have availed to her 3 months' termination notice. The CEO did not take the decision against Dede based on his own feelings; he did so in accordance with the termination law. The Human Resources Manual obligated the Respondent to respect the laws of the host Countries. Singh did not have documents to support the Counter-claim. Dede was not entitled to boarding fees. The contract allowed for payment of her housing provision, and school fees. If payment was made, it was in accordance with the contract of employment. The Respondent would cater for her repatriation. She never approached the Respondent for the assistance. She did not go through clearing with the Respondent.

78. Singh concluded his evidence on redirection with the clarification that Dede was asked to contact the Human Resources Section after termination; she did not revert. The International Organization had to guarantee the loan to Gambia. The negotiating team had found Gambia was not a legal entity. The International Office was legitimately concerned. Dede was warned, and counseled. She had issues with other International Directors besides Jellema, such as Helen and Adriano. The comments captured in the 180 degrees appraisal were from fellow Directors as well as Employees reporting to her. Singh informed Dede at the meeting of 13th and 14th November 2009 that her contract with the Respondent would have to be terminated one way or the other. Clause 8.2.3.4 of the contract allowed for termination without notice in case of gross misconduct. Singh felt Dede was never going to make the decision to end the contract. The RTEP Review was focused on the whole globe. It was not representation on the basis of geographical areas, but technical issues. The Board took a decision as a team. No one had discretion in implementation of collective decisions. Senior Managers have a high level of responsibility and accountability. Ramesh Singh had no reservation for the decision he made.

79. Irene Ovonji-Odida is a Lawyer from Uganda. She is the Chair of Action Aid International Board. She ascended to the position in June 2009. She studied for LL.B at the Makerere University Uganda, and LL.M at the Howard University in the US. She met Dede when she [Odida], was an observer for the International Board in 2007/ 2008. Ramesh Singh was the CEO.

80. The CEO informed the Chair he was having challenges with Dede. This was at a meeting in Rio de Janeiro. She advised Dede should be supported because she was new. She was the sole African female, and the Chair wanted to see her succeed. Odida would talk to Dede, and encourage her. Dede had problems relating with her Colleagues and resorted to personalization of issues, especially if she was in a minority decisional role. She was not a team player.

81. She had problems with the closure of African Offices in certain Regions, and opening of new ones in the North. The Chair explained to Dede that they were opening in the North, because this was where the funds originated. Odida explained she is a Volunteer and has a life outside the Organization.

82. Singh was leaving the Organization and towards the end of 2009, the CEO's position was advertised. Dede applied. She then wrote to Odida a letter dated 17th November 2009. She made a multiplicity of accusations against the CEO and his team. Such letters are not acceptable. It was a grievance, expressed to be a campaign letter. It was an unusual letter. Odida wrote back and asked Dede if she was initiating a grievance. She did not reply. The Chair brought the letter to attention of the Board. It was potentially defamatory to the CEO and his team. Because it was not raised as a grievance, the Board decided to set up a Task Force. The Task Force concluded the allegations did not warrant a full hearing. It was

concluded there was an interpersonal issue between Dede and Singh. The Management was given the green light to proceed with the matter. The CEO had put on hold the management process. The Board felt Singh acted within his mandate in dismissing Dede.

83. Questioned by Mr. Agwara for the Claimant, the Chair confirmed she was at the time of giving evidence, still the Chair of the Respondent. The Board provides oversight to the Management team. It is not involved in the day to day management. The Chair felt it was not in the interest of the Respondent to continue working with Dede. Dede was wrong on the issues she raised. The Chair felt it was a matter of perspectives, but Dede was wrong in imputing improper motive on the other Directors.

84. There were issues revolving around the Gambian project and her relationship with fellow Directors, in particular, Anne Jellema. Resource allocation was an issue. The Chair was not aware that Dede was not informed of the decision to close Guinea Bissau and Cameroon. The letter of 17th November 2009 was addressed to the Chair, not anyone else, and was not copied to anyone else. It was partly campaign, partly grievance. A Senior Manager with a grievance could only go before the Board. It was the duty of the Chair to bring the issues before the Board. The Panel constituted to investigate the issues raised by Dede was not a Disciplinary Panel. It concluded the issue on resource allocation was legitimate and healthy debate. There was tension among International Directors. There was no evidence of lying and improper behaviour among them. The Board did not have a role in termination; this was the preserve of Management.

85. Odida testified that the problem with Dede was not about raising issues for debate; the problem was that she did not accept the decisions made on the issues raised.

86. Redirected, Odida testified that Dede was out of synchronization with what was going on in the Organization. She stated at page 65 of the Claim that once a decision was made, members must accept or resign. The Chair advised if she was in a team, and failed to agree with the collective decision, she would have to resign. Dede said she was going to create a crisis; her grievance was therefore not genuine. She never raised the issue about not being consulted on withdrawal from Guinea Bissau and Cameroon. Odida testified, in answer to a question posed by the Court that the grievance letter from Dede of 4th March 2010 came much later after the conclusion of the Board process. The Respondent urges the Court to uphold its evidence dismiss the Claim, and allow the Counter-claim.

THE COURT FINDS AND AWARDS:-

Preliminary Ruling

87. Although the Court dealt with the preliminary challenge on jurisdiction, and assumed jurisdiction while advising aggrieved Parties to proceed to the next Judicial Forum, Parties appear not satisfied with that advice, and have rehashed the preliminary point in their Closing Arguments. It is the position of this Court that it does not have a monopoly of the law. The law is as expansive as the Bible, with different interpretations. There are as many legal conclusions, as there are religious doctrines. Judicial thinking however is hierarchical, and judicial thought is meant to be distilled through a hierarchy of Courts, so that whatever is the opinion given at the top of the edifice, is assumed to be the correct position, and for the sake of social equilibrium, the most acceptable, and therefore binding position. Rather than strain judicial economy through extended argumentation on a point of law upon which this First Court has rendered its view, the Parties ought to have moved to the Superior Courts, to seek an alternative and binding view.

88. For the record the Preliminary Challenge revolved around Clause 30 of the contract of employment concluded between the Parties which stated, *“This contract is made in accordance with the, and subject to the, laws of England and Wales.”*

89. The Respondent raised a preliminary challenge based on this Clause. It was a lengthy argument. It was argued the Industrial Court of Kenya could not assume jurisdiction, as the Parties had made a clear choice of the applicable law. The Court made the following findings and conclusions which, need restating:-

- a. The primary factor in determining the applicable law in a foreign contract of service is the notion of party autonomy. National laws have no reason to, and will not normally interfere with, or ignore the express will of the parties;
- b. Parties may, in exercise of party autonomy, choose a system of substantive law to regulate their contractual relationship. They may opt for amorphous body of laws such as general principles of law, transnational law or the recommendations of the ILO. They may choose a moveable or changing body of rules relying on a floating choice of law clause. Party autonomy allows the parties to even adopt non-legal standards to govern their contract;
- c. There are certain limitations to party autonomy. States have mandatory laws and rules which cannot be avoided. In this way, public law intrudes on private law. Closely related to these mandatory State laws and rules, is the principle of international public policy. Every legal system, national and international, has certain immutable moral and ethical standards, which cannot be avoided by choice of law clauses. Public policy comprises the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community. These standards are held so sacrosanct, so as to require their maintenance at all costs, and without exception. [See **Julian D.M. Lew “Applicable Law” [532] New York Oceana Publications 1978.**];
- d. Labour standards are viewed as falling within international public policy. States will not cede their sovereignty easily over issues that concern implementation of labour standards within their territorial boundaries. Like criminal law, labour law is highly territorial. The maxim in labour is **lex loci laboris**, which means that national law should be applied to every labour relationship, created within the territorial boundaries of the respective state; and
- e. The Claimant in this dispute obtained a Kenyan Work Permit, held a contract that was to be performed in Kenya, and from Kenya. She was resident in Kenya. Action Aid International has Regional Offices in Nairobi. The law of unfair termination under the Employment Act 2007 is a mandatory law, defining Labour Standards which are an issue of International Public Policy, and the Clause in the Claimant’s contract of employment stating the applicable law to be the law of England and Wales did not bar the Industrial Court of Kenya from assuming jurisdiction.

90. The principle of *lex loci laboris* is given weight in the decision of **Todd v. British Midland Airways Limited [1978] ICR 959**, where Lord Denning stated, “ *A man’s base is where he should be regarded as ordinarily working, even though he may spend days, weeks or months, working overseas. I would only make this suggestion. I do not think that the terms of the contract help much in these cases.... You have to find at the material time where the man is based.*” This position was restated in the case of **Lawson v. Serco ltd [2006] UKHL 3**. In **the Kenya Court of Appeal Civil Appeal No. 36 of 1983 between United India Insurance Co Limited and Kenindia Insurance Co limited v. E.A. Underwriters [Kenya Limited]** the Court upheld the decision of the High Court to assume jurisdiction, in a commercial dispute where the contract had a clause opting for the laws and courts of Bombay India. The Court stated that litigation should take place “ *close to the scene. It is litigation which properly belongs to this Country.*”

91. The Court may also point out that there is no significant, substantive difference between the Employment Law of Kenya and that of England and Wales, on the subject of unfair termination. In either set of laws there is requirement for Employers to grant Employees written contracts; specify the terms and conditions of employment; and observe procedural and substantive justice on termination of employment. There is no major advantage either Party would have over the other, by applying one substantive law rather than the other. In fact, this Court’s view is that Labour Standards are globalized through the International Labour Organization Conventions. Most domestic and regional legislations follow those standards. Our law is up to the Standards laid down by the ILO; it well –equipped to deal with all labour disputes arising within our territorial jurisdiction; and is fully responsive to disputes arising from the International Labour Market, in particular from the Expatriate and Peripatetic Employees, serving in the various International Organizations resident in the regional hub of Nairobi. The Respondent’s Global HR/OD Framework Clause 1.6 appears to endorse the primacy of the law of the

place, in the following terms: “*Action Aid International abides by the laws of the Countries in which it is working. No member of staff will be put in a position where they are required to contravene the laws of the country where their office is located.*” The Court is satisfied that its assumption of jurisdiction in this Labour dispute was correct, and there is no need to extend the debate at this level.

92. There is common evidence that the Respondent is an International NGO created to fight global poverty. It is registered in Den Haag Netherlands. It has a Regional Office in Nairobi, covering West and Central Africa and East and South Africa. Its Secretariat is in Johannesburg South Africa. Dede was employed by the Respondent as the International Director for West and Central Africa. Her letter of appointment is dated 21st May 2007. She signed the contract of employment issued 21st May 2007, on 11th June 2007. Her contract was indeterminate. She commenced working on 15th August 2007. The other Region, East and South Africa, was under International Director Chris Kinyanjui. Her employment was also regulated through the Respondent’s Global HR/OD Framework. There is no dispute that she worked up to 5th March 2010, when the Respondent, through its CEO Ramesh Sigh, terminated her contract of employment.

93. The questions raised in the substantive dispute are, ***whether the Claimant’s contract was terminated for valid reason or reasons; whether the decision was arrived at fairly; and whether she is entitled to the remedies sought?*** The Employer under Section 41, 43 and 45 of the Employment Act 2007 is required to give fair, valid reason or reasons, in justifying termination, and to adhere to a fair procedure in arriving at the decision. These provisions are similar to Sections 94, 95 and 98 of the English Employment Rights Act 1996. The Claimant seeks the remedy of reinstatement with back-pay or anticipatory salaries for the remainder of her contract. Reinstatement is created through Section 49 of the Employment Act 2007, and Section 15 of the Labour Institutions Act 2007 which was in force, at the time of Dede’s dismissal. There are similar remedies under Sections 113, 114, 115, and 116 of the English Employment Rights Act 1996.

VALIDITY AND FAIRNESS OF REASONS

94. The reasons leading to the termination of the Claimant’s contract of employment may firstly be seen, in the e-mail communication from CEO Ramesh Singh to the Claimant, dated 5th March 2010. These reasons can be summarized as follows:-

- a. Negative attitude from the Claimant towards her peers and team of International Directors;
- b. Misconduct over the Gambian Contract, Exit Plan for Cameroon and Guinea Bissau, and the RTEP Review Plan; and
- c. Writing of a highly inappropriate campaign letter to the Chair of the International Board dated 17th November 2009, making serious allegations against the CEO, the International Directors and the Organization.

These grounds were repeated in the hard copy version of the letter of termination, though in slightly different language.

[a] Negative Attitude.

95. The Respondent’s position as narrated by its CEO is that Dede was an International Director. She was expected to demonstrate respect to her peers and fellow International Directors. The Respondent’s Human Resources Manual requires all Employees to uphold the values of mutual respect and work together towards a common goal. Dede’s failure in meeting these values was, according to the Respondent, demonstrated through various incidents and evidential materials. The 180 degrees appraisal had comments about Dede from staff under her supervision and from fellow International Directors. While the different commentators lauded the Claimant’s role in strengthening field programme, partnership and accountability in the Organization, they were near unanimous in their assessment of her inadequacies and

failures. Some of the words used to describe Dede by her Colleagues are 'Defensive, Obstructive and Divisive.' The Claimant on her part charged that the Respondent, in particular the CEO failed to accord her equal treatment with her peers, and mischievously instigated the sour relationship between her and some of her peers to further the CEO's personal vendetta against her.

96. The Court finds Dede had an attitudinal problem in relation to her colleagues. The Court is not able to agree with her that the CEO Mr. Singh created the wedge between Dede and her peers. The commentators in the 180 degrees appraisal were different commentators, on both ends of the Organization Dede served. These were her fellow International Directors, as well as members of staff under her supervision. It is highly unlikely the CEO would guide their thoughts of Dede. There was evidence of this negative energy and attitudinal problem from various sources, as captured here-below:-

- Relationship with Chris Kinyanjui International Director East and South Africa based at the Regional Office in Nairobi, alongside Dede- In her Memo of the meeting held in Johannesburg on 13th and 14th November 2009, Dede reveals she had forwarded an e-mail written by Chris to the CEO, to the Country Directors. She says that she did this because Country Directors were speculating who the 'traitor' in the team was. She suggests Chris was the 'traitor' because he was passing information to the CEO. This in the view of the Court, reflected scant respect on the part of Dede, for a fellow International Director, with whom she shared Regional Offices at Waiyaki Way, Nairobi. The CEO explained that part of the agenda in the Johannesburg meeting, was to explore ways of making the Regional Office in Nairobi functional.
- Relationship with Anne Jellema, International Director for Policy- Dede acknowledged there were differences between her and Jellema, but testified these were not personal, but differences on policy. There however appeared to exist, more than mere policy differences between Dede and Jellema. The CEO's evidence was that Dede persistently criticized and attacked Jellema. The CEO had issued Dede warnings, asking her to refrain from these attacks. It did not stop. At the heart of Dede's sustained animosity towards Jellema was the feeling that the latter wanted to centralize the work of the Organization, which on its own seems to be a policy difference. It was the manner of Dede's expression of these differences, which cast her as an International Director who did not fully appreciate the principle of mutual respect. In the e-mail exchanges between Dede and Jellema in January/ February 2008, it is clear there were policy differences between the two on South- South issues. These were escalated into questions being raised by Dede on recruitment of staff [Ojobo], and on the thinking of other staff members such as Brian, Titumir and Sandeep on the South- South debate. Dede goes on to narrate her personal circumstances, revealing that her Father, who is 25% Welsh and 75% English, wrote a book called '*Class Struggle in Wales.*' She concludes her strongly worded e-mail to Jellema with the suggestion that she [Dede] did not think her Father could legitimately stand on South- South platform, except by special invitation. The Court understood this to imply that Jellema could not legitimately lead, although she was the International Director for Policy and Campaign, in the South-South debate. Looked at beyond the face value, this was a personalized attack on Jellema, an allusion to her racial or regional origin, and ability to discharge her role without special invitation. Dede stated in her dossier that Ramesh Singh had hinted he was promoting women in the Organization. She at the same time complained about his discrimination of African Women. She then suggested that Singh was probably supporting the candidature of Jellema to the position of CEO. In her evidence before this Court, she testified that the candidate favoured for the CEO's position was Adriano Campolina. Dede seemed to speculate. Considering that Dede herself applied for the position, her sustained attacks on Jellema may have been informed by the desire to wear down a potential rival, which was the wrong attitude.
- Juliana Makapan worked on a short fixed term contract between January and September 2008. She testified the differences between Dede and Jellema were not personal but policy based, and that she talked to both ladies, and they bridged their divergence. This evidence was not persuasive. Makapan's service with the Respondent and interaction with the International Directors was too brief to enable her make informed assessment of the situation. After she left in September 2008, there is evidence to show the bad blood between Dede and Anne Jellema continued into the year

2009. Makapan confirmed at one point during the International Directors' meeting, she was asked by the CEO to ask Dede to tone down her language, and also that whenever Dede spoke other International Directors kept quite. Dede was out of synchronization. It is noteworthy that although Juliana did not testify as such, Dede alleges in her dossier on creation of a crisis, that Juliana's hiring and exit after 6 months, was part of the problem of Racism, Bullying and Discrimination against black women perpetrated by the CEO. This again reveals in Dede a problem of attitude. Irene Ovonji- Odida the Chair came out as an independent, impartial person, and confirmed there were concerns with Dede's attitude towards Jellema. The CEO gave clear evidence on this and was emphatic the differences went beyond the boundaries of acceptable policy differences. Dede herself did not convince the Court that she was merely concerned with policy and management.

- It was clear from the record and from Witnesses such as Dr. Joan Akaba, that there were Employees of the Respondent, who felt Dede was doing the right thing in her vociferous advocacy of the African interests in Action Aid International. They saw her as fearless, and ready to confront the status quo. She was defending resource diversion from the poor in Africa, to the North. She had many admirers like Dr. Joan Akaba from her native Ghana, who resigned after Dede's contract was terminated. While Dede cannot be criticized for her strong convictions, her manner of expressing these convictions overlooked certain limitations placed upon her as an Employee of Action Aid International by her contract of employment and in particular the Human Resource Manual. She acted as a rabble rouser, while retreating to the role of the injured party under the banner of gender and racial discrimination, whenever called upon to take responsibility. Decisions were made by majority vote. According to Irene Ovonji-Odida Dede's problem was that she did not accept these decisions when she fell in the minority. The Court upholds this evidence.
- Her relationship with other International Directors such as Helen and Adriano was termed as bad in the 180 degrees appraisal. In her dossier she makes comments such as '*Ramesh started to get nasty again.*' She held the CEO as a man given to nastiness. The CEO testified, without much of a challenge from the Claimant, that some International Directors contemplated resigning if decisive action was not taken against Dede. The Chair gave evidence confirming Dede did not have the right attitude. When pointed out to her by the CEO in the Johannesburg meeting of 13th/14th November 2009 that she was disrespectful to the CEO and the International Directors, she coldly answered that all she had done was point out the facts to them. She alleged in her formal complaint against the CEO to the Chair, which was made a day before termination, that the CEO started harassing and victimizing her soon after she joined Action Aid in 2007. This would appear to discount her later day claims that she was being victimized because she had offered herself as a candidate for the CEO's position. Why would the CEO recruit her and then immediately begin to harass her? In her letter to the Chair campaigning for the position of the CEO, Dede stated, '*we cannot have an IDs [International Directors] team that lies to the Board.....We cannot have a CEO who lies to the Board..*' She condemns the entire team she was supposed to work with and which she desired to lead, without reservation. The Court will shortly discuss this letter, but notes these statements confirmed the validity of the first allegation against Dede in the letter of termination, with respect to negative attitude by Dede towards her Colleagues.

[b] Gambia Contract; exit Plan for Cameroon and Guinea Bissau; and RTEP Review Plan.

97. Action Aid the Gambia [AATG] signed a Euro 3.995 million contract with Global Fund, which could be extended to 5 years at the overall cost of Euro 11 million. In May 2009, the CEO Ramesh Singh gave express instructions that the contract should not be signed, without his approval. The Respondent felt a contract of the size, brought with it significant risks. AATG was not considered an autonomous legal entity, and accrued risk on signing the contract, would fall on Action Aid International and its affiliate Action Aid UK.

98. The Country Director for Gambia Kujejatou Manneh signed the contract on 20th August 2009 without the approval of Ramesh Singh the CEO, and in disregard of the instructions given by the CEO. The Country Director explained to the CEO that she had no option but to sign the contract. The Country Office, Kujejatou explained was better placed to know what course of action to take. She was not

apologetic, telling the CEO off, and complaining that the Respondent's Management was too focused on getting an expatriate Head of Finance for Gambia, at the expense of completing the contract for the benefit of the Gambians.

99. Dede was the International Director for West and Central Africa. It was the view of the Management that she was complicit or negligent in the signing of the contract. The Claimant explained that the criticism from Management, on the signing of the contract, was probably occasioned by the fact that Dede and Kujejatou were Black Females, and revolved around power dynamics; it was also probably due to changes in personnel at the time the contract was signed; and probably there were issues of breakdown in trust and communication.

100. Interestingly Dede stated in one of her e-mails to the CEO on 10th September 2009, that the instructions not to sign reached Dede and the Country Office, after the signing had already been done. She stated that the instructions against signing the contract were sent by Singh on 26th / 27th/ and 28th August 2009, too late to stop the signing on 20th August 2009. She told the Auditors picked to investigate the circumstances surrounding the signing of the contract, that she had not received the e-mail of the CEO of 1st May 2009, which she belatedly found in her pre-migration inbox.

101. The Claimant also held the position that Kujejatou had met the CEO in Copenhagen after which she returned to Gambia full of reassurance on the probity of the project. Dede was not unduly worried about the capacity of the Gambia to manage the funds. She had been to Gambia and was impressed by the deep engagement of the staff in the project. The Global Fund Consultant had mentioned to Dede that Kujejatou's leadership was effective. She downplayed the concerns of the other International Directors, saying they had not had the advantage of meeting the Global Fund negotiators.

102. When called upon to give a detailed explanation by the CEO, Dede responded saying there were rainstorms throughout the Gambia, which caused blackout and breakdown in telecommunications.

103. The Auditors Report on the contract did not expressly place blame on Dede. It states she did not, as the Line Manager to Kujejatou, give express authority for the signing of the contract. Kujejatou took full responsibility. AATG was also found to have the capacity to deliver. There were institutional weaknesses pointed out. The Respondent did not have clear protocols to guide Country Programmes on signing significantly large contracts with donors. A similar situation had occurred with Nigeria in the past, out of which the Respondent should have learnt the need for clear guidelines.

104. From the perspective of the employment relationship, this is not to say the Claimant did not insubordinate the CEO. The CEO was asking for time to sort out fundamental concerns on the contract. The Auditors report makes it clear that, "*the size of the contract [Euro 11 m] and the strength of the concerns expressed by the CEO and other IDs, should have ensured that the contract was discussed at a formal setting to bring all the parties together and better understand the different perspectives.*"

105. Dede did not do much to ensure the contract was not signed when it was. There was no opportunity to ensure better understanding of the contract, in the absence of clear guidelines, at both the Country and International Directors' level. The Claimant appears to have egged Kujejatou on, through her stance that Kujejatou was an effective leader roundly endorsed by the Global Fund Consultant, and by her lack of actively engaging with Kujejatou to delay the signing. No proper risk assessment was carried out prior to the execution of the contract. Dede came up with handwritten papers on risk assessment when called upon to explain. The position by Dede that the CEO's instructions to stop signing came after the signing was done, tended to show Dede as someone who knew much more than she cared to disclose, on the disregard for the CEO's instructions. She took no disciplinary action against Kujejatou and was thereafter agitating the CEO and Management to extend Kujejatou's contract after it had lapsed, arguing that the lapse over the Gambia contract, was a collective failure. In the view of the Court, the failure to uphold the position of the other International Directors and the CEO on the project again showed Dede as lacking in team spirit, and bent on accentuating the divisions in Action Aid International. The allegation against her on the Gambian contract was a valid termination ground.

106. In 2008 there was a global financial crisis, making it difficult for the Respondent to fulfill its mandate in its various Country Programmes. The International Board met, and determined to close down some of the Offices including Cameroon and Guinea Bissau. It was a collective decision. These Countries fell within Dede's West and Central Africa Region, and expectedly she felt the decision was wrong. Dede was unhappy, but given the task of drawing the exit plan, recommended a 2 year exit plan while eventually, a 1 year exit plan was adopted.

107. The CEO explained the criteria in selection of Countries from which to withdraw to include absence of longer term commitment and funding; the scale of existing work and presence; strategic importance; and the risks. Fault lines and confusion, the CEO explained, might have emerged in relation to RTEP operational plan revision, particularly with respect to Guinea Bissau and Cameroon. A decision had already been made to withdraw from Sri Lanka and Venezuela, and it was the position of the CEO that the two African Countries were not being unfairly selected for closure. He expected new Countries would be added in the West Africa when the Respondent developed a successor to the RTEP.

108. The 2 African Countries thought it was ill advised to shut them down. Cameroon Office had been able to raise substantial funds without the aid of the Respondent, and was working well with UN Agencies. It was also argued to be a strategic office within the Region. Guinea Bissau was at the point of signing a contract worth USD 400,000, indicating there was potential for growth. Dede recommended 2 year exit plan for both Countries, during which the Respondent would support the Countries in fundraising, while identifying a suitable partner to take them over.

109. There was no proper evidence from the CEO and the Chair of the Respondent, to validate the accusation against Dede over Cameroon, Guinea Bissau and RTEP review plan. She was the International Director for the West and Central Africa Region. The CEO stated she was vocal against closure, and publicly criticized the Board's decision on closure. The Court has reviewed this evidence and finds this was a vigorously debated and divisive issue. Furthermore the CEO left out Dede from the International Director's Board meeting which made the decision. She gave an exit plan for 2 years, which would suggest to the Court she was, on this one, willing to go by the majority decision on closure. In the end the Board adopted 1 year exit plan. There was no evidence beyond the CEO's word that Dede refused to implement the decision. Nothing was placed before the Court to show that Dede marshaled Country Directors or any President in the involved Countries, to oppose the closure. It is doubtful she would be writing a paper on the exit plan, while resisting closure. The RTEP Review Plan involved review of the whole globe. It was not based on geographical areas, but technical issues, according the CEO. He did not however show to the Court that Dede was insubordinate, incompatible or disrespectful in engaging her Colleagues in the debate, or that she refused to implement what was collectively agreed. The Respondent did not make out its case on the allegations revolving around closure of Cameroon, Guinea Bissau and RTEP Review Plan. This ground was not a valid ground for termination.

[c] Inappropriate Campaign letter.

110. Dede held a meeting with Stanley Arumugam Director of Human Resources, and CEO Ramesh Singh in Johannesburg on 13th and 14th November 2009. After the meeting she prepared some notes, reflecting on the discussion at the meeting. She confirmed that her relationship with the International Directors and the CEO was not working. It is in these notes that she suggested a way forward - create a crisis or negotiate separation. She took the first option and wrote the campaign letter dated 17th November 2009.

111. There was nothing in the Human Resource Manual, barring candidates for the position of the CEO from writing campaign letters. It does however appear unusual, and the Chair to whom the letter was addressed testified was inappropriate, for a job applicant to follow up her application with a campaign letter. The practice in Kenya is that one does not apply for a job, and then write campaign material addressed to the potential Employer; the CV and testimonials forwarded with the application are deemed to have sufficient campaign value. The major problem with this letter was in its contents.

112. Dede tore into her Employer for increasing its investment in the US and Northern Offices at a time

of global recession. “ *Donors do not want to see their monies spent on plush offices in expensive capitals!*” she thundered. She accused the International Directors of lying about the performance of the fundraising Affiliates. She did not spare the outgoing CEO, accusing him of lying about decisions taken by the Board. She charged that Ramesh Singh had allowed himself to be captured by certain interests. The CEO testified that Dede calumniated all the Directors, including those who were supposed to be her competitors in succeeding the CEO.

113. This letter was highly inappropriate, and a mark of eccentricity. It denigrated fellow International Directors, the CEO and the Organization itself. It was a letter written in bad faith, designed solely to create a crisis. She intended to have the campaign letter result in an investigation, which it did. She intended to broaden the scope to racism, bullying and corruption in the International Directors’ team. This is an Employee who had fundamental differences with her Colleagues and Employer, and appeared determined to destroy the Organization as it existed. Her letter was inappropriate, written for selfish reasons and intended to harm the other International Directors. Termination, on the basis of this inappropriate letter, was well founded.

114. These facts reveal 2 legal grounds to warrant termination- Insubordination and Incompatibility. Stanley had informed Dede while in the meeting in Johannesburg, that there was incompatibility between her and the International Directors’ team. She agreed saying “ *While it was clear what Stanley was saying was true, that things were not working in my relationship with the International Directors’ team, the reasons for those problems had not been analyzed.*” Her conduct over the Gambian contract and her language and attitude towards the CEO at various turns, demonstrated a case of persistent insubordination.

Incompatibility and Insubordination

115. Section 45 [2] [b] of the Employment Act 2007 states that the reason for termination is fair, if related to the Employee’s conduct, capacity or compatibility. It is also fair if termination is based on the operational requirements of the Employer. Employers generally are entitled to have harmonious working relationships in their Organization, and can do so by weeding out trouble makers, eccentrics and disruptive Employees from their Organizations.

116. Incompatibility can be a nebulous concept and workplaces normally have a wide array of personalities, approaches and managerial styles. Employers can tolerate mild eccentricity or idiosyncrasies, but cannot reasonably be expected to tolerate downright impossible or unmanageable Employees. In order that the Employee is not victimized for mild eccentricities, Courts have required the Employer to show that the Employee’s conduct has resulted in irreparable breakdown of the relationship [***Wright v. St. Mary’s Hospital 1992 [ILJ] 987 IC***]. The Court in this decision described incompatibility as “*the inability on the part of the Employee to work harmoniously with fellow Workers or Managers, or failure by the Employee to fit with the corporate culture.*”

117. Dede is shown through her actions and writings to have been unable to work harmoniously with the International Directors and the CEO, and did not fit with the corporate culture of the Respondent. The common refrain, which she endorsed in her dossier, was that she had failed to fit in the International Directors’ team. In which case, in the humble view of this Court, either she or the team would have to give way. One commentator, in the 180 degrees appraisal, described Dede as “ *very passionate about African Politics, identity and regional issues. She is very protective of the interests of her countries. I found her very committed to her work. I do not believe that Dede’s profile fits the demands of this job. She has limited management experience and neglects this area. She appears to be insecure and threatened in the International Directors’ team, which results in her always taking adversarial positions. I do not feel she is a team player.*” This assessment is supported by the Claimant’s notes after the meeting on 13th /14th November 2009 with Stanley and Singh. She brought a lot of energy to the Respondent, but the negative kind of energy, that did not work in furthering the corporate agenda of the Respondent. She had been through warnings, review meetings, and counseling even before her letter of 17th November 2009 to the Chair. She was incompatible.

118. In the South African case of ***Council for Scientific & Industrial Research v. Fijen [1996] [2] SA 1 [A]*** the Court established that the result could be different, in cases where the Employee is an Unsophisticated Labourer. Sophisticated and refined Employees are thought to understand their work environments better, and give appropriate responses to particular situations, without appearing eccentric or idiosyncratic. Fijen was a Professional, working for a Professional Organization, who was given to disruptive outbursts at his workplace, culminating in his dismissal on the basis of incompatibility. On cross-examination, Dede accepted that she was an Executive in her own right, not a Labourer. She is a highly educated and respected intellectual, involved in many development projects in Africa, and was in a position of leadership, within the Respondent Organization. She has taught at the reputable London School of Economics, and worked in several UN Agencies. She would be expected to handle her workplace differences with finesse. The Respondent was therefore justified in terminating the Claimant's contract. There were valid and fair reasons for termination. The Parties agreed in Johannesburg that the Claimant was incompatible, and agreed one way out would have been mutual separation. Instead of pursuing that recourse, the Claimant stalled, wrote the campaign letter, which led to a chain of undesirable events, including the commencement of this litigation. Her incompatibility was such that the Respondent could also invoke the other fair reasons under Section 45 of the Employment Act 2007, in particular, conduct. In the case of ***Wright v. St. Mary's Hospital*** above, dismissal on the basis of incompatibility was seen as an operational requirement, necessary because the Employee or his/her presence was undermining the proper and efficient administration of the Enterprise. This position has however altered in South Africa upon a narrower definition of 'operational requirement' in subsequent Legislation. The Employment Act 2007 has no such narrowed definition of 'operational requirement,' but the Industrial Court in many of its decisions has adopted the narrower definition of 'operational requirement' as denoting economic or strategic justification in terminating employment contracts. Although Dede was a hindrance to the operations of Action Aid International, it may not be correct to view her departure as necessitated on operational requirement. Dede was not involved in one act of poor judgment; she engaged in sustained incompatible behaviour. She was counseled, warned and taken through consultative meetings. Irene Ovonji-Odida the Chair, encouraged Dede, and wanted to see her succeed. The 2 ladies were close, as shown by Dede's evidence that she massaged the Chair's feet in Rio de Janeiro. Odida would not utter untruths about Dede. Dede's own Witness Makapan testified she intervened in the dispute involving the Claimant and Anne Jellema. There was no end to her attacks on Jellema even after this intervention. It is the finding of the Court that the Claimant's contract of employment was validly terminated on the basis of incompatibility and conduct, which are fair termination reasons, under Section 45 of the Employment Act 2007.

119. Insubordination falls under Section 44 [4] [d] and [e] of the Employment Act 2007. It is a valid ground for summary dismissal. This law covers verbal and non-verbal insubordination. Constant and intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority, amounts to non-verbal insubordination. The concept was discussed by the Industrial Court in ***Industrial Court Cause Number 1073 of 2012 between Abraham Gumba v. KEMSA [2014] e-KLR*** where citing the ***Mississippi Supreme Court in Simms v. the Board of Trustees Holly Springs Municipal District School, 414 SO, 2d 431 [Miss. 1982]***, insubordination was described as "constant or continuing intentional refusal to obey direct or implied order, reasonable in nature, and by or with proper authority." The failure by Dede to ensure the contract for Gambia was not signed as and when it was signed; her apparent endorsement of Kujejatou's position on the contract's signing; her feigning ignorance of the instructions given by the CEO on 1st May 2009 not to sign, and explanation that these instructions were received after the signing; all would in the aggregate amount to non-verbal insubordination. Even when asked to explain after the contract was signed, Dede dithered, attributing lack of information on rainstorms which had hit Gambia, interfering with telecommunications. There was a discernible pattern of insolence in her engagement with her CEO and Colleagues throughout. Verbal insubordination occurs when the Employee uses abusive or insulting language to the Employer, or to a person placed in authority over him by his Employer. Although there is no clear recorded conversation where Dede directly insulted or abused her CEO, there is the letter of campaign where she calls him a liar. The letter would naturally come to the attention of the CEO and other International Directors. She also infers in her notes that the CEO was obtaining information from her computer improperly, and through a 'traitor' who the Court thought referred to her Co- International Director in Nairobi Chris. She referred to the CEO in her notes as being nasty. Her Colleagues commented in the appraisal feedbacks "Given the

fact that we still have a lot of misunderstandings, coupled with resistance to RBA, when a ID says the things Dede said in public, it just creates a bad situation.” “ Dede is blunt to a fault. She needs to learn the politics of communications.” It should be noted that incompatible behaviour can result from repeated acts of insubordination, such that there would be no clearly drawn line between the 2 concepts. In the ***South African case of Jabari v. Telkom SA [Pty] Ltd [2006] 10 [BLLR] 924 [LC]***, the Employee was dismissed for being arrogant, uncooperative and insubordinate. All these aberrations were thought to comprise incompatibility, the Employee having demoralized Colleagues and created disharmony at the workplace. The Court explained that for incompatibility to be upheld as a fair ground for termination, the Employer must show the Employee's conduct is the cause of disharmony, and give the Employee an opportunity to remove the cause of the disharmony. The Respondent was able to show Dede's conduct was the source of disharmony, with some International Directors contemplating resignation from the Organization, if no firm decision was taken against Dede. Dede was counseled, warned and asked to remove the cause of the disharmony. She persisted, finally exploding in her campaign letter. Dede's speech was perceived as blunt. Her expressions against the CEO showed a lack of respect for authority, which is what verbal insubordination is all about. In the view of the Court, the ground relating to insubordination was valid.

Fairness of Procedure

120. In both the Employment Act 2007 and the English Employment Rights Act 1996, Employers are required to carry out their termination decisions fairly. Section 41 and 45 of the Kenyan Law required the Claimant to be availed specific charges in a language understood by her; be heard in the company of a workmate; and any representations made by her or her Colleague, be considered, before a decision was made to terminate. The Respondent's Global HR/OD Framework likewise calls for the fair hearing of an Employee before a decision is made. Clause 7.1.1 states that in cases of serious misconduct where dismissal is being considered, a special investigation panel may be formed to provide for all concerned to put forward their cases.

121. The Respondent's Manual is not very clear on the procedure to be adopted in the disciplining of an International Director, and even the Grievance procedure which Dede invoked at the eleventh hour, applied to all permanent, temporary and hourly-paid Employees, with the exception of International Directors. It was not explained to the Court what procedures would apply in cases such as the Claimant's, who wished to lodge grievances against the CEO. The grievance procedure seems tailored for Staff below the level of International Directors. The effect in the view of the Court is that an International Director with bottled-up grievances, could be handicapped in ventilation of those grievances, and even when taken through a disciplinary process, not have the benefit of clearly defined internal disciplinary standards.

122. The Human Resources Manual created offences referred to as major misconduct, among them insubordination, repeated instances of minor misconduct, and any action which may result in or create a situation detrimental to AAI's work or reputation, outside or inside the place of work. From the evidence analyzed in the preceding paragraphs, Dede was involved in these employment offences. The Human Resource Manual states that these actions warrant immediate investigation and suspension/dismissal. The Court understands this to mean there should be an investigation or suspension before hearing and the eventual decision is taken. The Kenyan law does not contemplate instant dismissal, without the benefit of a hearing, and the Human Resource Manual of the Respondent is to be read in a manner consistent with the Kenyan Law. Clause 7.1.2.1 and 7.5 which suggest that serious offences are subject to summary dismissal [i.e. on the spot, no notice] separate from other major misconduct which must be established [i.e. hearing mandatory], need to be read in consistence with Sections 41 and 45 of the Employment Act 2007, which calls for mandatory hearing, irrespective of the degree of gravity of the offence. All offences must be established.

123. The Respondent through its CEO issued the Claimant a formal warning on 26th April 2009. She was asked to refrain from personal attacks of Anne Jellema, and mend her relationship with the other International Directors. This was a final warning. The CEO alluded to previous warnings, but no evidence of these was availed to the Court. The Disciplinary Procedure under Clause 7.1.1 allows for informal procedures in cases of minor misconduct, but calls for formality where informal mechanisms have failed.

Even verbal warnings must be captured in the Employee's file, and dismissal would only take place in case there was no improvement.

124. Although the warning system under the Human Resource Manual again falls short on clarity, and although the CEO did not provide the Court with the full record of warnings, there is reason to conclude that Dede did not change after 26th April 2009. She is reported to have been warned at another meeting in Denmark in July 2009. The meeting that followed in Johannesburg on 13th and 14th November 2009 discussed the same failings. Her campaign letter and notes which came short on the heels of the meeting showed no remorse. *'I am not a quitter,'* stated Dede after the discussions. She then wrote the campaign letter, which compelled Management to put to hold any other steps in the disciplinary process, to allow the Board constitute an Investigation Panel on the allegations made by Dede in her letter.

125. It is good to appreciate from the outset that the Investigation Panel was not a disciplinary mechanism, rather a mechanism at the service of the Board, to establish the veracity of the allegations, and recommend way forward. The disciplinary process belonged to the Management led by the CEO, and was stayed, pending the finalization of the Board process.

126. It is equally important not to omit the observation that specific to the Gambian project, the CEO commissioned investigation led by Respondent's Auditors, who generated a Report. This Report was availed to Dede, and a formal explanation called for by the CEO from Dede, showing why the CEO should not take appropriate disciplinary action against Dede for insubordination and for potentially putting the Organization at risk. The CEO's letter on this is dated 24th November 2009, some days after the Johannesburg meeting and after Dede had written the campaign letter. The Claimant gave her written response. This aspect of the disciplinary process was similarly frozen, pending investigations of the Panel constituted by the Board on the allegations by Dede.

127. The Investigations Panel did find some of the issues raised by Dede healthy for debate within the International Directors. Importantly, the Board did not find the CEO or the International Directors to have lied as alleged by Dede. It was in the end recommended that the issues raised by Dede did not merit a full hearing. There was a Briefing Session in London after the Investigation where both Dede and Ramesh Singh were made to understand the terms of reference of the Investigation and its key findings.

128. It was understood that the disciplinary process against Dede, earlier on frozen, became unfrozen with the end of the Investigation. It was also agreed the Board's process was confidential, and the Management could not use any of the material arising from the Board's process. Stanley the International Director for Human Resources attended the Investigation only to take notes. It was clarified by the Board that Dede's rights as an Employee, were not affected by the Investigation commissioned by the Board; they remained the same as for any other Employee of Action Aid.

129. The Court understood this to mean that by unfreezing the Management driven disciplinary process, the CEO would have to pick up the process from where it was frozen. Unfortunately, Ramesh Singh appears to have been hampered by the circumstances, between the time the Board Investigation ended, and the time he terminated the Claimant's contract, to fulfill the demands of fair procedure. He refers to attempts made to meet Dede in Gambia in February 2010, for a hearing, but that Dede became deliberately scarce. Dede testified she met the CEO in the Gambia on 23rd February 2010, *'for a hearing on organizational issues.'* Ramesh Singh testified Dede avoided him, but they talked on the phone. The Court did not find any requirement in the Claimant's contract and Human Resources Manual, which compelled the Management to consult Country Offices, as stated in the evidence of Dr. Akaba, before terminating the Claimant's contract of employment. What was the *hearing on organizational issues* given to Dede on 23rd February 2010 in the Gambia?

130. There was no evidence from the CEO that after reverting to the Management process, there was an investigation of the allegations against Dede by a Special Investigation Panel in accordance with the Human Resource Manual. She was not suspended; she instead received a letter of termination, dated 5th March 2010. There was a teleconference with the CEO in the 2 days preceding termination, where Dede

was asked to give her way forward.

131. The Court is aware that the Claimant, Stanley Arumugam and the CEO had floated the idea of mutual separation in Johannesburg, and there appeared to be, a meeting of the minds. Dede herself acknowledged in her notes that it was true there was incompatibility between her and her Colleagues. She had on 13th November 2009, been requested by the CEO and Stanley to sleep over the terms of honourable separation, and give her view the following day.

132. On 14th November 2009, she disappointingly and characteristically reported back to the CEO and Stanley that she had not reflected on the proposal for an honourable exit, because some friends of hers had come and taken her out the previous evening. The CEO and Stanley continued to engage Dede on mutual separation, on the 14th November 2009. The Parties went into the details of the proposed separation covering financial, emotional and communication issues. It was after this that Dede wrote the letter campaigning for the position of CEO.

133. Stanley wrote to Dede in follow-up on 23rd November 2009, reminding Dede that she did not give her position to the Management by 18th November 2009 as agreed. Although at the same level with Dede, Stanley wrote under the instructions of the CEO. Dede's answer was that she was not able to reply by 18th November 2009, because of the daily teleconferences which she thought she should be excused from. Stanley then asked her, to give her word, by 25th November 2009. She replied she would not be able to do so because she had not consulted her daughters, who were major stakeholders. The day for her response was moved by Management to 30th November 2009. She replied that she had started to draft something, but was distracted by the daily International Directors' conferences, asking Stanley to "*kindly remind me of the options.*" These e-mails revealed the Claimant to be insolent to her Colleagues. She trashes every process set in motion by the Management in the direction of a solution. There are not many available decisions from Kenya on the subject of employee insolence, due to our past law reporting policies, and frequently, Kenyan Courts look for labour law precedents outside. In the ***South African case of Commercial Catering & Allied Workers Union of South Africa v. Woolfru Limited t/a Woolworths [1989] 10 ILJ 311 [IC]***, the Court suggested that insolence is distinct from insubordination, equating insolence to impudence, cheekiness, disrespect or rudeness. It was the view of the Court that insolence did not necessarily involve disobedience of lawful and reasonable orders. The second view, and which this Court shares, is that insolence is a form of insubordination, as expressed in the South African Commission for Conciliation and Arbitration case of ***Sekete v. Temoso Technologies 8A College [2004] 13 CCMA 8.18.7***. Insolence is a form of insubordination, and repeated acts of insubordination can lead to a finding of incompatibility.

134. There was no good will or mutual respect at all, shown by Dede to her Colleagues. The Management bent backwards, and let pass for so long, some of these eccentricities. She toyed around with the CEO and Stanley, engaged in hide-and-seek, while all the time she had no intention of accepting a mutual and honourable separation. In her notes, she refers to the details of separation. When discussing transitional phase, she cheekily notes, "*Ramesh [CEO] if you mean by transitional phase the CEO recruitment, I will be here for another 9 months....*" Her mind was on the CEO's prize, even as she led her Colleagues down the garden path on the proposed mutual and honourable separation. She even suggested that she would raise, by way of broadening issues in event the Board called for investigations, the point that it was inappropriate for Stanley to be negotiating her exit from the Organization since he was a member of the CEO's recruitment panel. She suggested that Stanley could have been working with the CEO to eliminate competition for the CEO's chosen successor Anne Jellema. Yet, as seen elsewhere, she also testified Adriano Campolina, the gentleman from the Latin America, was the CEO's preferred successor. These are issues she is not shown to have raised directly with Stanley and the CEO. It was therefore not surprising that Dede did not give any meaningful response to Stanley and the CEO, when they asked her to give her word on mutual separation. It is noted that the CEO who succeeded Ramesh Singh was a Canadian Woman, who came from outside the Organization, and also, that the Organization was not bound to source staff from within its ranks under the Human Resource Manual.

135. It was understandable for the CEO to feel exasperated and take the decision of 5th March 2010

without full adherence to the disciplinary procedure which he ought to have adopted, after the management process was unfrozen. In determining whether fair procedure is present in the process of termination, the Court should not just look at the words defining fair procedure in the law and the contract of employment; the conduct of the Employee in making it possible for the Employer to administer procedural justice must also be looked at carefully. Ideally, the discussion over mutual and honourable separation should have been distinguished from the disciplinary process. One could not be a part of, or substitute, for the other. But Dede exasperated the Management, did not take the discussions with the CEO and Stanley seriously, and it is even doubtful that she was ready to submit herself to a full disciplinary hearing. She was constantly elusive whenever she felt engagement with the CEO, would likely result in her exit, before the 9 months she had set as the remainder of her term. The disciplinary procedure under the Human Resource Manual in the case of an International Director is not in clear terms. The Employee did not come out across as someone who took the actions of her Management seriously and who was ready to submit to the jurisdiction of that Management in disciplining her.

136. In the end the Court finds that the Respondent did not fully meet the requirements of fair procedure, but may have been hindered from doing this by the weaknesses in the Human Resources Manual, and the uncompromising nature of the Employee in question. In such a situation, the Court is not compelled to find that termination was unfair on account of procedure. There was the impression created in the meeting between Dede and Management in Johannesburg in South Africa, that there was a common ground the relationship between Dede and her Colleagues was irreparable, and mutual separation was the way forward. The issues were well known to Dede and her Employer. The CEO can be excused by this Court, for overlooking the formalities that he was bound to follow, in concluding a fair disciplinary process. The actions of the Employee were such as to frustrate any processes that led to her exit, before her desired 9 months, intended to give her a chance in succeeding Singh for the position of the CEO. When she got wind that termination was in the offing, she wrote a grievance letter on 4th March 2010, which was calculated to unfurl another time-consuming phase of putting in place an ad hoc committee, investigation and hearing. The Chair Irene Ovonji- Odida thought Dede's campaign letter back in November 2009 was a grievance notification, but when she wrote to Dede seeking clarification, Dede ignored the Chair and did not respond. The Grievance Procedure was not available to Dede, but she nonetheless invoked it, to prolong or muddy the exit process. There would be no way to bring to a close an employment relationship that was long past irreparable. The CEO sent the Claimant an e-mail communicating termination. This mode of communication in the view of the Court is acceptable within International Organizations, where Management is not resident, in the habitual place of work of the Employee. There was evidence that the Respondent also issued a hard copy of the termination letter to Dede, which she refused to receive. Termination on account of procedure in the circumstances was not unfair.

137. The Respondent counter-claims from the Claimant a total of GB Sterling Pounds 20,696. This comprises Boarding Fees for the Claimant's Children paid in advance, at GB Sterling Pounds 19,000; School Fees paid in advance for her Children for March, April, May and June 2010 at GB Sterling Pounds 1,202; and Advance payment of the Claimant's house rent for March, April, May, June, July and August 2010 at GB Sterling Pounds 494.

138. Clause 22 of the Claimant's employment contract referred to Action Aid's housing policy, which did not form part of the Employee's contract. The document advised that in most locations, the Respondent provided housing allowance in cash. There was no detailed housing policy available for the perusal of the Court, but Clause 4.5 of the Human Resources Manual granted expatriate staff member "*provisions for modest housing.*" The CEO conceded in cross-examination that the contract allowed for payment of housing for expatriates. There was no evidence that this was to be paid in "*anticipation of the Claimant's loyal service devoid of insubordination and gross misconduct,*" as pleaded in the Counter-claim. The refund of house rent allowance of GB Sterling Pounds 494 is disallowed.

139. Clause 25 of the contract provided that the Respondent would reimburse 90% of the primary and secondary day school fees for dependent children. This was irrespective of whether the Children accompanied, or did not accompany, the Employee in his /her posting. Clause 4.5 of the Human Resource Manual allowed the expatriate staff provision for school fees for children up to the age of 18 years in case of accompanied postings. The Claimant came to Nairobi with 2 of her Children who were enrolled in

schools in Nairobi. The CEO conceded the provision for fees was in the contract. Again the Court is not able to agree that this was payable on the understanding the Claimant would not be engaged in gross misconduct. It is not relevant that school fees and housing provisions were paid in advance, up to June and August 2010 respectively; the Respondent did this based on its contractual obligation. These cannot be refunded, just as salaries paid to her cannot be refunded to the Respondent on account of her misconduct.

Conclusion

137. The Court is satisfied that termination was fair. The Respondent had adequate, fair and valid reasons, and attempted in very difficult circumstances, and against a recalcitrant Employee, to meet the full demands of a fair procedure. The correct way forward, was for Dede to settle on the honourable separation, not create a crisis. She chose to create a crisis, and the Court cannot assist her to draw benefit from a situation she deliberately authored. She engaged the Respondent in a costly and totally unnecessary litigation. Her Claim has no merit. The Counter-claim has no merit. The Court Orders:-

- a. ***Termination of the Claimant's contract of Employment was fair;***
- b. ***The Claim is rejected in its totality;***
- c. ***The Counter-claim is rejected; and***
- d. ***The Claimant shall meet the costs of this Cause.***

Dated and Signed at Nairobi this 6th day of June 2014

James Rika

Judge

Dated and delivered at Nairobi this 11th day of June 2014

Matthews Nderi Nduma

Principal Judge

