IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A., KOOME & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 7 OF 2015

BETWEEN

ETHIOPIAN AIRLINES ENTERPRISE.....…….....…….. APPELLANT

AND

BEAUTTAH ANSELMO MAALI…….....…….……...RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Nambuye, J.) dated 28th August, 2012

in

H.C.C.C. No. 635 of 2007)

****

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the High Court dated 28th August, 2012. The appellant, Ethiopian Airlines Enterprises, was the unsuccessful party in a suit which was commenced by plaint by Beauttah Anselimo Maali, the respondent in this appeal in which he claimed two principal reliefs namely, unpaid salaries of Kshs. 15,209,011/20 and a declaration that he was still an employee of the appellant. As an alternative to the second relief, the respondent claimed general damages for unlawful retention of his salary and emoluments.

[2] The respondent's employment with the appellant was governed by two documents namely, the Memorandum of Agreement between the appellant's Board of Airline Representatives and the respondent's Union, the Transport and Allied Workers' Union, (hereinafter referred to as the Memorandum of Agreement), and the appellant's personnel policy document for its employees in Kenya.

[3] The respondent was employed by the appellant on 15th September, 1973 as a transportation agent and rose through the ranks to become the Chief Officer of the appellant at its Nairobi office which position he held until his purported termination on 10th August, 2000. The respondent's case as pleaded and according to his oral testimony was that he was in senior management cadre and that he had never been terminated and was not notified of any termination. He urged the view that the purported termination by the appellant was not in accordance with laid down procedures. He contended that the appellant caused him to be charged and convicted on false allegations of theft in Nairobi Chief Magistrate's Court Criminal Case No. 1930 of 2000 but was vindicated in Nairobi High Court Criminal Appeal No. 662 of 2003 and

was therefore entitled to a declaration that he was still an employee of the appellant; to payment of unpaid salary and emoluments.

[4] The appellant's case was that between the months of October 1988 and March, 2000, the respondent in breach of the terms of his employment, withheld air ticket sale proceeds and failed to forward to the appellant's head office, sales reports. In the process, it was alleged the respondent converted to his own use Kshs.5,689,104.83 and US$ 48,169.48 belonging to the appellant. According to the appellant, the respondent accepted responsibility for the conversion and authorized the appellant to recover his indebtedness from his pension funds with American Life Insurance Company. Given the respondent's admitted conversion of the appellant's sale proceeds, the appellant urged that it was entitled to and did indeed terminate the respondent's employment in accordance with clause 24.4.4. item (b) of the Memorandum of Agreement aforesaid.

[5] Following a full hearing, the High Court, Nambuye, J., (as she then was), in a short judgment of 17 pages found for the respondent and awarded him:

> **(a) Kshs. 9,723,387.50 for loss of salary for the balance of the period the respondent would have served until age 60 years.**
>
> **(b) Interest at court rates from the date of filing suit till payment in full.**
>
> **(c) Costs.**

[6] The appellant was aggrieved by the said judgment and decree, hence the appeal now before us premised upon nine (9) grounds (of appeal). At the hearing of the appeal however, Mr. Obel, learned counsel for the appellant, abandoned grounds 1, 5, 6, 7 and 8 and argued grounds 2, 3, 4 and 9. Those grounds are expressed thus:

> "**(2) The learned Judge erred in law by failing to consider the evidence on record that was (sic) an express acknowledgement that the plaintiff misconducted himself while in the employment of the appellant.**
>
> **(3) The learned Judge erred by finding that no notice to terminate the contract of employment was issued by the appellant.**
>
> **(4) The learned Judge misdirected herself by finding that the relief of dismissal of the respondent was not available to the appellant as it was not pleaded and yet the same was pleaded.**
>
> **(9) The learned Judge's decision was against the weight of evidence".**

[7] In his submissions before us, Mr. Obel contended that the appellant carried out an audit of its operations at its Nairobi office and established that the respondent had embezzled Kshs.5,689,104.83 and US$ 48,169.48 which embezzlement, the respondent acknowledged in writing without being coerced to do so. In his view, there was no basis for discrediting the evidence of acknowledgment produced by the appellant.

[8] With regard to termination, Mr. Obel submitted that a letter of termination was indeed forwarded to the respondent's known address and on its being returned, the appellant caused an advertisement of the termination in the press which advertisement was read by the respondent. The issue of termination, according to counsel, was therefore proved satisfactorily.

[9] With regard to the issue of dismissal, learned counsel contended that the appellant followed laid down procedure for summary dismissal as the grounds for doing so were demonstrated. In learned counsel's view, the requirements of the Memorandum of Agreement and section 17 (G) of the Employment Act (now repealed), were followed.

[10] On the final ground argued before us, learned counsel contended that there is statutory limit of twelve (12) months' salary compensation for unfair termination, yet the learned Judge of the High Court awarded to the respondent salary for the balance of the period until retirement.

[11] In resisting the appeal, Mr. Were, learned counsel for the respondent, submitted that the appellant's basis for disciplining the respondent was the alleged embezzlement of funds, which basis collapsed when the respondent was acquitted of the criminal charge on appeal. In learned counsel's view, under the Memorandum of Agreement governing the respondent's contract with the appellant, he was entitled to reinstatement and one of the witnesses during the criminal trial considered him as the appellant's employee. Mr. Were maintained that the appellant did not communicate its decision to terminate the respondent's employment to him which fact justified the award of salary for the remaining years of his employment with the appellant. Learned counsel discredited the attempt to serve the termination notice through the print media as such mode was unprocedural.

[12] Being a first appeal, our primary role is to proceed by way of a re-hearing through analysis and re-evaluation of the evidence recorded by the trial court so as to draw our own independent conclusion but bearing in mind that we did not see or hear the witnesses testify and must give allowance for that. See Selle -v-Associated Motor Boats Company Limited [1968] EA 424.

[13] In our view, having considered the pleadings, the evidence in support thereof, the judgment of the High Court, the grounds of appeal argued before us, the rival submissions and the applicable law, the broad issues arising for determination in this appeal are:

1) **How could the contract of service between the two parties be terminated?**

2) In the circumstances, was the contract properly terminated and if so, what were the legal consequences of such termination?

3) Was the High Court justified in awarding the respondent Kshs.9,773,387.50 as loss of salary?

[14] Going by the recorded evidence, it is common ground that the respondent was employed on permanent terms by the appellant and mostly served at the appellant's Nairobi office. No letter of employment was produced but it is common ground that before a dispute arose between the parties, the respondent had served the appellant for twenty seven (27) years. It was also not in contest that the Memorandum of Agreement and the Personnel Policy document for the appellant all were applicable to the contract of employment between the respondent and the appellant. The respondent claimed that as he was charged, convicted and subsequently vindicated on appeal, the appellant should have reinstated him as provided under clause 24.3 of the said Memorandum of Agreement. The said clause is in the following terms:-

"**24.3 Criminal Offences: Where a criminal offence is involved either on or off duty and an employee is charged with this and thereafter remanded on bail, precautionary suspension on half pay should be imposed until the court case is completed or (sic) not longer than a maximum period of six months. If remanded in custody and the employee is therefore unable to perform his or her contract of employment then having regard to the circumstances of the offence and likely length of absence, the employment may be deemed terminated. Any absence prior to this termination shall be without pay. If an employee who has been remanded in custody and terminated with the above clause, if found not guilty or not proven (sic), he or she shall be reinstated to his/her place of work without loss of benefits and any salary payments withheld shall be paid".**

(Undelining ours)

[15] Dismissal is provided in clause 24.4.4 of the agreement and sub-clause 4(b) reads: -

"24.4.4. Dismissal: The employer may summarily dismiss any employee who commits an act or omission prejudicial to the good name, efficiency or interest of the employer which shall be deemed, inter alia, to include the following:

a. .....

.....

.....

b. Theft, fraud or dishonesty in connection with the employer's business or property or conviction by a court of law of any criminal offence".

And clause 24.5 on disciplinary procedure reads:

"24.5 Disciplinary Procedure; Where an employee commits an offence serious enough to warrant investigation, the employer shall immediately suspend the employee from duty on half pay, and institute a preliminary investigation into the offence.The preliminary investigation shall be held as speedily as possible, whilst allowing, all the facts to be established. When it is believed that there is a case to be answered the employee must be advised in writing of the alleged offence within 72 hours of the completion of the preliminary investigation and asked to submit his reply to the offence within 72 hours of receipt of the letter from the employer. A hearing shall be held within seven

(7) calendar days of the date of the employee's reply being received.

After the hearing the employer shall inform the employee in writing of his decision for it and of any disciplinary action to be taken, a copy of that letter shall be placed in the employee's personal file".

[16] These provisions are replicated in the appellant's Personnel Policy document which is incorporated in the record of this appeal. In its letter of termination of the respondent's employment dated 10th August, 2000, the appellant cited clause 24.4.4 item (b) of the Memorandum of Agreement as its basis for terminating the respondent's employment. Given the significance of that letter we set it out below in extenso:

Mr. Beauttah A. Maali,

Chief Res/Tkt Agent,

Reg. No. 6396,

NAIROBI.

TERMINATION OF EMPLOYMENT

As per the special Audit Report dated July 24, 2000 you have embezzled an amount of Kshs.5,689,104.83 and US$ 48,169.48, from Ethiopian Airlines.

You are well aware this fraudulent activity constitutes extremely serious offences (sic) against Ethiopian Airlines interest.

Therefore, as per BAR/TAWV Agreement Clause 24.4.4 Item (b) your employment with Ethiopian Airlines is terminated as of today, August 10, 2000.

You are required to return your uniform, Airport Pass and Company Identification Card immediately, to enable us do the needful per company policy".

[17] The appellant therefore opted to summarily dismiss the respondent for "Theft fraud or dishonesty in connection with its business" as, at the date of the letter, the respondent had not even been charged with any offence before any court. It is significant that the appellant did not at all refer to the criminal case which the respondent faced subsequent to the said letter of termination.

[18] It was common ground that the said letter of termination was returned to the appellant unclaimed. The respondent confirmed that he did not receive the letter. Having failed to contact the respondent by registered mail, the appellant caused an advertisement to be published in the Daily Nation Newspaper edition of 16th August, 2000. The advertisement was head-lined "ETHIOPIAN AIRLINES - PUBLIC NOTICE". It carried a photograph, the name of the respondent and his Identity Card Number.

[19] The following statement appeared immediately below the photograph:

"The above named person has ceased to be an employee of Ethiopian Airlines and is not authorized to transact any business on behalf of Ethiopian Airlines".

[20] The respondent acknowledged reading that advertisement. In his own words:

"I saw article in the newspaper. They said I was no longer an employee. I was shocked I bought it from the vendor on the street. The issue of 17th August, 2000 had a story, my name is not there. Daily nation of 16th August, 2000 my name was there my photograph was there. My name was mentioned in the Standard on that (sic) I stole money...".

[21] On the above mode of communication, the learned Judge of the High Court stated:

"6. The relief of dismissal of the plaintiff from his employment is not available to the defendant firstly, because it was not pleaded and secondly, because it was not resorted to by them as there is no documentation to support it and so it could not be introduced through submissions.

.....

7. The relief of termination of employment is not also available to the defendant, firstly, because there is no proof that this procedural step had been undertaken by the defendant in accordance with the laid down clause of the collective bargain agreement.

(ii) The correspondence allegedly conveying the same were (sic) returned unclaimed.

(iii) Although adverts were placed in the newspapers, these were not the correct mode of communication required by the collective bargain agreement. In any case, they simply read that the plaintiff was no longer an employee of the defendant and not that they were notices of termination of the plaintiff's employment with the defendant".

[22] Arising from the above findings, specific issues which are alive are whether:

(1) termination or dismissal was pleaded;

(2) the appellant was entitled to serve the respondent with notice of termination or dismissal;

(3) the appellant served the respondent with valid notice of termination or dismissal and

(4) what were the consequences of service or none-service.

[23] On the issue of termination or dismissal, the learned Judge held that the reliefs were not available to the appellant because the same had not been pleaded and that reliance on the provisions of section 17 of the Employment Act Cap 226 Laws of Kenya had no basis. It was also the learned Judge's view that even if the appellant could invoke the relief of termination, it would not succeed because it had not demonstrated that it had complied with the procedure outlined in the Memorandum of Agreement (governing the contract of employment between it and the respondent).

[24] We shall consider the foregoing findings in the light of the pleadings of the parties. Starting with the respondent's plaint, the issue of termination was pleaded as follows:

> "**5. The plaintiff avers that he has never been terminated or received any correspondence of termination from employment at any given time".**

[25] The appellant answered that averment in paragraph 13 of its written statement of defence as follows:-

> **"13. The defendant in reply to paragraph 5 of the plaint terminated on 10th August, 2000 in keeping with BAR/TAWA agreement clause 24.4.4 item (b) and will put the plaintiff to strict proof thereof".**

[26] We have already set out the provisions of clause 24.4.4. items (b) of BAT/TAWA Memorandum of Agreement (BAT/TAWA). The clause deals with dismissal of an employee "who commits an act or omission prejudicial to the good name, efficiency or interest of the employer". The appellant invoked item (b) against the respondent which provision gives the appellant two sets of circumstances when it can summarily dismiss its employee. Those circumstances are:

> **"b. Theft fraud or dishonesty in connection with the employer's business or property or conviction by a court of law of any criminal offence".**

[27] The appellant expressly pleaded clause 24.4.4 item (b) in its defence as an answer to the respondent's claim. The appellant may not have expressly used the terms "summary dismissal", but it cannot be gainsaid that it set up that defence. The use of the term terminated in paragraph 13 of the statement of defence in answer to the averment of the respondent in paragraph 5 of the plaint was in our view not technical. The appellant was merely stating that the relationship of employee and employer between the respondent and the appellant had been brought to an end pursuant to the provisions of clause 24.4.4 item (b) of the Memorandum of Agreement.

[28] It was therefore an error for the learned Judge to positively conclude that the appellant had not pleaded termination or summary dismissal. The reference to clause 24.4.4 item (b) aforesaid left no doubt that the appellant was pleading that it had summarily dismissed the respondent.

[29] The next issue to determine is whether the appellant demonstrated, on a balance of probabilities, that it summarily dismissed the respondent. The appellant relied upon its letter dated 10th August, 2000 to show that it informed the respondent of its decision to summarily dismiss him. It is common ground however, that the respondent did not receive the letter as the same was returned unclaimed.

[30] Apparently, the appellant did not have an alternative address of the respondent at which communication could have been addressed to him. The respondent did not clarify the position either by stating what his correct address at the time was. The appellant was however determined to communicate to the entire world that the respondent was not its employee. It therefore published in the print media of that the respondent was no longer their employee. The respondent read the publication when it hit the streets on 16th August, 2000. So even if the respondent did not receive the dismissal letter of 10th August, 2000, on the 16th day of the same month he knew that the appellant had dismissed him summarily.

[31] We turn now to whether the summary dismissal was lawful. The appellant averred in its written statement of defence that the respondent in breach of his contract of employment, "withheld sale

proceeds, underdeposited sale proceeds and failed to forward sales reports to the defendant's head office". It also pleaded that the respondent "converted to his own use a sum of Kshs.5,689,104.83 and US$ 48,169.48" and accepted responsibility.

[32] If the averments of the appellant could be demonstrated, on a balance of probabilities, the appellant, in our view, would have justified the summary dismissal of the respondent. However, did the appellant prove the allegations against the respondent satisfactorily? It adduced evidence of those allegations before the High Court including purported acknowledgements by the respondent and even his desire to make good the losses to the appellant. The learned Judge of the High Court did not accept the appellant's evidence. In her own words:

> "**1. Indeed, the plaintiff had been accused of embezzlement of the defendant's funds but he was absolved of the same through the criminal process.**
>
> **2. In law the defendant is entitled to revisit the issue in civil proceedings. They have done so but this Court still finds them not proved because the alleged acknowledgment letters of commitment executed by the plaintiff have been explained by the plaintiff that they were procured under duress.**
>
> **(ii) They formed the basis of the criminal proceedings and they were also found not to have proved the existence of the commission of the offence. There is no other new evidence to support them".**

[33] The learned Judge, like the subordinate court which tried the respondent for the criminal charge discredited the audit report produced by the appellant on the ground that it was not dated and was not signed nor verified by the respondent.

[34] Our analysis of the learned Judge's assessment of the evidence before her reveals the following issues of concern. In her view, once the evidence adduced by the appellant on embezzlement of its funds was rejected at the respondent's criminal trial, the same evidence could not be relied upon in the civil suit against it. We say so, because the learned Judge stated: "There is no new evidence to support them".

[35] The learned Judge, seems to have overlooked the fact that the standard of proof in a criminal case is one of proof beyond all reasonable doubt and that what may not have been demonstrated as embezzlement in a criminal trial could very well demonstrate liability in civil proceedings. The learned Judge quite uncharacteristic of her, failed to analyse the pleadings and the documentary evidence that was in evidence. This absence of detail will become clear shortly.

[36] After discounting the evidence relied upon by the appellant, the learned Judge accepted the respondent's testimony at its face value. At no time however, did she state that he was a more credible witness than the witnesses called by the appellant. She indeed saw the witnesses testify and had the opportunity to assess their demeanor. Yet she made no comment on the witnesses' respective demeanor.

[37] In the case of Omuroni -v- R., [2002] 2 E.A. 508, the Court held:

"Trial courts can decide cases one way or the other on the basis of demeanor of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case, the trial Judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial Judge to make favourable or unfavourable impression about the credibility of a particular witness".

[38] In this case, the learned Judge of the High Court did not point out instances of demeanor which she noted and upon which she relied to prefer the testimony of the respondent over that of the appellant.

Our independent analysis however, has led us to the conclusion that the respondent's testimony should not have been accepted as gospel truth. The following illustrate the point. In his plaint, the respondent merely

alleged that the appellant made a false allegation of theft against him and caused him to be charged and convicted in a criminal case which conviction was quashed by the High Court. In answer to this allegation, the appellant gave particulars of the respondent's conversion of its funds and the date the respondent accepted responsibility for his misconduct. At the hearing, the appellant produced documentary evidence of acknowledgment and part-payment.

[39] Significantly, despite these express averments by the appellant in the written statement of defence, there is no evidence on this record to show that the respondent denied the appellant's averments in a reply to defence. It is in such a reply that the respondent could have challenged the appellant's averments. It is in the reply that he could have set up the plea of coercion. He did not do so. He did not even do so in his evidence in chief. It is in cross-examination that he challenged his acknowledgment of liability and part-payment. This is not the type of litigant whose testimony can be or would be acceptable without scrutiny.

[40] In our view, the appellant demonstrated, on a balance of probabilities, that it had good cause to complain against the respondent. However, despite the gravity of the complaints, in our view, the appellant should have given the respondent an opportunity to respond to the allegations once it formed the intention to part ways with the respondent.

[41] It is significant that section 44 of the Employment Act (Cap 226 now repealed), provided that summary dismissal would take place when an employer terminates the employment of an employee without notice or with less notice period than that to which the employee is entitled to by any statutory provision or contractual term. Sub-section (3) thereof enabled an employer to dismiss an employee summarily when the employee had, by his conduct, indicated that he had fundamentally breached his obligation arising under the contract of service.

[42] In our view, notwithstanding the provisions of any statute or contract, an employee has a right to dispute an employer's allegations, even where the employer believes that he is entitled to summarily dismiss the employee. The employee must be given an opportunity to challenge the alleged grounds for summary dismissal. We say so, because an employer is not the only one who should determine what amounts to gross misconduct or what entitles him to summarily dismiss an employee.

[43] An employer has no monopoly of wisdom and knowledge on what constitutes a ground for summary dismissal. It is immaterial that a determination of such an issue may involve consideration of matters of law and/or terms or provisions which may be technical or complex. We are, of course, aware of a body of case-law emanating from the High Court and this Court which postulates that a contracting party does not have to rely on a misconduct in order to terminate a contract of service and that a party can terminate such contract without giving any reason. See for example the case of Kenya Revenue Authority -v- Menginya Salim Murgani [2010] eKLR. Those cases also advanced the view that even where dismissal or termination is found to be wrongful, the damages payable to an employee could only be the salary which would have been paid in lieu of notice. See **Alfred Githinji -v- Mumias Sugar Company Limited [Nairobi Civil Appeal No. 194 of 1991] (UR) and David Chege Mwangi -v- University of Nairobi [Civil Appeal No. 144 of 1995] (UR),** among many others**.**

[44] The position received statutory underpinning in section 16 of the Employment Act Cap 226 Laws of Kenya now repealed. The section provided as follows:

> **"16. Either of the parties to a contract of service to which paragraph (ii) or (iii) of sub - section (5) or the proviso thereto of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provision of that sub-section".**

[45] The Employment Act, Chapter 226 whose commencement date was 3rd May, 1976, was subsequently repealed on 22nd October, 2007. It was replaced by the Employment Act 2007 whose commencement date was 2nd June, 2008. This new Act somewhat mitigates the harshness of the earlier statutory provisions on termination of an employee's employment. Section 41 recognizes the right of an

employee to be heard before being terminated even if gross misconduct is alleged. The section is in the following terms:

> "**41. Notification and hearing before termination on grounds of misconduct.**
>
> **1) Subject to section 42 (1) an employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**
>
> **(2) Notwithstanding any other provision of this part an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person if any, chosen by the employee within sub-section (1), make".**

[46] These provisions mitigate the harshness of the previous position that a party to a contract of employment could terminate such a contract without assigning any reason for doing so. The suit before the High Court was filed sometime in

September, 2007. The hearing before that court was concluded on 28th August, 2012. The provisions of this act applied to the contract of employment between the appellant and the respondent by virtue of section 93 thereof, which reads as follows:

> **"93. Transitional provisions**
>
> **A valid contract of service, and foreign contract of service to which part XI applies, entered into in accordance with the Employment Act (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties shall be subject to those provisions accordingly".**
>
> (Underlining ours).

[47] The appellant in this case dispatched the letter of 10th August, 2000 summarily dismissing the respondent without giving him an opportunity to respond. That default, in our view, amounted to unfair termination as defined under section 45 (2) (b) and (c) of the new Employment Act. The appellant may have had legitimate reason for summarily dismissing the respondent, but in failing to give the respondent an opportunity to dispute the summary dismissal, it breached the procedure, which thereby made the dismissal unfair.

[48] The learned Judge of the High Court determined that as the respondent's conviction was quashed by the High Court, he should have been reinstated to his former position with the appellant. As the respondent was, at the time of the judgment, past retirement age, the learned Judge awarded him benefits "to be worked out ... based on loss of earnings upto retirement age". The learned Judge computed the sum payable to the respondent to be Kshs. 9,723,387.50 taking the retirement age as 60 years.

[49] That conclusion as we have already observed was erroneous. The learned Judge failed to appreciate that under the employment contract governed by the Memorandum of Agreement aforesaid, the appellant was entitled to dismiss the respondent under clause 24.4.4 item (b) reproduced herein-above. The appellant did not dismiss the respondent because he had been convicted of a criminal offence. The provisions of clause 24.6 quoted above were therefore not applicable. An order for reinstatement was therefore not available to the respondent. Consequently, the award of loss of earnings upto retirement could not be properly made.

[50] The learned Judge relied upon this Court's decision in Gad David Ojwando - v- Prof. Nimrod Bwibo, Chairman, Maseno University and 2 Others (Kisumu Civil Appeal No. 336 of 2005), (UR). As the learned Judge herself appreciated, this Court in that case, found that it was the respondent who had acted recklessly and in wanton breach and disregard of a statute and "in flagrant violation of the appellant's rights as an employee". The case is clearly distinguishable. In the case before us, we have not found any breach and disregard of an Act of Parliament. Indeed, the employment relationship between the parties herein was not governed by a statute as was the contract of employment in the Gad David Ojwando (supra) case. Furthermore, we cannot say that the appellant in this case acted in flagrant violation of the respondent's rights as an employee. The only infraction of the appellant herein was a procedural breach and not a flagrant violation of the respondent's rights as an employee.

[51] The learned Judge also invoked the decision of this Court in the case of Kenya Revenue Authority - v- Menginya Salim Murgani [2010] eKLR. We have perused this judgment with a tooth comb and have been unable to trace

"assessment of loss of salary for the remainder of the working period upto the compulsory retirement age", as postulated by the learned Judge of the High Court. In that case, the High Court (Ojwang, J., as he then was), had, inter alia, held that the respondent was entitled to salary for seven years and six months as his employment had been terminated in breach of the then provisions of Article 77 of the retired Constitution since he had not been given a fair hearing before the termination. On appeal, this Court held:

> **"It is also our finding that the appellant was in breach of the contract in not keeping the two disciplinary bodies separate as far as it was practicable and accordingly, we find that it should have terminated the contract by giving a reasonable notice which we hereby set at six months...".**

[52] We are at a loss to understand as to why the learned Judge misapplied the decision in Kenya Revenue Authority -v- Menginya Salim Murgani (supra). We can only attribute the lapse to pressure under which all Judges operate rather than a deliberate desire to achieve a particular result.

[53] Before considering the consequence of the appellant's aforesaid procedural breach of the contract of employment with the respondent, we feel impelled to comment on other findings of the learned Judge which have caused us anxiety. The respondent had in his plaint prayed for a total sum of Kshs. 15,209,011.20 being unpaid salary. He did not particularize this claim. He did not state for what period he made the claim. He did not specify his monthly, quarterly or yearly salary. In his evidence at the trial, he stated that his unpaid salary per month was Kshs.107,108.00 and that the retirement age was 55 years. As at the time the appellant terminated his services he said he was 50 years of age. He was therefore seeking unpaid salary for 5 years being the remaining period to retirement. Simple arithmetic shows that the unpaid salary for the entire period of the five (5) years would have been Kshs.6,426,480/=. The prayer for Kshs.15,209,011.20 for unpaid salary would therefore appear to be without foundation.

[54] Furthermore, the learned Judge in computing the respondent's entitlement applied a retirement age of sixty (60) years. She purported to do so "under any other or further relief" the court deemed fit to grant. While appreciating in her judgment that special damages must not only be specifically pleaded but must also be strictly proved, the learned Judge continued:

"The Court finds that the plaintiff has satisfied the said ingredients by the pleading being made specifically in the plaint. There is sufficient particulars in that there is mention of loss of salary and increments upto retirement age. What remains is strict proof".

[55] The learned Judge, with all due respect to her, was too generous to the respondent. Our perusal of the record shows that from the averments in the plaint, the only way to determine the monthly salary was to carry out the computation which we have attempted hereinabove and even after doing so, the sum prayed for appears to have been plucked from the air. Although at the hearing of the suit the respondent testified that his monthly salary was Kshs.107,108.00, he did not relate it to his pleading in the plaint. He also maintained that his retirement age was 55 years. Given the respondent's averments in his plaint and his

testimony at the trial, there was no basis for applying the retirement age of sixty (60) years.

[56] This Court, in National Social Security Fund Board of Trustees -v- Sifa International Limited [2016] eKLR cited with approval the case of William Kiplangat Maritim & Another -v- Benson Omwenga - Civil Appeal No. 180 of 1993, Nairobi (UR) which had in turn cited the decision in Coast Bus Services Ltd -v- Murunga Danyi & 2 Others - Civil Appeal No. 192 of 1992 (UR) as follows:

"**We would restate the position, special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit the particulars of special damages were not known, then, those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of special damages are pleaded in the plaint that a claimant will be allowed to strict proof of those particulars...".**

(Underling ours)

[57] Applying the above principles to the matter before us, the respondent should have particularized his special damages before being allowed to strictly prove the same. He had every opportunity to seek leave to amend his plaint before offering evidence in proof of them. He did not do so, hence our observation that the learned Judge was rather generous to him.

[58] In Galaxy Paints Company Ltd -v- Falcon Guards Ltd [2000] 2 EA 385, the Court stated:

"It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of Order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination".

[59]Authorities are indeed legion expounding the principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. In the case of Anthony Francis Wareham & Others -v- Kenya Post Office Savings Bank [Civil Appeal Nos. 5 and 48 of 2002] (UR), this Court held that a court should not make findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

[60]The object of pleadings is principally to let the other party have notice of issues in an action or defence. We expressed it in, **Charles C. Sande -v- Kenya Co-operative Cremeries Limited [C.A. No. 154 of 1992 (UR)**, thus:

> **"All the rules of pleading and procedure are designed to crystallize the issues a Judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are".**

See also **Abdul Shakoor -v- Addul Majied Sheikh [Nairobi C.A. No. 161 of 1991] (UR)**, in which we made it clear that generally, a plaintiff is not entitled to a relief which he has not specified in his statement of claim. In the circumstances, we have come to the conclusion that the learned Judge of the High Court did not properly direct her mind to the pleadings and evidence and arrived at an incorrect decision.

[61] Turning back to the consequences of the appellant's procedural breach of the contract of employment with the respondent, our considered view is that the respondent was entitled to be compensated for the breach. In this regard, the provisions of clause 25 of the Memorandum of Agreement between the parties is pertinent. The clause is in the following terms:

> "**25. TERMINATION OF EMPLOYMENT**

The employment of permanent staff may be terminated by either the employer or the employee giving to other ONE (1) MONTH'S notice is writing or otherwise by the payment of either party of ONE (1) MONTH'S pay in lieu of notice for those with a seniority upto ten (10) years; and two (2) months for those with a seniority of more than ten (10) years".

[62] As we have stated earlier, the High Court awarded the respondent salary for the remainder of the period he would have worked until the age of retirement. We have further discussed our anxieties with respect to that finding. We have previously held that where a notice period is provided in the contract of employment, then an employer need not assign any reason for giving the notice to terminate the contract and therefore the question of offering to the employee a chance to be heard before giving the notice could not arise. (See Rift Valley Textiles -v- Edward Onyango Oganda - Civil Appeal No. 27 of 1992 (UR). That stance, as we have discussed, can no longer be applied.

[63] We have found that the appellant should have given the respondent an opportunity to respond to the allegations the appellant made entitling it to summarily dismiss him. We have also discussed why giving such an opportunity to an employee to give his side of the story and say why the relief of summary dismissal is not available has statutory underpinning. To the extent that the respondent was not afforded such an opportunity, we have found that dismissal of the respondent summarily was unfair.

[64] We have also considered the provisions of section 49 of the Employment Act which set out remedies for both wrongful dismissal and unfair termination. The section provides:

"(1) Where in the opinion of a Labour Officer, summary dismissal or termination of a contract of an employee is unjustified, a Labour Officer may recommend to the employer to pay to the employee on all or any of the following -

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c)the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal".

[65] And section 49 (4) of the new Employment Act sets out several factors which a labour officer has to take into account in deciding whether to recommend the remedies specified in section 49 (1) in determining a complaint or suit for wrongful dismissal or unfair termination of employment. Section 50 of the same

Act requires the Industrial Court to take into consideration the same factors including practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the employee's length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment might have continued but for the termination and any conduct of the employee which to any extent caused or contributed to the termination.

As we have already observed, the appellant's averments and the failure to respond to the same by way of a reply should have been considered. His failure to specifically plead special damages and the failure to strictly prove the same should also have been considered. The respondent's conduct before termination was also a relevant consideration before determining his claim for unpaid salary for the remainder of the period of retirement.

[66]The respondent had served the appellant for about twenty seven (27) years before the termination. That notwithstanding, had the appellant served the respondent with the notice of dismissal procedurally, the summary procedure would have been fair.

[67]Taking into consideration all the circumstances surrounding the respondent's employment especially his twenty seven (27) years of uninterrupted employment with the appellant, we have come to the conclusion that an award of twelve (12) months' salary would have been a reasonable compensation for the unfair dismissal.

[68]The upshot is that the appeal is allowed and the judgment of the High Court is set aside. In substitution, we award to the respondent compensation of twelve (12)months' salary of Kshs.1,014,510/=. This sum shall carry interest at court rates from the date of filing suit until payment in full.

[69]With regard to costs, the general principle is that they follow the event therefore the appellant would have been entitled to the costs of the appeal as it is substantially successful. Having taken into account the parties' previous relationship of employer/employee, however the order that commends itself to us is that the parties shall bear their own costs of this appeal. The respondent shall have the costs of the High Court suit to be assessed on the basis of our award in this appeal.

Judgment accordingly.

Dated and delivered at Nairobi this 25th day of November, 2016.

P. KIHARA KARIUKI - P.C.A.

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.