IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL NO. 105 OF 2007

BETWEEN

MARY WAKHABUBI WAFULA …….. APPELLANT

VERSUS

BRITISH AIRWAYS PLC …….. RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Waki, J.) dated 3rd February, 2006

in

HCCC. No. 157 of 2002)

****

JUDGMENT OF THE COURT

In a plaint filed at the High Court of Kenya at Nairobi on 8th of May, 2001 the appellant, **Mary Wakwabubi Wafula,** sued her former employer, **British Airways Plc,** for what the appellant claimed to be a breach of an employment contract. It was averred in the plaint that the parties entered into an employment contract on 1st April, 1989 where the respondent employed the appellant and that the appellant rose through the ranks in the respondent's establishment until the employment contract was terminated in December 2000. It was further averred in the plaint that the terms of the contract were contained, firstly, in the written contract itself as amended and, secondly, in implied terms of the same contract. One of the implied terms according to the appellant was that the respondent would, while the employment contract subsisted, conduct itself in a manner not likely to damage the relationship of trust between the appellant and the respondent. It was further averred that the performance of the employment contract was regulated by terms and conditions stipulated in the said written contract and staff regulations issued or published from time to time in staff manuals and that such regulations stipulated the rules to be followed by the staff in the discharge of their duties, work related offences, the disciplinary procedure to be followed in case of misconduct and the termination of the contract. Further, that the appellant's salary and benefits as at the time of termination of the contract was Shs.174,520.60. Further, that due to her good performance the respondent, in the year 2000 nominated the appellant to undergo a graduate programme in International Leadership which was to take place in London for a period of 36 months. The appellant stated further in the plaint that on 21st December, 2000 while she was on annual leave she was recalled by the respondent and at a meeting held at the respondent's premises, several allegations were made against her leading

to her tendering a written resignation from employment. That on the 25th December, 2000 the appellant decided to withdraw her resignation and demanded that the respondent follow regulations pertaining to termination of the contract of employment but that the respondent did not do so. That on the 10th January, 2001 the respondent wrote to the plaintiff giving the appellant notice of terminal dues which the appellant was required to collect. Those terminal dues included one month salary in lieu of notice. The appellant averred in addition that the respondent acted fraudulently or recklessly in the way it conducted its affairs. Particulars of fraud were duly set out.

It was also averred that on 2nd January, 2001 while the issue of the employment relationship was still unresolved, the appelant received communication from the British High Commission in Kenya informing her that her visa and entry into the United Kingdom had been suspended and needed to be reviewed. For all these the appellant stated that she had suffered loss and damage and claimed the following:

PARTICULARS OF LOSS

"(a) Loss of salary …… Kshs.90,404,447.96

(b) Loss of pension rights …… Kshs.8,040,444.80

(c) Loss of promised benefits of

(i) allowances …… Kshs.16,347,496.88

(ii) medical treatment or cover ……...Kshs.5,225,625.00

(iii) unclaimed awards and

allowances upto December 2000 …… Kshs.138,407.00

(iv) a course of training in Graduate

Development Programme approximately …… Kshs.5,000,000.00 Kshs.126,156,421.64

The appellant also claimed damages for fraud, misrepresentation and breach of warranties, loss of reputation and restriction of movement; declaration that the appellant was entitled to:

i) Unlimited right to travel on the respondent's aircraft to any destination within the respodnent's network and to pay only 10% of the fare and for the appellant's nominees

ii) A free annual ticket with her nominees within the respodnent's network.

The respondent delivered a defence which essentially denied the appellant's claim. The respondent took the view in the defence that the employment contract contained all the intentions of the parties. Implied terms of the contract were denied. The salary alleged by the appellant was denied and it was stated that the salary was Shs.133,627/= per month. The defendant also took the position that it had

acepted the appellant's resignation and the acceptance determined the contract.

The suit was heard by Waki, J. (as he then was) who in the judgment delivered on 3rd February 2006 gave judgment to the appellant for Shs.400,881/= being three months salary in lieu of notice and costs of the suit. The learned judge found that the appellant was only entitled to damages representing the period of notice governing the employment contract. The appellant was not satisfied with that judgment and that is what provoked this appeal. Being a first appeal, it is our duty to examine and re-evaluate the evidence. This Court has variously held that it is the duty of a first appellate court to do so. In **Mwanasokoni v Kenya Bus Services Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur)** Hancox, JA, speaking for the court, stated of the duty of a first appellate court:

"….Although this Court of Appeal will not lightly differ from the Judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary."

Also, in **Peters v Sunday Post Ltd (1958) EA 424,** a decision of Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

But the jurisdiction "(to review the evidence) should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

Accordingly only when the finding of fact challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this court interfere with it. See Ephantus Mwangi & Another v Wambugu, (1983/84) 2 KCA 100 at page 118."

It is therefore our responsibility to look at the evidence to see how the learned judge dealt with it with the caution that we did not hear the witnesses or observe their demeanour, an advantage only the trial Judge enjoys.

In the memorandum of appeal that has 13 grounds of appeal which we have decided to set out in full the learned judge is faulted for the following:

"1. The Learned judge erred in fact and in law by failing to find and hold that the origin of this litigation lies with the illegal and unlawful activities of the respondent in ferrying illegal immigrants in its airline on the Nairobi-London route in respect of which the respondent had on several occasions been found guilty and fined heavily by the British Authorities.

2. The Learned judge erred in fact and in law by failing to find and hold that in the contract of employment entered into between the parties, the respondent had promised in an implied term not to conduct illegal, dishonest and corrupt business.

3. The Learned judge erred in fact and in law by failing to find and hold that the appellant as an employee of the respondent was bound by the said contract and by law to ensure that the respondent did not engage in illegal, dishonest or corrupt business.

4. The Learned judge erred in fact and in law by failing to find and hold that the appellant in the performance of her obligations under the contract diligently performed her duties whenever she was on duty to ensure that the respondent did not ferry illegal immigrants from Nairobi to London and thereby commit an unlawful or illegal act in its business.

5. The Learned judge erred in fact and in law by failing to find and hold that in breach of the said implied term of the contract and the law, the respondent reprimanded the appellant for complying with the said requirement of the contract.

6. The Learned judge erred in fact and in law by failing to find and hold that the appellant's dismissal was the final or ultimate act of punishment by the respondent against the appellant for carrying out or insisting on carrying out her duties lawfully, diligently and honestly.

7. The Learned judge erred in fact and in law by failing to find and hold that the above conduct of the respondent was unacceptable and a trust destroying conduct in breach of the independent implied obligations of mutual trust and confidence in the said contract of employment.

8. The Learned judge erred in law by failing to find and/or hold that the implied obligations of mutual trust and confidence is an incident of the contract of employment and a legal duty imposed by the law not to conflict with the decision in the case Addis vs Gramophone Company [1909] A.C. 488 or the Employment Act.

9. The Learned judge erred in law by failing to find and/or hold that the said implied obligation of mutual trust and confidence is or was an independent implied obligation in the contract between the parties.

10. The Learned judge erred by failing to hold and/or find that the respondent was liable in damages to the appellant for breaching the said independent implied obligation by;

(a) unduly flexing its muscle against the appellant who was a simple dedicated employee with acknowledged exemplary services.

(b) fabricating false charges against the respondent

(c) twisting the appellant's lawful actions and accusing her of engaging in the very activities which she was trying to prevent for the respondent's benefit.

(d) covering up its hind handed or cruel action by forcing the appellant to tender a letter of resignation so as to make it appear that the appellant has voluntarily and freely terminated her

services.

11. The Learned judge erred in law by failing to hold or appreciate the purpose and intent of the said obligation which is to ensure fair dealing between the respondent as employer and the appellant as employee and that this was as important in respect of disciplinary proceedings, suspension and dismissal as at any stage of the employment relationship.

12. The Learned judge having found that the appellant suffered financial loss pleaded, and will continue to do so until she fully mitigates it, as a result of the respondent's said conduct, erred in holding that the appellant could not recover the said damages in respect of the said breaches of the independent implied obligation by the respondent.

13. The Learned judge erred in fact and in law by holding that the loss pleaded in paragraph 27 of the plaint or claim is incapable of grant."

For all these the appeal should be allowed and the respondent should be held liable in damages to the appellant for breach of the independent implied obligation of trust and confidence term in the contract of employment; that the decision not to grant the appellant acknowledged loss and damages suffered as a consequence of the respondent's misconduct be reveresed; that the appellant be awarded damages as prayed in the plaint which were declined and not awarded and that the appellant be awarded costs.

In the hearing that took place before the learned judge the appellant produced into evidence the contract of employment but added that there were other implied terms which were not included in the employment contract. She testified that it was wrong for the respondent to dismiss her without framing a proper charge which she would be required to answer. Further, that she proceeded on approved annual leave on 20th December, 2000 but the same day in the evening she was surprised to see an envelope being pushed under her door at her residence and that when she opened it she found a letter summoning her to attend a meeting with the respondents' Managers the next day. That when she called at her employer's premises the next day she met three of her seniors where she was confronted with the allegation that she had allowed illegal immigrants to be ferried in the respondent's planes to the United Kingdom. That she denied the allegations but was informed that the respondent had lost confidence in her and she should resign or she would be sacked. She left the premises after being required to return all company property and when she reached home she wrote a resignation letter which she delivered to the respondent. That upon reflection about four days later she wrote another letter withdrawing her resignation but there was no response to this from the respondent. Her appeal dated 31st December, 2000 was not acknowledged but a letter reached her dated 24th January, 2001 where her appeal had not been accepted but had been rejected. According to her none of the issues she had raised in her resignation letter was addressed.

In further evidence the appellant testified that during her 11 years service with the respondent she had a very good working environment where she was given room to grow and passed with distinction in all the courses that she sat. She received many letters of commendation from her employer, the respondent, and from customers who flew British Airways. She did not receive any warning letters save one in February 2000 which referred to ferrying of illegal immigrants.

The witness explained that in her line of duty she had found that there were passengers who would try to board flights to other countries using fake identity cards, tickets and credit cards. If such a passenger reached a destination in the United Kingdom the airline would be fined £2000. It was her duty with others to ensure that such passengers did not board British Airways flights.

In adition the witness testified that she had sent many letters of applications for employment to various organizaitons and had received only one acknowledgement which was a regret. To her understanding she had not resigned from the respondent's employment but it was the respondent who terminated her services. She wondered how she would have been paid salary in lieu of notice if she had resigned. According to her, therefore, she was entitled to be paid the balance of her contract period until retirement at 60 years and because she was 36 years 9 months at the time of termination, she claimed a salary for 23 years and 3 months being what she saw as balance of her contract until retirement. She also testified on the other claims made in the plaint.

The lengthy cross-examination and subsequent re-examination did not add or subtract much from what went down in examination-in-chief just summarized in this judgment. And the appellant's case was then closed.

The respondent called as witness its Area Human Resource Manager for East and North Africa, **Sammy Onono**. He was one of the managers present at the fateful meeting on 21st December, 2000 which led to the termination of the appellant's contract of employment. He testified that their London headquarters office was concerned about a number of illegal immigrants who had been caught in London after flying British Airways from Nairobi. It was alleged that most of those immigrants took flights originating from Nairobi on shifts where the appellant was the line manager. The appellant had denied knowledge of such activities but had chosen, the next day to resign from employment. That resignation was formally accepted through a letter signed by him. He denied that the appellant was forced to resign stating that the appellant had made that decision freely and that the appellant's subsequent letter withdrawing her resignation could not be accepted, resignation having taken effect. But they had decided, gratuitously, according to this witness, to pay the appellant one month salary in lieu of notice. He denied that the appellant was entitled to the prayers she sought taking the position that the respondent had met all its obligations under the contract of employment. In cross-examination the witness said that:

"…. I did not consider Mary's letter of 21.12.00 as a voluntary resignation. An involuntary resignation is also a proper resignation because she says the company had lost confidence in her …..No we had not gone through the motions to establish whether Mary was right or wrong. Yes the company had a basis for losing confidence.

……was the large number of fines received during the shift….."

That marked the close of the respondent's defence to the appellant's claim.

The learned judge analysed the evidence produced before him and reached the conclusion that the terms of the contract of employment between the appellant and the respondent were contained in the

letter of appointment dated 1st April, 1989 and that, apart from implied terms in a contract that both parties to the contract would act with honesty, faithfulness, trust and confidence to each other while performing the contract, there was no actionable "trust and confidence" implied term in the contract of employment between the appellant and the respondent.

On how the contract of employment was terminated the learned judge found that the respondent had not conducted itself as required by the regulations governing the contract of employment. The learned judge found that the respondent summoned the appellant to a meeting whose agenda was not disclosed; the appellant was ambushed with allegations which she had no notice of; that the appellant was forced to resign and that the regulations governing the contract did not provide for resignation – in the end the learned judge found that the regulations provided for "termination of employment" by either party giving to the other requisite notice and that:

"….. My finding on the facts is that the plaintiff's employment with the defendant was wrongfully terminated. There is no doubt that the plaintiff feels that the manner of termination was most contumelious, coming as it did after 11 years of acknowledged exemplary services to the airline. She has suffered financial loss and will continue to do so until she fully mitigates it. But the law is very clear that the contract of employment cannot be enforced by specific performance, else it would be servitude. The law is also clear on what damages are payable to an employee whose services are terminated in whatever manner which is outside the contractual terms. It is the amount she would have been paid if the contract was lawfully terminated. On the facts she was entitled to three month's notice or payment of equivalent salary in lieu. The monthly salary in my finding was Shs.133,627. I give judgment accordingly for the sum of Shs.400,881 (133,627x3), in damages together with interest thereon at court rates from the date of filing suit until payment in full. The rest of the plaintiff's suit is dismissed….."

Those are the findings that provoked this appeal as the successful plaintiff thought that the learned judge erred in not allowing the other claims and only finding for the plaintiff for the said sum.

The appeal was canvassed by the written submissions of learned counsel who, when they appeared before us on 22nd June, 2015 decided not to highlight the same but left the whole matter to us to consider and deliver a judgment accordingly.

In the said submissions the appellant relies on **Section74** of the retired **Constitution** which disallowed subjection of any person to torture or to inhuman or degrading punishment, to claim that the treatment that she was subjected to on 21st December, 2000 when she was summoned by her employer to a meeting amounted to torture or inhuman or degrading punishment and therefore contravened that Sectionof that Constitution. The appellant also faulted the learned judge for not awarding damages as per the principle laid out in the English House of Lords case of **Malik v Bank of Credit and Commerce International SA in liquidation [1997] 3 All ER 1**. The appellant therefore submitted that she was entitled to all emoluments and benefits on the employment contract until her retirement and faulted the learned judge for not making that award. Counsel for the appellant contended in the said submissions that the case before the learned judge was a unique one and had no precedent in Kenya.

The respondent thought otherwise. Learned counsel submitted that the appellant had not established

that the respondent engaged in illegal activities to entitle the appellant to rely on the principle in the **Malik** case (supra). In any event, it was further submitted that the said

Section74 of the retired **Constitution,** was not breached and the suit by the appellant was not founded on breaches of Constitution. For all these the respondent urged that the appeal, be dismissed.

The appellant found it necessary to file supplementary submissions because, as learned counsel stated in those submissions:

"…… I have come across a provision in our new laws which may be relevant to the just determination of the said issue, and in the discharge of my duties to the Court under Section3 (3) of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, I seek indulgence of this Honourable Court to bring the said provision to the attention of the Court in these supplementary submissions."

Although there was no leave granted to the appellant to file the said supplementary submissions, we shall in this instance admit and consider the same as in the circumstances of this appeal, no prejudice was occasioned to the respondent whose counsel had opportunity to comment on the same.

The provision of law that the appellant feels it is important to bring to our attention is **Article 73** of the **Constitution of Kenya, 2010** which provides that:

"73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people."

According to the appellant, the effect of that Article is to do the following, and we quote from supplementary submissions:

"7. This Constitutional provision is an acknowledgement or recognition that:

(a) the concept or principle of trust and confidence exists in law as a legal right or obligation;

(b) the legal principle or obligation of trust and confidence is an essential requirement of any human or contractual relationship especially where the relationship confers authority or power on one party to be exercised over the other party;

(c) the principle or obligation of trust and confidence is a necessary measure to ensure that power or authority is exercised with due regard for the respect of the affected people or persons.

8. The drafters of Constitution in their wisdom found it necessary to make and include this provision in the Constitution as a way of regulating the exercise of power or authority by public officers against citizens."

We have carefully considered the record of appeal, the Memorandum of Appeal, submissions made and the law.

The appellant faults the learned judge for various reasons – not finding that the respondent engaged in the unlawful activity of ferrying illegal immigrants on the Nairobi – London route. Of this the appellant testified before the learned judge that:

"….. All the time I worked with British Airways they did not act towards me dishonestly. Until 21st I say they were dishonest because they accused me on 21st. before them (sic) they were not dishonest. That is when our relationship ended. I have no quarrel with payments or promotions given earlier. …."

and:

"…. The illegal activities. I was asked to conceal was about illegal immigrants. They were carrying passengers without proper documents to UK. During my employment British Airways did not on any single instance bring illegal immigrants and tell me to cover it up …." (emphasis by underline)

The learned judge found, on the evidence, that the respondent was not a corrupt airline carrying illegal immigrants as a corporate policy and therefore the principle in the **Malik** (supra) case could not apply.

On the facts of the case, and as readily admitted by the appellant, there was no material placed before the learned judge to find that the respondent was otherwise than a good corporate body carrying out the normal business of an international airline. We can find no fault in this finding by the learned judge.

The learned judge found that the terms of the contract of employment were contained in the letter of appointment dated 1st April, 1989. He also found that save for the general propositions of honesty, faithfulness, trust and confidence between employer and employee to be implied in every contract of employment, there was no actionable

"trust and confidence" implied term of the contract. In the end, and as already stated, the learned judge found that the respondent unlawfully terminated the appellants employment for which the respondent was ordered to pay the appellant the equivalent in money of three months notice to terminate employment.

We have already stated in this judgment that the contract of employment was made in 1989 while the suit was filed in 2001.

The remedies that were available to employees who suffered wrongful dismissal or unfair termination before the year 2007 were clearly set out in the repealed **Employment Act, Cap 226** and the repealed **Trade Disputes Act, Cap 234, Laws of Kenya**.

In the case of termination in lieu of notice **Section16** of the **Employment Act** provided that an employer must pay wages or salary which would have been earned in respect of the period of the notice. The provision was set out in the Act as follows:

"16. Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection(5), or the proviso thereto, of section14 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 subsection."

In addition to the payment in lieu of notice **Section15** of the repealed **Trade Disputes Act** provided that for wrongful dismissal the court may order the remedies of reinstatement, and in addition to or instead of award compensation to the employee. The compensation award provided was that it should not exceed twelve months of monetary wages or, in the case of reinstatement, the actual pecuniary loss suffered by the employee as a result of the wrongful dismissal.

Upon the repeal of the **Employment Act, Cap 226** and the **Trade Dispute Act,** the remedies available to an employee who suffered wrongful dismissal or unfair termination were increased under **Section49 (1) and (3)** of the 2007 **Act**. Radido Stephen J, in the case of **Alphonce Maghanga Mwachanya v. Operation 680 Limited [2013] eKLR** gives a summary of the remedies set out in the said **Section49(1)** and **(3)** of the **Employment Act** where the court finds that a termination of employment was unjustified and unfair as:

"(i) Wages that an employee would have earned had he been given notice

(ii) Proportion of wages due as between date of notice and dismissal

(iii) Maximum 12 months compensation

(iv) Reinstatement

(v) Re-engagement."

In addition **Section12 (3)** of the **Employment and Labour Relations Court Act, 2011** provides for either interim preservation orders, prohibitory orders, compensation, an award of damages, reinstatement within three years of dismissal as provided under the Act or any other written law and any other appropriate relief as the court may deem fit to grant, as remedies the court can grant.

Rika J, in the case of **G M V v. Bank of Africa Kenya Limited [2013] eKLR** explained the caps on the compensation of awards in employment matters before 2007 as follows:

***"95. Historically, caps on compensatory awards have existed within specialized Employment Dispute Resolution Mechanisms, so that these Tribunals do not veer into assessing damages in employment claims, following the influences from personal injury claims. It is argued that without statutory caps, there would be no need to have these specialized dispute resolution mechanisms; employees would just move to the Civil Courts, and damages awarded in the mode of personal injury claims. Capping of the awards of the Industrial Court under the Trade Disputes Act Cap 234, which was carried over to the Employment Act 2007 and the Labour Institutions Act 2007 borrowed from the English Employment Tribunal System. Claims in this Tribunal for unfair termination had monetary limit, while contractual claims filed in the Civil Courts had no limitation* a priori.**

96. The *House of Lords in the cases of Eastwood & Another v. Magnox Electric PLC; McCabe v. Cornwall County Council & Others [2004] UKHL 35,* explained the capping as follows:

"*in fixing these limits on the amount of compensatory awards, parliament expressed its view on how the interests of employers and employees, and social economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the Courts to extend*

further, a common law implied term, when this would depart significantly, from the balance set by legislature. To treat the statute as prescribing the floor, and not a ceiling, would do just that..... it would be inconsistent with the purpose parliament sought to achieve, by imposing limits on compensatory awards payable in respect of unfair dismissal.''

The Employment Tribunal in England, like our Industrial Court under the Trade Disputes Act, however, had the authority to grant the remedies of reinstatement or re-engagement, as alternatives to compensation. This was an authority not enjoyed by the Civil Courts. The capping therefore took into consideration the additional powers of the Employment Tribunals to grant alternative remedies, which jurisdiction was not enjoyed by the Civil Courts."

In realizing these caps this Court in the case of ***Rift Valley Textiles Ltd v. Edward Onyango Oganda*** **(Nakuru) Civil Appeal No. 27 of 1992 (unreported)** quoted, with approval, the holding in **Cyrus Nyaga Kabute v. Kirinyaga County Council, Civil Appeal No. 29 of 1985 (unreported):**

"The High Court (Justice Waki) in *Wanjohi v Mitchell Cotts Kenya Ltd* (2002) 2 KLR 462 similarly held that the general damages for wrongful dismissal is well settled, such that damages are limited to the amount that the employer would have been obliged to pay in accordance with the terms of the contract."

The question, therefore, before us is whether the remedies that are available in the **Employment and Labour Relations Court Act, 2011,** and the **Employment Act, 2007** are available to an employee who suffered unlawful termination before the enactment of these current laws.

This question leads to the consideration whether the current labour laws may be applied retrospectively. **Shroud's Judicial Dictionary of Words and Phrases Fourth Edition Vol. 3, London, Sweet & Maxwell Limited, 1973** explained the principle of retrospectivity in the following way:

"Nova constitutio faturn forman imporere deber, non" i.e. unless there be clear words to the contrary, statutes do not apply to a past but to a future, state of circumstances"(emphasis by underline)

This principle has been captured in the Latin maxim ***'lex prospicit non respicit'*** meaning 'the law looks forward not backward'. This principle is neither absolute nor cast in stone as was noted in the case of

Municipality of Mombasa v Nyali Limited [1963] E.A. 371 where Newbold JA spoke for the court as follows:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested;

whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which

has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

The Supreme Court in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** adopted the view above as it set out the principle to be used in considering when a non-criminal law may be applied retrospectively and stated as follows:

"(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.

(Halsbury's Laws of England, 4th Edition Vol. 44 at p.570)."

This legal position was also considered in the holding in **Philips v Eyre *(1870)* LR QB 1** which was cited with approval, by Nyamu J. (as he then was) in **Keroche Industries Ltd v Kenya Revenue Authority & 5 others (2007) eKLR** that:

"Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly the Court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature."

Further, the **Interpretation and General Provisions Act, Cap 2 Laws of Kenya,** also gives guidance on the retrospective application of law in

Section23 which provides:

"(1) Where in a written law a reference is made to another written law, that reference shall, except where the context otherwise requires, be deemed to include a reference to the last-mentioned written law as it may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted.

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or…."

(emphasis by underline)

So retrospectivity of application of law will not ordinarily be permitted as new laws look to the future.

From a reading of the authorities and the law as we have set it out, we find no express intention by the legislature for the remedies in the current **Employment Act, 2007** and the **Employment and Labour Relations Court Act, 2011,** to be applied retrospectively.

If it were necessary to visit any other provision of law, **Schedule 5, paragraph 2(4)** of the **Labour Relations Act** expressly provides

that:

"2. (4) Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed)

(a) any trade dispute that arose before the commencement of this Act;

(b) any trade dispute referred to the Industrial Court before the commencement of this Act;

(c) any revision or interpretation of an award by the Industrial Court; and

(d) any summary dismissal that took place before the commencement of this Act;"

All that said, then, is to say that this Court only has jurisdiction to award the remedies available at the time of the wrongful dismissal or unfair termination, that is, when the cause of action arose. These are the remedies that are provided for under the repealed **Employment Act, Cap 226, Laws of Kenya** and the repealed **Trade Dispute Act, Cap 234, Laws of Kenya.**

There cannot, therefore, be any basis for Mr. Oyatsis' submission that **Article 73** of the **Constitution of Kenya, 2010** gives any shield to the appellant in this appeal. The contract of employment, the subject of this appeal, was terminated well before the current constitution was enacted and the remedies available to the appellant were the remedies recognized by the legal regime that existed when the contract of employment was terminated.

The learned judge awarded the appellant three months salary in lieu of notice. That is what the appellant was entitled to and no more.

This appeal has no merit and we accordingly dismiss it. What about the issue of costs"

This, as will be common ground, will usually follow the event. The appellant herein was an employee who lost her employment in a way that hurt her so badly that she believed, wrongly as has been shown, that hers' was a case without precedent and she pursued what she thought would create new horizons for employees in this jurisdiction. She did so with much industry but did not succeed in her quest to persuade the trial court, or us, that her course was justified. This is a situation where we think that we should depart from the ordinary course and order that each party meets its own costs.

Dated and Delivered at Nairobi this 9th day of October, 2015.

J.W. MWERA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR