



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 50 OF 2012
(Originally Nairobi Cause No. 428 of 2012)

MARY MUTANU MWENDWA

CLAIMANT

v

AYUDA NINOS DE AFRICA-KENYA (ANIDAN K)

RESPONDENT

JUDGMENT

Introduction

1. Mary Mutanu Mwendwa (Claimant) filed a Memorandum of Claim against Ayuda Ninos De Africa-(Anidan K), (Respondent) on 15 March 2012 in Nairobi, seeking a declarations that the Respondent's decision to terminate her employment was unlawful and unfair and that the Respondent's failure to pay her terminal dues was unlawful, unfair and without justification and further seeking payment of Kshs 850,000/- being lost salary for remaining duration of the prematurely terminated fixed term contract, and two months leave for the duration of the contract, general damages, costs and interest.
2. The Respondent was served and it filed a Memorandum of Response on 7 June 2012. In the Response, it was pleaded that the termination was in compliance with section 40 of the Employment Act. Thereafter the Cause was transferred for hearing and disposal in Mombasa. On 20 May 2013 the Respondent filed its witness statement.
3. I heard the Cause on 30 May 2013, and the parties highlighted their submissions on 18 July 2013 after which I reserved judgment to 13 September 2013. I could not deliver the judgment on that day because I was away from the station.

Claimant's pleadings and case

4. The Claimant pleaded that she was initially appointed by the Respondent as a nurse through letter dated 1 January 2009, for a period of two years at a monthly gross salary of Kshs 35,000/-. The letter set out other terms and conditions of employment.
5. The Claimant further pleaded that by letter dated 30 April 2009, the Respondent unlawfully, wrongfully, unreasonably, illegally, unjustifiably and without colour of right dismissed her citing shortage of funds and sponsors. The dismissal, it was stated was in breach of contract and natural justice of which particulars were given.
6. Part of the particulars included the suspension of the Claimant/compulsory leave and the advertisement put out for nurses so soon after dismissal of the Claimant.
7. The Claimant gave sworn testimony and she stated that she was employed by the Respondent on 1

- November 2008 on probation and later offered a two year contract effective 1 January 2009 (Claimant's Exh. 1) at a salary of Kshs 35,000/- per month with a 10% increase over the second year of the contract.
8. On 18 March 2009 the Claimant reported for work as usual and in the course of the day, a baby patient was admitted on the instructions of a Dr. Louise and diagnosed with malaria. The Claimant was requested to look after the baby overnight.
 9. The next day, 19 March 2009, the Claimant handed over the baby patient to a nurse called Esther Karare and F Abdurrahman and went to explain to Dr. Louise that she was five months pregnant and therefore could not work the day shift. Dr. Louise refused her permission to go home but nevertheless she left for home with a warning from Dr. Louise that she would inform the Board members and have the Claimant sacked.
 10. The Claimant further testified that when she reported to work on 20 March 2009, Dr. Louise shook everybody else's hand except her and from then she was not allocated any patients to handle. The Claimant's relationship with the doctor became terrible. On 29 March 2009 the Claimant wrote a letter of complaint to the Respondent's Administrator claiming that Dr. Louise had accused her of threatening her security and therefore seeking for investigations. She further stated the doctor had threatened to get her dismissed.
 11. On 31 March 2009, the Respondent sent the Claimant on suspension/compulsory leave because of the letter of complaint and on 30 April 2009 the Respondent's Operations Manager called her and gave her a dismissal letter.
 12. The dismissal letter gave the reason for the Claimant's dismissal as *shortage of funds and sponsors during the current economic recession*. The letter informed her she would be paid Kshs 35,000/- as one month salary in lieu of notice.
 13. The Claimant also testified that prior to the dismissal the Respondent had not informed her of lack of funds and that the dismissal was illegal and unlawful. This was so, because, on 2 July 2009 she saw an advert in the Daily Nation seeking for a doctor, and two nurses at salary of Kshs 35,000/- and Kshs 45,000/- and that out of a staff compliment of 10 (one doctor, one clinical officer, two lab technicians, two cleaners, a receptionist and 3 nurses), it is only herself who was terminated. Out of the three nurses, the Claimant was the second to be employed, Esther Karare being the last nurse to be employed.
 14. On 7 July 2009 the Claimant sent an application letter to the Operations Manager Mr. Odera but he informed her that the Respondent was not interested in her services.
 15. The Claimant therefore seeks a declaration that her termination was unlawful and unfair and the other prayers I have already referred to.

Respondent's pleadings and case

16. The Respondent pleaded that the Claimant sent a complaint letter dated 29 March 2009 to its Administrator complaining about a doctor and that on 31 March 2009 the Claimant was sent on compulsory leave to enable investigations to be carried out.
17. The Respondent further pleaded that in the course of the Claimant's suspension, it encountered financial instability and therefore it had to cut costs drastically and so no investigations were carried.
18. On the termination, it was pleaded that some members of staff would be terminated and the Claimant was one of those selected for termination on the basis of Last In- First Out principle. The termination was on the ground of loss of donor funds and was in compliance with section 40 of the Employment Act on redundancy.
19. The Respondent denied it discriminated or was biased against the Claimant or that the Claimant's position was filed two months after her termination after donors released funds.
20. Finally, the pleadings stated that the Claimant was entitled only to Kshs 35,000/- which she refused to collect.
21. The Respondent called one witness Stephen Odera, its Administrator, but previously the Operations Manager.
22. The witness stated that the Respondent is a charitable organisation running a childrens' home and charitable hospital and gets and relies on donor funds entirely and does not charge fees for its services.

23. The witness confirmed that the Claimant was employed on permanent basis on 1 January 2009 and served until 30 March 2009, had disagreements with Dr. Loice who was in charge and that the Respondent had three nurses.
24. The witness confirmed receipt of the complaint letter by the Claimant dated 29 March 2009 and that he was to carry out investigations but that pending the investigations, he suspended the Claimant. The investigations however were not carried out due to lack of funds.
25. On 30 April 2009 a dismissal letter was written to the Claimant and the basis of the dismissal was because the Respondent had received information that funding would be cut. The Respondent therefore commenced laying off staff and because the Claimant had worked for only three months it was decided to lay her off and pay her because the Claimant was the last nurse to be employed by the Respondent and not Esther Karare. He further testified that Dr. Loice also left after two months because they could not afford her salary of Kshs 150,000/- per month.
26. The witness further stated in examination in chief that the '*redundancy was due to lack of funds*'.
27. After three months the Respondent's finances improved and it therefore advertised for two nurses and another doctor and a reduced salary of Kshs 120,000/- per month but the Claimant did not apply for the nurse position.

Questions arising for determination

28. From the foregoing narration, the parties' pleadings, evidence and submissions the questions which arise for my determination are
 - i. The law applicable
 - ii. whether the dismissal of the Claimant was unfair
 - iii. whether general damages are available for unfair termination/dismissal
 - iv. whether loss of salary for premature termination of fixed term contract is appropriate/available and
 - v. appropriate relief.
29. I will deal with each issue seriatim. For purposes of my evaluation, I will use the terms dismissal and termination interchangeably.

Evaluation

Applicable law

30. I need to mention at the outset that by dint of section 20 of the Industrial Court Act, the Industrial Court is not strictly bound by rules of evidence except in criminal matters.
31. The primary and statutory burden placed upon parties in a complaint of unfair termination or wrongful dismissal is located in section 47(5) of the Employment Act. The section provides that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
32. Section 43 of the Employment Act on the other hand require an employer to prove the reason(s) for the termination otherwise the termination shall be deemed unfair. These reasons must be the ones which genuinely existed and caused the employer to terminate the services of an employee.
33. But that is not all for the employer. Under section 45(2)(a) and (b) of the Employment Act, an employer is expected to prove that the reasons for the termination are both valid and fair if the reasons relate to an employee's conduct, capacity, compatibility or are based on operational requirements.
34. Sections 43, 45(2) and 47(5) of the Employment Act in essence deal with what is generally referred to in employment/labour law as substantive fairness.
35. The Employment Act, in a radical departure from the position which obtains under the common law and in Kenya prior to 2 June 2008 has made it mandatory by virtue of section 41 for an

- employer to notify and hear any representations an employee may wish to make whenever his/her termination is under contemplation by the employer if the ground for the termination relates to the employee's misconduct, poor performance or physical incapacity. The employee is by law even entitled to have a representative present.
36. Because in the course of testimony the issue of redundancy came out, it is necessary to keep in mind the provisions of section 40 of the Employment Act. The section sets out what an employer needs to comply with before terminating a contract on account of redundancy. The section has outlined some 7 conditions and these relate to notice to the union and labour officer where an employee is a member of a union; written notice to the employee and to the labour officer where the employee is not a member of a union; selection on the basis of seniority, skills, ability and reliability; not placing non union employees at a disadvantage in terms of terminal benefits; paying off leave in cash; payment of not less than one month wages in lieu of notice and payment of severance pay.
37. Sections 74 and 10(7) of the Employment Act leave no doubt that it is incumbent upon an employer to produce records to prove or disprove an alleged term of employment.
38. My evaluation will therefore largely turn on the above cited primary provisions and where there is need to make reference to other provisions or statutes I will do so.

Whether the dismissal of the Claimant was unfair

Procedural fairness

39. The employment relationship between the parties was reduced into writing through a contract dated 1 January 2009. Clause 2 of the contract indicated that it would be for a duration of 2 years, that is until 31 December 2010.
40. Clause 10 provided for termination by one month's notice or payment of one month's salary in lieu of notice. There was provision for termination summarily for lawful cause or extra-ordinary termination.
41. On 31 March 2009 the Claimant was sent on compulsory leave/suspension for one month. On the expiry of the one month compulsory leave/suspension, the Respondent terminated the services of the Claimant through a dismissal letter dated 30 April 2009.
42. The reason given in the dismissal letter was

due to the shortage of funds and sponsors during the current economic recession, the organisation has decided to lay off some staff. In this case we are very sorry to inform you that we cannot be able to support you as one of the staff at the hospital as from 30 April 2009

43. It is apparent that the Respondent dismissed the Claimant for operational reasons. The funds it used to run its activities had run dry.
44. To my mind, the Respondent was declaring the Claimant redundant. Redundancy has been defined in section 2 of the Employment Act to mean

the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and the loss of employment.

45. The procedural steps to be complied with by an employer who is declaring redundancy have been outlined in section 40 of the Employment Act. The section has in fact set out seven conditions. It was not suggested that the Claimant was a member of any union and therefore section 40(a) of the Act would not be applicable.
46. Out of the seven conditions, the ones applicable to the Claimant were notification by the Respondent to the Claimant and the local labour office personally in writing of the redundancy and selection on the basis of seniority in time, skill, ability and reliability. The section further provides for not putting non union employees at a disadvantage on payment of terminal benefits,

- payment of any outstanding leave in cash, payment of one month wages in lieu of notice and payment of severance pay
47. The Court of Appeal in *Thomas de la Rue v David Opondo* (2013) eKLR opined that the notification should be one month in advance.
 48. The Claimant was issued with a dismissal letter on 30 April 2009. No notification of impending termination of employment through redundancy was given. The Respondent did not inform the local labour officer of the redundancy. Out of the conditions applicable to the Claimant it seems the Respondent was ready to comply only with the one on payment of one month's wages in lieu of notice.
 49. The Claimant testified that she was the second last nurse to be employed and that there was a nurse Esther Karare who was employed after her. The Respondent's witness maintained it was the Claimant who was the last nurse to be employed. It is the duty of employers to keep and maintain employment records. A list of the employees of the Respondent would have easily sorted out this issue.
 50. But be that as it may the Respondent did not inform the Court of the criteria used to select the Claimant for dismissal. Apart from seniority, the law expects an employer to consider skills, ability and reliability. The Respondent did not carry out any evaluation of the three nurses or if any evaluation was carried out the Court was not apprised of the process or criteria.
 51. The dismissal of the Claimant through redundancy in my view was not in accordance with the procedural processes outlined in section 40 of the Employment Act and was therefore procedurally unfair.

Substantive fairness

52. On the merits or substantive fairness, section 45(2) of the Employment Act obliges an employer to prove the validity and fairness of a termination. The Claimant was dismissed for operational reasons and it was incumbent upon the Respondent to prove the validity and fairness of the reasons.
53. The Respondent's witness testified that donor funds had run out amidst the economic downturn in Europe at the time. But no evidence or documentation was presented before Court. No financial statements or correspondence from any of the donors was exhibited or produced. These were things which were peculiarly within the knowledge of the Respondent.
54. About two or three months after the dismissal, the Respondent advertised for two nurses and a doctor, after its financial status improved. The Claimant testified she applied but the Respondent's witness denied that she applied. I would prefer to believe the version of the Claimant. If the dismissal of the Claimant was solely on the basis of the reduction in donor funds, the Respondent, if it was acting in good faith and that it observed doctrine of fair dealing would have tried to reach to her and considered her for reemployment.
55. In my view the Respondent has failed to prove that the dismissal of the Claimant due to shortage of donor funds was a valid and fair reason to warrant the dismissal. The dismissal was also substantively unfair.
56. Reference was made in evidence to the bad relationship between the Claimant and Dr. Loice but because of the conclusion I have come to it is my view that I need not evaluate the contribution of that to the dismissal of the Claimant.

Whether general damages are available for unfair termination/dismissal

57. I have previously attempted to deal with this issue but this is the first time I have had the benefit of counsel addressing me on it and I will therefore briefly discuss it and review some of the authorities cited by counsel and a few others I have come across in the course of researching on the question.
58. The debate on whether general damages are available or is an appropriate remedy for unfair termination or wrongful dismissal has refused to go away. I thought the debate had died with the decisions of the Court of Appeal in cases such as *Cyrus Nyaga Kabute v Kirinyaga County Council*, Civil Appeal No. 29 of 1985; *Rift Valley Textiles Ltd v Edward Onyango Oganda*, Nakuru Civil Appeal No. 27 of 1992 and *Kenya Revenue Authority v Menginya Salim Murgani*,

Nairobi Civil Appeal No. 108 of 2010. It seems the ghost has refused to be damned and keeps rearing its head.

59. In the *Kabute* case, one of the prayers sought by the Plaintiff in the High Court was *general damages for loss of employment and retirement benefits from the date of judgment to the attainment of the plaintiff 60th birthday*. The Plaintiff also sought aggravated damages and general damages for breach of contract.

60. The Court in this instant reasoned and held that

supposing that he had shown that his dismissal had not been justified, he would not have been able to get any of the prayers for which he prayed in the plaint even though the dismissal may be wrongful it stands, and what flows from the breach of conditions of service, is damages according to the terms of the contract. Those damages would not have been aggravated damages and would not have given him benefits up to his 60th birth-day, nor arrears of salary from July 1980. The Court did not use the term 'general damages'.

61. In *East African Airways v Knight* (1975) EA 165, the Respondent had claimed in the High Court **general damages for 'loss of salary, allowance and career'**. At the time of dismissal Mr. Knight still had some thirteen years of service ahead of him before the retirement age of 50 years. The High Court awarded the damages and East African Airways appealed.

62. Some of the grounds of appeal were that Mr. Knight's claim for damages should have been in the form of special damages, precisely quantified and not a claim for general damages and that the claim for damages should have been limited to the period of notice to which he was entitled instead of being measured in terms of the period extending to his normal retirement age.

63. The appellant's case before the Court of Appeal was that Mr. Knight's claim being substantially one for loss of earnings by reason of wrongful dismissal was one for special damages and should have pleaded as such and quantified.

64. The Court's answer was that Mr. Knight's was

deprived of his career, of the opportunity to serve the Corporation for at least another 13 years. It is quite impossible to say what he would have earned during that period, by way of salary and allowances, which fluctuate.....Who can say what his rank and earnings, would have been had he been allowed to continue in service with the Corporation until he reached retiring age?....It is for damages for the ruin of his career, extending over a long period, and involving imponderables as to his future earnings which are not capable of exact assessment. In these circumstances I agree with the judge, and with the submissions of Sir William Lindsay who appeared for Mr. Knight in the court below and on this appeal, that damages in this case were at large, and were properly claimed as general damages.

65. In between the quoted paragraph there is dicta to the effect that *'If a plaintiff has been wrongfully dismissed from employment which was for a fixed term at a fixed salary, his loss can be precisely calculated and should be claimed as special damages'*. I will make reference to this dictum while discussing the claim for loss of income in due course.

66. It appears from this authority that loss of earnings can properly be claimed as general damages where there is a contract with a retirement age, what is popularly referred to in Kenya as a permanent contract.

67. In the *Oganda* case, Mr. Oganda was summarily dismissed by Rift Valley Textiles Ltd and he brought a claim in the High Court claiming both special damages totaling Kshs 54,575/- which included pay in lieu of notice and general damages. The parties reached settlement on the claim for special damages but left for the determination of the Court general damages for wrongful dismissal. The High Court awarded Mr. Oganda twelve months gross salary as general damages and a further three months pay in lieu of notice. The Court of Appeal was emphatic that the law did not allow the award of twelve months general damages and three months pay in lieu of notice since the contract provided for pay in lieu of notice and that had been paid and admitted. The Court then cited the holding in *Kabute* with approval and proceeded to deal with the question of natural justice in contracts of employment

68. The question which begs for answer flowing from the above cited authorities is whether there is any legal or practical/factual difference between **general damages for 'loss of salary, allowance and career'** (Knight), **general damages for loss of employment and retirement benefits** from date of judgment to the attainment of retirement age (Kabute) and **general damages for wrongful dismissal** (Oganda).
69. My answer to the question is that whatever the label, the Court under the Industrial Court Act has been allowed to award damages and compensation but subject to the Industrial Court Act or any other written law. And the damages and or compensation is capped by the Employment Act to the equivalent of a maximum of twelve months gross wages.

Whether loss of salary for premature termination of fixed term contract is appropriate/available

70. At paragraph 14 of the Statement of Claim the Claimant sought and particularized loss of salaries for the first 9 months of the contract and remaining duration of the contract and the leave she would have taken totaling Kshs 850,500/-. In prayer (c) the Claimant asked for an order directing the Respondent to pay her Kshs 850,500/-.
71. The Claimant has majorly cited foreign authorities and I will briefly discuss them and then look at the situation obtaining in South Africa and under English common law before coming back home.

Comparative analysis

South African framework

72. In pursuing the relief of loss of salary, the Claimant sought to rely on the principle of legitimate expectation and placed reliance on several cases. The first case relied on was *Ian Charles v The Board of Governors of the H. Lavity Stoutt Community College Claim No. BVHCV 2010/0049* which defines a fixed term contract. It is not in dispute that the Claimant was in a fixed term contract and I would therefore not go into a discussion of what is or is not a fixed term contract.
73. On the principle of legitimate expectation, the Claimant submitted that she had been led to believe that the Respondent required her services for two years and that she was employed in a skilled and specialized profession, had undergone two months probation and that the contract expected her full devotion to her duties among others issues.
74. And in seeking the payment of the salary for the unserved portion of the contract the Claimant cited two South African authorities, *Buthelezi v Municipal Demarcation Board* (2004) ZALAC 15 and *Fedlife Assurance Ltd v Hendrik Johannes Wolfaardt* (2001) ZASCA 91.
75. In the *Buthelezi* case, the appellant was employed by the Respondent on a fixed term contract of five years. 11 months after commencement of the contract the Respondent retrenched the appellant.
76. In addressing the measure of damages, the Court made reference to the uncritical dicta of the application of the standard in *Meyers v Abrahamson* 1952(3) SA 121 in which the Court had laid down the approach for computing damages for premature dismissal as

the measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him of the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.

77. In the *Fedlife* case, the Court reiterated the continued existence or survival in South Africa of the common law right of employees to be fully compensated for the damages they could prove they had suffered due to unlawful premature termination of fixed term contracts and that chapter VIII of the 1995 Labour Relations Act did not provide an exhaustive list of rights and remedies that accrue to employees upon termination of contract.
78. Prof Marius Olivier, in an article 'Legal Constraints on the Termination of Fixed-term Contracts of Employment: An Enquiry into Recent Developments', *17 Industrial Law Journal Juta 1001 1996* underscored the position that within the South African context the 'common law' remedies available to fixed term contract employees would still be available/applicable to employees

provided the employee mitigated his loss despite the new regime created by the Labour Relations Act. The author nevertheless posited that the common law would not provide a remedy where the employee does not have a right to the renewal of the contract and that the Labour Relations Act had restricted compensation as a remedy for unfair dismissals.

79. An overview and discussion of the jurisprudence from South Africa would not be complete without a mention of the obtaining statutory framework. The first port of call is section 186 of the Labour Relations Act. The section provide

Meaning of dismissal

"Dismissal" means that-

(a) an employer has terminated a contract of employment with or without notice;

(b) *an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;*

(c)

80. The South African statutory framework has expressly provided that the non renewal of a fixed term contract where an employee reasonably expected renewal amounts to dismissal. Therefore the principle of legitimate expectation which the Claimant relied and submitted on has statutory grounding and is not merely a judicial development of the common law by judges.

81. Closely intertwined with the inclusion of non renewal of a fixed term contract as a species of dismissal is the provision of section 195 of the Labour Relations Act of South Africa.

195. Compensation is in addition to any other amount

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

82. It is clear in this regard that compensation is not the only remedy available for dismissals but South African Courts are allowed to consider other remedies.

83. I will in due course contrast the Kenyan statutory framework with the South African case.

English law/common law

84. Under English law and more specifically common law the law was set out initially in the case of *Addis v Gramophone Co Ltd* (1909) AC 488.(the harshness of this decision on employees has since been changed through legislation). The appellant argued that there had been a development in the law in respect of the measure of damages and that the measure of damages was the whole loss sustained by the appellant. The jury had awarded Mr. Addis £340 as loss of commissions and £600 for wrongful dismissal. The Court of Appeal allowed the damages to stand and the matter went to the House of Lords. The House of Lords held that Mr. Addis was entitled only to the equivalent of six months' salary as notice and not the £ 600.

85. Lord Loreburn LC held

In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my

opinion, the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge CJ has been quoted as authority to the contrary (*Maw v Jones*). I doubt if the learned Lord Chief Justice so intended it. If he did I cannot agree with him.

If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.

86. In *Gunton v Richmond-Up-on-Thames London Borough Council* (1981) Ch 448 it was held that

the damages recoverable having regard to the plaintiff's duty to mitigate his damages, are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period of which the defendant was bound by his contract to employ the plaintiff. In the case of a fixed term contract, the assessment will extend over that fixed term.

Kenyan framework

87. The repealed Employment Act, cap 226 Laws of Kenya at section 16 made provision for termination of a contract of service without notice upon the payment of wages which would have been earned during the notice period expressed in the contract or determinable by the cycle of payment of wages. Otherwise there was no statutory underpinning for payment of any other damages under the Act.

88. For those who had access to the Industrial Court established pursuant to the Trade Disputes Act (repealed), the Court by dint of section 15(1)(ii) could award compensation not exceeding twelve months wages in addition to reinstatement where it held the dismissal to be wrongful.

89. Most of the authorities I will refer to, I have also cited while discussing the question of general damages generally.

90. It is under this statutory framework that the Court of Appeal in decisions such as *Cyrus Nyaga Kabute v Kirinyaga County Council*, Civil Appeal No. 29 of 1985; *Rift Valley Textiles Ltd v Edward Onyango Oganda*, Nakuru Civil Appeal No. 27 of 1992; *Kenya Ports Authority v Silas Obengele*, Mombasa Civil Appeal No. 38 of 2005; *Kenya Revenue Authority v Menginya Salim Murgani*, Nairobi Civil Appeal No. 108 of 2010 were made. These decisions were emphatic that apart from what was provided for in the contract no other damages were payable.

91. In the case of *Obengele*, the main issue on appeal was whether having been awarded salary in lieu of notice and pension, the Judge was right in holding that Mr. Obengele was entitled to be awarded salary he would have earned had he continued to work until he attained the retirement age of 55 years.

92. The Court of Appeal reviewed its decisions in the cases referred to in paragraph 76 and the decision of Hayanga J in *Peter Onyango Onyiengo v Kenya Ports Authority*, Mombasa HCCC No. 496 of 1995 and the holding in the *Addis* case and reiterated that where termination is found **wrongful**, damages are awardable according to the terms of the contract. The Court held that Obengele was entitled to damages.

93. Regarding the measure of damages the Court posed the question, 'In these circumstances what would have been the measure of damages? The Court answered the question it had posed by holding that '*certainly not the money he would have earned had he worked until he attained the compulsory retirement age of 55 years. There are several imponderables which affect an award of damages in such cases*'.

94. The Court then made reference to two decisions by its predecessor in *Southern Highlands Tobacco v McQueen* (1960) EA 490 and *East African Airways v Knight* (1975) EA 165 to confirm the award of damages by the High Court but with a variation to take into account a discount due to accelerated payment.

95. The decision in the *Obengele* case seems to have turned on the fact that Mr. Obengele was entitled to a hearing in accordance with the regulations B.11 of the Kenya Ports Authority Revised Staff Regulations. The right to a hearing had a statutory underpinning.

96. What is not clear from the Court of Appeal decision is whether the damages awarded as salary which Mr. Obengele would have earned up to retirement age were treated as special or general damages. But the fact remains he got damages in lieu of salaries he would have earned but for the early termination.

97. In *Southern Highlands Tobacco Union Ltd v David Mcqueen* (1960) 1 EA 490, Mr. Mcqueen had a 4 year contract with the company. The company terminated his services before the 4 years were over. He claimed wrongful dismissal and sought £8000 representing four years salary among other reliefs. The trial Court found in his favour. The company appealed. The Court of Appeal upheld the trial court's decision and made reference to the principles applicable thus

a person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of the dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation.

98. In the *Knight* case, Mr. Knight claimed general damages for loss of salary, allowance and career. He was terminated with about thirteen more years to retirement. One of the issues was whether a claim for loss of earnings was a special or general damage. The Court held that a claim for loss of earnings arising from wrongful dismissal in a fixed term contract with a fixed salary should be claimed as special damages because the loss can be calculated precisely but where the damages are for ruin of career extending over a long period and involving imponderables as to future earnings then it can be claimed as general damages. The Court endorsed what it had stated in the Mcqueen case.

99. The three authorities of *Knight*, *Obengele* and *Southern Highlands Tobacco Union* suggest that lost prospective income as damages is awardable.

100. In the *Kabute* case, Mr. Kabute had sought arrears of salary, general damages for loss of employment and retirement benefits from the date of judgment to the attainment of the 60th birthday and aggravated damages and general damages for breach of contract. The Court of Appeal was very emphatic that Mr. Kabute could not get any of the prayers sought even if his dismissal had not been justified and that he could only get damages according to the terms of the contract and these were dues on normal retirement, arrears of salary upto July 1980, gratuity and payment in lieu of leave.

101. In the *Murgani* case the Court of Appeal reversed the High Court's decision to grant the Respondent general damages for destruction of career or for misfeasance in public office amounting to Kshs 87,000,000/-. The tide seems to have swung the other way in the *Kabute* and *Murgani* cases.

The Industrial Court Act

102. Section 12 of the Industrial Court Act provides for the jurisdiction of the Industrial Court. The jurisdiction is exclusive and original in relation to all disputes relating to employment and labour relations.

103. Under section 12 (3) of the Act, the Court is given power to make the following orders (i) interim preservation orders including injunctions in cases of urgency; (ii) a prohibitory order; (iii) an order for specific performance; (iv) a declaratory order; (v) ***an award of compensation in any circumstances contemplated under this Act or any written law***; (vi) ***an award of damages in any circumstances contemplated under this Act or any written law***; (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or (viii) ***any other appropriate relief as the Court may deem fit to grant***.

104. It is clear that the Court is clothed with power to make awards of compensation and damages as contemplated under the Industrial Court Act or any other written law.

105. The Industrial Court Act has not explicitly mentioned loss of earnings/income as an award the Court can make. But in my view, loss of earnings or income would qualify as compensation and or special or general damage.

Employment Act, 2007

106. Section 49 of the Employment Act has provided remedies for wrongful dismissal and unfair termination. The three main remedies are the equivalent of a number of months' wages not exceeding twelve months based on the gross wages, reinstatement and reengagement. The Act has not made reference as to whether the equivalent of wages not exceeding twelve months is compensation or damages. By practice the award is usually referred to as compensation but technically it would still qualify as damages.

107. The question arising is whether the remedies set out in section 49 of the Employment Act are exhaustive of the remedies the Court can grant for wrongful dismissal and/or unfair termination. And if these remedies are not exhaustive can the Court relying on section 12(3)(viii) of the Industrial Court Act award other remedies such as loss of earnings/income.

108. Or to put it another way is loss of earnings/income a remedy contemplated under any written law.

109. My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms.

Appropriate relief

Severance pay

110. I have come to the conclusion that the Claimant was dismissed on the ground of redundancy and that such dismissal was unfair. Section 40(1)(g) of the Employment Act requires

an employee who has been declared redundant to be paid severance pay. The value of any severance payable to an employee is one of the factors to be considered when awarding compensation for unfair termination or wrongful dismissal. The Claimant was declared redundant but she had served for only three months and any severance pay would be very minimal.

Loss of salary for 21 months

111. The Claimant sought Kshs 315,000/- as loss of salary for 9 months for the first year of the contract and Kshs 462,000/- as loss of salary for the 12 months of the second year of the contract. The claim for loss of salary in total is therefore Kshs 777,000/-.

112. In view of what I have stated in the preceding paragraphs the most that the Claimant can get is the equivalent of 12 months wages. But the award is discretionary and subject to the thirteen factors set out in section 49(4) of the Employment Act.

113. One of the factors is the reasonable expectation of the employee as to the length of time she would have served the Respondent. The Claimant expected to fully serve her two year contract. This was terminated prematurely. The Claimant is a registered nurse. She has opportunity to secure alternative employment. Any severance pay is negligible.

114. Considering these three factors it is my view that the equivalent 12 months gross wages in the sum of Kshs 420,000/- would be just.

Leave

115. Leave is earned after twelve consecutive service. In case of termination before completion of twelve months it is usually *pro rated*. The Claimant had only served for three months and would be entitled to 4 days leave.

General damages

116. I decline to make any award under this head because of the discussion in earlier paragraphs.

Costs

117. Unlike under the civil procedure regime, costs in the Industrial Court do not follow the event. The Court is permitted to make a costs order which it considers just.

118. The Claimant has been successful. Both parties went out of their way to carry out research. The Respondent is a charitable organisation which is dependent on donor funding. Evidence was led that it has been offering free medical services within Lamu. It is still bound to comply with the employment laws in Kenya. Weighing and balancing these factors I do direct that each party bears its own costs.

119. I wish to register my appreciation to both counsels involved in this matter for their industry and decorum.

Conclusion and Orders

120. In conclusion I do find and hold that the termination of the Claimant through redundancy was unfair and award her

(a) 12 months' compensation Kshs 420,000/-

108. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day October 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Njoroge instructed by Ms Njoroge & Katisya Advocates for Claimant

Mr. Mutisya instructed by Peter Mutisya & Co. Advocates for Respondent