THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA, JJ,S,C)

CIVIL APPEAL No.12 OF 2002

BETWEEN

AHMED IBRAHIM BHOLM.....APPELLANT

AND

CAR AND GENERAL LTD.....RESPONDENT

[Appeal from judgment of the Court of Appeal at Kampala (Kato, Twinomujuni and Kitumba, JJ.A) dated 2nd May, 2002 in Civil Appeal No.30 of 2001].

JUDGMENT OF TSEKOOKO, JSC: This is a second appeal. It is against the decision of the Court of Appeal which overturned the judgment and decree of the High Court where Mukanza, J; had awarded to the appellant US $ 18,700 as special damages and Uganda Shs. 30m/= as general damages, on account of breach of a contract of employment.

The facts in this appeal can be simply stated. The respondent, Car & General (U) Ltd, is a company incorporated in Uganda. It belongs to a group of companies called Car & General. There is another company in Nairobi, called Car & General (Kenya) Ltd. It seems to be the headquarters of the group. I shall hereinafter refer to the latter company as the Kenya Company. On 17/5/1993, a director of the respondent based at the Kenya Company offered the appellant employment for two years. The offer was in a form of a letter (Exhibit P.1). The

appellant accepted the offer apparently by signing at the end of it. A contract of employment was thus executed. Under the contract, he had to work on probation for three months. There is no provision mentioning extension of the probation period. The appellant travelled to Kampala to work for the respondent in Kampala. While the appellant was working in Kampala, the respondent paid him a salary, provided him with a house and paid for utilities such as water, electricity and telephone. The respondent also provided the appellant with a car which was in bad mechanical condition. In the course of his work, there developed what was described as "*irreconcileable differences*" between him and a Mr. Agvan, the respondent's General Manager. The appellant continued to perform his duties until 13th January 1994, when the respondent, through its Executive Director, terminated his services and ordered for the appellant to be paid one month's salary in lieu of notice.

Consequently the appellant instituted a suit against the respondent, in the High Court, claiming for: -

(a) Special damages,

(b) General damages for breach of contract,

(c) Exemplary damages,

(d) Costs, and

(e) Interest on (a) at the rate of 45%.

In the plaint, and in his testimony, the appellant claimed that he was offered employment on contract of two years and he signed it. This was originally accepted by the respondent in its defence but in its amended written statement of defence and counterclaim, the respondent denied the existence of the contract. Further, the respondent counterclaimed for Shs 1,754,200/= as

the value of its property allegedly lost or damaged by the appellant. It also claimed for general damages.

Five issues framed for determination by the trial judge were: -

(1). Whether there was a contract of employment between the two parties.

(2). If there was, which was (Sic) the terms of the contract of employment.

(3). Which of the parties was in breach of the contract.

(4). Whether the plaintiff owes the defendant any money and Vice versa.

(5). What general and special damages are due to either party.

The discussion by the trial judge of the issues are rather confusing but his conclusions are clear. At first the learned judge appeared to hold that the contract of employment was illegal and that the appellant's employment was illegal under the Employment Decree, 1975. However, later in the same judgment, the learned trial judge answered all the issues in favour of the appellant, holding that there was a valid contract between the parties and that the respondent breached the contract by wrongfully dismissing the appellant. Consequently, the learned judge awarded the appellant US$ 18,700 as salary for the period 13/1/94 to June, 1995, that period being the balance of the two years contract. He also awarded the appellant shs 30m/= as general damages to compensate him for;

> **"*Wrongful dismissal harassment, humiliation and embarrassment and other benefits denied to the plaintiff as per employment contract*".**

The judge dismissed the respondent's counter claim.

Upon appeal, the Court of Appeal held that there was no valid contract between the parties; that the appellant had sued a wrong party and that the appellant was illegally employed. Accordingly, that court allowed the appeal, set aside the judgment and orders of the trial judge. The court did not indicate what would happened to the counterclaim. The appellant has now appealed to this Court on two grounds.

In the first ground the complaint is that the learned Justices of Appeal erred in law and in fact in finding that there was no valid contract between the appellant and the respondent. Mr. Ebert Byenkya, counsel for the appellant, argued that there was a valid contract. He contended that the Court of Appeal did not study the pleadings, and or review the evidence so as to reach its own conclusions. He further contended that had the Court of Appeal studied the whole defence and the counterclaim, the court should have found that there was implicit admission by the respondent of a valid contract between the parties. Learned counsel submitted that the Court of Appeal did not appreciate that the respondent did not plead illegalities as required under Order 6 Rule 5 of the CP Rules so as to show that the action was not maintainable. The illegalities being alleged were the absence of a signed contract and absence of an immigration permit. According to counsel, pleading these matters was necessary for purposes of fair hearing. It was submitted that in his plaint the appellant did not plead that the entire contract was in one document and that the learned Justice of Appeal who wrote the lead judgment should have found that there were other documents relating to the contract which were in writing. Counsel referred to a letter ref: VV/jxn/96 dated 13/1/1994, (exhibit P.3) which was written by Vijay Gidoomal, the Executive Director, of the respondent to the

appellant terminating the employment. (The letter specifically refers to terms of the contract). Counsel also referred to a Car & General (Uganda) Ltd memorandum, dated 30/10/93, by which a Mr. Karim Agvan extended the appellant's probationary period to December 1993 and to a similar memorandum Ref. UGA/AKA/BHALM/7/11/1/94 dated 11/1/94 by which the same A. K. Agvan, General Manager, purported to again extend the probationary period to the end of January, 1994. It was also contended, and here I agree, that these documents affirm the existence of a contract, contrary to the finding of the Justices of Appeal. Referring to section 10 of the Employment Decree, 1975, learned counsel contended that it is not correct, as asserted by the respondent, that exhibit P1, which was admitted in evidence without objection by the respondent, did not reflect the true terms of the contract. He argued that the terms of the contract were proved. In counsel's opinion, the evidence of **Cecil Joseph** (DW1), the respondent's Ag. General Manager since 1997, indicates acceptance of the terms of the contract. Therefore, contended learned counsel, the provisions of sections 10 and 11 of the Decree were complied with. He also argued that: -

(a) Under Company Law (presumably S 194 of the Companies Act and on evidence the respondent ratified the appellant's appointment.

(b) In appointing the appellant, the Kenya Company exercised ostensible authority on behalf of the respondent. Counsel relied on **Hely - Hutchinson Vs Brayhead Ltd & another** (1968) QB.D.549. and S16 of the Employment Decree, 1975.

(c) The conduct of the respondent showed that there was the relationship of employer and employee and for this view counsel relied on the cases of: -

(i). **Mugenyi & Co. Advocates Vs Attorney General.** Civil Appeal

No.43 of 1995 (SC) (unreported), (ii). N. **Bandali Vs Lombank Tanganyika Ltd.** (1963) EA 304.

(No specific passages were referred to by counsel but in those cases the courts considered the application of the doctrine of estoppel).

Mr. Shonubi, counsel for the respondent, submitted that: -

(a) The Court of Appeal re-evaluated the evidence on record.

(b) There was no contract, but if there was any contract, it was between the appellant and the Kenya Company which employed the appellant to work for the respondent. That this is confirmed by the letter of appointment (Exh.P.1) written on the letterhead of the Kenya Company

(c) In paragraph 6 of its amended written statement of defence, the respondent denied the existence of the contract.

(d) 0.6 Rule 5 does not remove the obligation for the appellant to prove existence of contract and its validity. The appellant had the obligation to produce the rest of the contract.

(e) Section 13 (1) (a) of the Decree requires foreign contracts to be in writing and to be attested.

(f) Exhibits P.2 and P.3, the letters extending probation and terminating contract are unhelpful.

(g)S.113 of the Evidence Act and S .154 of Company's Act were not applicable to this case.

Learned counsel relied on **Prof. Syd Hug Vs Islamic University in Uganda Civil Appeal No.45 of 1995 *(SC);* Makula International Vs H.E. Cardinal Nsubuga** (1982) HCB 11 and **Gullabhai Ushillingi Vs Kampala Pharmaceuticals Ltd** - Civil Appeal 6 of 1999 (S.C) for the view that Court cannot condone illegality.

In my opinion none of the above three cases can help the respondent. On the facts the cases of **Hug** and **Makula** are clearly distinguishable in that the illegality relied on by the Courts in either of the two cases was obvious and clear. Indeed **Ushillingi's case,** as will appear later, supports the appellant's case. In his plaint, the appellant averred, in paragraph 2 thereof, that the respondent is a branch company of the multinational company called Car & General which is incorporated and doing business in Uganda. In the 4th paragraph, and contrary to Mr. Byenkya's submission on this point, the appellant indicated that the contract was in one document; for he averred that on 17/5/93, he was offered employment on contract which he accepted and signed on 18/5/93 before he reported for duty at Kampala. In paragraph 6, the appellant enumerated his benefits under the contract. The contract was annexed to the plaint. I should point out that in the original written statement of defence filed in November, 1994, these averments were admitted explicitly in paragraph and 4 thereof However, on 24/11/95, before the defence was amended, Mr Shonubi, counsel for the respondent, unsuccessfully submitted in the High Court before the trial judge that the appellant had no cause of action against the respondent because the contract was entered into with the Kenya

Company. In his submissions, he refers to the last page 4, of the contract where the names of the parties appeared. Counsel contended that:

> "***The company which has been sued is incorporated in Uganda…… what my learned friend should have done is to sue both. Page 4 of the contract which clearly shows the parties, the plaintiff and the Kenya Company***"

Likewise, the trial judge, in his ruling, rejecting Mr. Shonubi's objection, referred to page 4 of the same contract where the names of the parties appeared. The judge delivered his ruling six months latter on 28/3/1996. Thereafter, the respondent sought leave and was allowed to amend its defence and on 20/9/96 it amended and filed its amended defence, this time, denying the averments in paragraphs 2 and 4 of the plaint. In that amendment the respondent rather evasively denied the existence of a written contract. Thus in its para 4, it averred that "paragraph 4 and 5 of the plaint are denied in that the defendant never contracted with the plaintiff"

The mystry surrounding page 4 doesn't seem to have aroused any body's curiosity. In his written submission, when discussing the first and second issues, the appellant's counsel maintained that exhibit P.1 was a valid contract. Respondent's counsel took the contrary view, contending that exhibit P1 was entered into with a foreign company and was not binding.

In away the respondent was merely saying that the contract exists but the respondent was not a party to it. A close study of those submissions shows that the respondents counsel made two alternative contentions before the trial judge. This was in line with the amended defence. In paragraphs (vii) and (VIII)

of his submissions, he accepted that Exhibit P.1 was signed in Nairobi. But in para IX, counsel contended that because page 4 of the same document was missing from the record therefore, sections 13 (I) and 14 (I) of the Decree were contravened and so there was no valid contract.

In his evidence, as stated earlier, the appellant testified that he was interviewed in Nairobi by the Kenya Company and that he signed the contract of employment before he was posted to Kampala. The terms of employment relating to duties, salary, housing, leave, security, medical, transport, and others are spelt out in the contract itself (exhibit P1) and in the job profile (exhibit P.2). I find it necessary to reproduce parts of the contract relating to duration of the contract, work permit, commitment and probation. It reads as follows: -

> *"cc. Head Office* *C & G*
>
> *Car & General*
>
> *REF: ENG/248/VA. I 7 t h*
>
> *May, 1993. Mr. Ahmed.*
>
> *I. Bholm P.O. Box 70453*
>
> ***NAIROBI***

Dear Mr. Bholm,

Further to your recent interview, I have pleasure in offering you the position of Financial controller, Kampala. The date of commencement is to be agreed. <u>This contract is for a term of two years.</u>

Duties

Based initially in Kampala, you will be responsible for the total accounting and finance function with Car & General (Uganda) Limited. Should the company so decide, you may be transferred anywhere within the Group in East Africa. You will report to the General Manager of Car & General (Uganda) Ltd.

Salary

You will be paid a salary in Uganda shillings equivalent to US $ 1,100 per monthly gross. This salary will be paid in arrears at the end of each month. The currency conversion factor will be revised every three months and once fixed will be applicable for the whole of the succeed three months.

Work permit.

This contract is conditional upon the company obtaining a work permit on your behalf. The initial term of contract will be two years from the date your employment commences.

Commitment

You will be expected to devote you whole time and attention to your duties as per laid down terms of reference and to undertake not to become involved in any other employment nor to take active part in politics.

Standing orders

You are required to make your self familiar with, and abide by, such standing orders as shall from time to time be issued by the company. You will not without the consent of the company engage in any other business

which will be in conflict with your duties as a full employee of the company.

Probation

Your employment is subject to the satisfactory completion of a three months, probationary period, and your confirmation shall be only in writing. During this probationary period your employment may be terminated by giving one month's notice either by the company or yourself."

It ought to be pointed out at this stage that the contract did not either expressly or by implication provide for extension of the 3 months probation period. No evidence was produced by the Respondent to show that it had authority outside the provisions of the contract to extend the probation period. Therefore it is legitimate to conclude that Mr. Agvan, the General Manager, in purporting to extend the probation period, acted outside the terms of the contract.

As pointed out earlier, during submissions on the preliminary objection raised by Mr. Shonubi for the respondent, he made reference to the parties and signatures which appeared at the end of exhibit P.1, the contract. So did counsel for the appellant, as indeed did the learned trial judge in his ruling, overruling the objection raised by Mr. Shonubi.

In his evidence in chief, Cecil Joseph DW1 partially testified as follows: -**" I *do have a record of the plaintiff's employment, I have a file. I have looked at these records - Exhibit p.1 I do have example exhibit P.1 is appointment letter for Rholu. The appointment is from Car &***

General Ltd Kenya, Nairobi. This contract is conditional upon obtaining a work permit. The appointment is only for two years…… When I look at the file the work permit was made on 20th October, 1993. There are application forms signed by the general manager to the work permit show (Sic) that work permit was granted. The letter is dated 18th November, 1993… The letter says/mentions that Bholu is on probation and that they were looking for more qualified person…….. "

It is a pity that at the trial, the appellant's counsel did not demand that DW1 produces the copy of the appointment letter he was referring to containing page 4. Be that as it may, after studying the proceedings relating to the objection by Mr. Shonubi that the plaint disclosed no cause of action, I have no doubt in my mind that the full contract. Exhibit P.l, had been on the court record as part of the pleadings. Otherwise both counsel and the trial judge would not have mentioned it in submissions and the ruling. By a strange twist of fate, the most important portion of the document, the one bearing the execution of the contract, disappeared in thin air perhaps soon after the ruling of 28/3/1995. Strangely, this disappearance appears to have emboldened or enabled the defence to file an amended defence denying the existence and validity of the contrart between the parties But DW1, in the above quoted evidence, betrayed the defence strategy. He indicates that the contract was in the possession of the defence. He did not say that it was not signed. Mr.Shonubi was legal Secretary of respondent at the material time. He referred to the full contract on 24/11/1995. In his address to the trial judge, he admitted the signing of the contract by both the appellant and Kenya Company in Nairobi. In these circumstances and with the greatest respect to the Court of

Appeal, it was wrong for that court to hold that there was no written contract. It is my considered opinion that the evidence on record proves existence of a written contract. To accept the submissions of the respondent in these proceedings that there was no written contract would be to reduce court into a vehicle for doing injustice. Further I think that reference to contract and its terms, by the respondent, in the subsequent documents by which the respondent purported to extend the probation period shows recognition by the respondent of a valid contract. If the respondent was not a party to the contract, why did the respondent rely on it to extend probation or to terminate service?

Mr. Shunobi suggested that the two documents were not properly proved because they were produced for identification only. But Joseph Cecil (DW1) did the proving, perhaps inadvertently, when he referred to them and stated that they extended the appellants' probation period. He did not disown the documents. In the circumstances, I agree with the trial judge and with Mr. Byenkya that there was a valid contract upon which both parties fulfilled their respective obligations until the termination of services. I think that the doctrine of estoppel prevents the respondent from denying the existence of the contract between the appellant and the respondent.

In his discussions, this is what the trial judge said:

> ***"With regard to issue No.1 from the evidence on record, it has been established that Exhibit P1 could be called a contract of employment because of all the terms of the said Exhibit P1 were mentioned although page 4 of this exhibit P1 was missing. It was signed by the employer and the employee ..... fact that***

both parties recognised its existence. No evidence was adduced by the defence to challenge the employment management (sic) which was allegedly signed in Nairobi and the plaintiff took up the employment in Kampala ".

In this passage the judge found that the contract had been signed and was valid. I think that the letter terminating the services of the appellant bolsters this finding. The letter is worded as follows: -

"our Ref: WG/jxn/94

Date. January 13th 1994.

Mr. A. Bholm

Car & General (U) Ltd.

KAMPALA.

Dear Mr. Bholm,

Due to your seemingly irreconcileable differences with your General Manager, I regret that we have to terminate your ***services with Car & General (Uganda)*** *Limited. In accordance with* ***your contract of employment and our subsequent letters extending your probation*** *up to January 31, 1994, the termination of your employment takes place within the probationary period. Consequently you are entitled to one (1) months pay in lieu of notice.*

This is to be paid immediately following which your services are no longer required at the branch.

Please arrange to vacate the house by Tuesday January (l9th?) 1994. We will pay for your transport back to Nairobi in accordance with the terms of your contract.

We thank you for your services and wish you the best of luck in the future.

Yours faithfully,

CAR & GENERAL (UGANDA) LIMITED

Signed by: VIJAY GIBOOMAL

EXECUTIVE DIRECTOR

cc. Mr. V.H. Gidoomal; Mr. W. Bjones; Mr. E M . Grayson; Mr. A. K. Agvan".

I have underlined four places in the letter namely: -

(a). "Termination of services with Car & General (U) Ltd". Those words show, as rightly argued by Mr. Benkya, that the behaviour of the respondent towards the appellant was that of master towards its employee.

(b). "Contract of employment and our subsequent letters extending your probation." (c). "The terms of your contract." (d). CAR & GENERAL (UGANDA) LIMITED

All these portions prove that the respondent adopted exhibit P.1 though it was executed in Nairobi. The defence evidence by Joseph Cecil shows he was recruited in the same way as the appellant and was then sent to Kampala to be respondent's General Manager.

I agree with Mr. Byenkya that this letter is one of the letters which signifies that the appellant was in fact employed by the respondent for two years and confirms that there was a valid contract between the parties.

One other matter needs to be clarified. I notice from the letter of appointment an indication that the appellant could be transferred anywhere in East African

suggesting that Kenya Company was the employer. In his evidence in chief the appellant testified: (page 75)

> **" *I was interviewed in Nairobi. We were about 4 or 5 candidates. I was interviewed by the Managing Director and (sic) considered responsible for Uganda group. I remember the names Milll Jones and V.J Iduman and Ben Brakeson*"**

I understand this unchallenged evidence to mean that he was recruited by agents of the respondent. Further, judging from the fact that the respondent is the one who extended periods of probation, provided the appellant with essential amenities and fulfilled all the terms of the contract and finally terminated the employment, instead of asking Kenya Company to recall the appellant, I am satisfied that the Kenya Company acted as agent of the respondent and the latter was the employer.

The two letters purporting to extend the appellant's probation by Mr. A. Karim Agvan, the General Manager, were written long after the three months period had ended.

The letter terminating the appellant's employment was curiously forwarded to the appellant under cover of a hand written note dated 14/1/94 from the same Mr. A.K. Agvan, the respondent's General Manager with whom the appellant had "irreconcilable differences". In that note Mr. Agvan states: -

> **"*Any discussion on the enclosed notice is to be done with Mr. Shonubi who is a Company Secretary*"** Clearly

Mr. Agvan did not like to see the appellant.

The inescapable inference is that probably Agvan wrote the letter of termination and had Gidoomal to sign it.

In my opinion, on the balance of probabilities, the appellant established existence of a contract.

For the foregoing reasons, ground one should succeed.

In the second ground of appeal, the complaint is that the learned Justices of Appeal erred in law and in fact in finding that the appellant had no valid work permit, and that as a consequence his employment contract was illegal.

Mr. Ebert Byenkya, argued that the evidence on the record shows that the appellant had a permit and that the respondent had indeed obtained a special pass for the appellant. Learned counsel relied on **Halsbury's Law of England** 3rd Ed., Vol. 8, paragraph 22 and **Cheshire and Foot** 8th Ed., Page 333, for the view that where, under a contract, work is partly lawful and partly unlawful, and the person employed was, at the time of undertaking the work, ignorant of the illegality of part of it, even though the legality of the whole work was not misrepresented to him, he can recover remuneration for so much of the work as is lawful. This means the lawful part can be severed from the unlawful part. Counsel pointed out, correctly in my opinion, that under section 10 (3) and S.13 (2) of the Decree, only the employer commits an offence and that this shows that both parties are not in pari delicto. In other words, the appellant is innocent. Mr. Shonubi for the respondent argued that;

(a). From the beginning, the appellant, as a foreigner, should have had a work permit as required by section 13 (1) (b) of the Immigration (Amendment) Act, 1984 but got only a special pass which was not produced in evidence.

(b). A work permit was only granted in January, 1994.

There is ample evidence to show that these arguments by Mr. Shonubi have no basis. The contract itself (exhibit P.1) provides that: -

" *The contract is conditional upon the company obtaining a work permit on your behalf*".

Further, the evidence of Cecil Joseph (DW1), part of which I have already quoted, confirms that it was the responsibility of the respondent to obtain the work permit for the appellant. The respondent cannot, therefore, avoid fulfilling its obligation, under the contract, of getting the work permit for the appellant by turning round claiming that the appellant worked illegally because he had no permit.

After securing the appellant and most probably because of the so called "irreconcileable deferences" between the appellant and Mr. Agvan, the General Manager, it seems the General Manager developed cold feet about processing quickly the work permit for the appellant. In my opinion, it is the respondent who is the guilty party and I can not find any basis for holding the appellant responsible for the failure to get the work permit earlier than when it was got. It is worth noting that when immigration officials visited the respondent's offices, in October, 1993, its officials chose to conceal the appellant by ordering him to stay in, and work from, his residence rather than to allow him to be seen by, or to take him to, the immigration officials for him to explain his plight to them. However on 24/10/1993, the General Manager obtained a pass for the appellant. The pass expired on 19/1/94. Here the reasonable inference to be drawn is that the respondent felt guilty of failure to get the permit for the appellant. It is the respondent who breached the relevant law but not the appellant because S.10 (3) of the Employment Decree, states: -

"*Where a contract is required to be in writing and the failure to comply with such requirement or agreement is due to wilful act or omission of the employer, he shall be guilty of an offence*"

In my view, the rules of the doctrine of contra preferentum work against the respondent in this case. The operation of this doctrine is to the effect that the construction of the document least favourable to the person putting it forward should be adopted against him and normally this means the author of the document. It would be contrary to common sense and even preposterous to assume that the respondent issued to the appellant exhibit P.1 when it was not properly executed.

In the plaint, the appellant asserted his contractual right when he pleaded in paragraph 6 that he was entitled to the work permit. Therefore the subsequent denial of this fact by the respondents in its amended defence defeats imagination. In the Court of Appeal, on this aspect of the case, Mr. Shonubi does not appear to have referred to the proper law requiring a work permit. He cited section 60 (2) (a) and (b) of the Uganda Citizenship and Immigration Control Act, 1999. In the lead judgment, Kitumba, JA, correctly, held that at the material time that was not the applicable law. She also correctly stated that the applicable laws were the Immigration Act, 1969 and the Immigration Control Regulations, 1969 (SI 1969 No. 165) because these were the statutory provisions which were in force at the time the appellant was employed. Although, regrettably, the learned Justice of Appeal in her judgment did not cite any of the relevant provisions of the Act and or of the Regulations upon which she relied to hold that:

> "***The respondent was supposed to have an entry permit before commencing work. As he did not have the entry permit, he was illegally employed***" she presumably referred to S.13 of the Immigration Act, 1969. In away the criticism of the Court by Mr. Byenkya is borne out as it

> appears that the learned Justices of Appeal did not cite the relevant provision of the 1969 law before holding that the appellant violated that law. To make matters worse, counsel for the respondent has now shifted posts by citing a different law. He referred to S. 13 (1) (b) of the Immigration (Amendment) Act, 1984. Even then actually the citation is wrong. He probably meant S.13A (2) (b), which in any case, does not help the respondent's case.

I have held that it was the respondent's obligation to secure the work permit for the appellant. There is no satisfactory explanation of why the work permit was not secured for the appellant early enough. Whatever the case, I think that as the permit was obtained eventually while the appellant was still working for the respondent, it (permit) had retrospective operation. I can not see anything in the relevant law prohibiting this. Moreover there is evidence that the appellant had a special pass allowing him to work. The special pass is one of the recognised documents because it serves the function of a work permit.

Counsel for the respondent contended that no permit was produced in evidence. It would seem though that this matter was not considered material because it was not framed as an issue for decision. It was only brought up in the course of adducing evidence. The point is that there was a permit and a special pass. This was confirmed by the defence evidence given by Cecil Joseph (DW1). Therefore, the learned Justices of Appeal erred when they held that the appellant never had a valid work permit and that, therefore, his employment contract was illegal.

For the foregoing reasons I think that ground 2 must succeed.

The success of the two grounds disposes of this appeal which should be allowed. It now remains to consider the consequences of the success of this appeal. I begin with the extensions of probation period.

The contract (exhibit P.1) stipulates in part, that: -

> ***"……..During this probationary period, your employment may be terminated by giving one month's notice either by the company or yourself"***

Does this render the success of the appeal a pyrrhic victory since the respondent purported to pay the appellant salary for one month in lieu of notice?

It appears to have been assumed by the respondent during the trial that the appellant was, or was assumed to be, on probation at the time the contract of employment was terminated. I say assumed because the contract did not provide for extension of the probation period. If I were to assume that the appellant was on probation he would have been entitled to only one month's notice or pay in lieu of the notice. The appellant testified that he was not paid anything upon termination of his services. Mr Cecil Joseph (DW1) confirms this. The latter claims however that the respondent could not pay the appellant any benefits because the latter was required to pay the respondent money for its lost property. This assertion is interesting. The appellant's evidence to the effect that he was literary chased out of his residence by Shonubi and askaris remain unchallenged. Considering the manner in which the appellant was treated by the respondent, it is not justifiable to hold him liable for any loss of property occasioned after he left. Had I found that he was on probation, the appellant would have been entitled to his pay for one month in lieu of notice.

However, the contract did not give the respondent power to extend the period of probation. If the respondent wanted to terminate the contract during the initial three months probation period as provided in the contract, termination should have been done before the end of September, 1993. This was not done. So when the probation period lapsed in early September, the contract became effective and should have lasted its full course of two years.

The contract did not provide for extension of probation period. On 11/1/1994, Mr. Agvan, the respondent's General Manager, purported to extend in writing the appellant's probationary period, for a second time, to the end of January, 1994. Then two days later (13/1/94) Mr. V.Gidoomal, the Executive Director of the respondent wrote exhibit P3 terminating the appellant's employment. Was the extension made for purposes of denying the appellant his benefits? I have no doubt that this was the purpose.

The termination letter was copied to Agvan and was in fact sent to the appellant under cover of a hand written note of the same Mr. Agvan. The inevitable inference appears to be that the extension on 11/1/94 was designed for purposes of denying the appellant any benefits under the two year contract.

During trial, the appellant's counsel contended vigorously that probation period was maliciously restored by the respondent and as such the appellant was entitled to the pay for the remainder of his contract. The judge accepted this. That is the effect of the judgment of the trial judge. After accepting those contentions, he awarded the appellant US$18700 as pay for the remainder of the contract as claimed.

There is evidence, and the trial judge in effect found, that the appellant was mistreated. The letter of dismissal states that he was dismissed because of

"irreconcileable differences" with the General Manager of the respondent. The trial judge did not believe this. He found as a fact that the respondent wanted to replace the appellant with another person. In other words the trial judge held that the appellant was dismissed for a wrong reason.

As a master, the respondent had a right to dismiss the appellant. It need not have assigned any reason. Or it could assign a reason that shows that the appellant contravened the terms of his employment. But the moment it assigned a reason which does not appear to be part of the appellant's terms of employment, the dismissal was wrongful. The trial judge found that the appellant "*was harassed, embarrassed and humiliated by the General manager*". Because of that holding, the learned judge awarded the appellant Shs 30m/=. My understanding of the findings of the judge is that although he described the damages as general damages (which must be due to the way the 5th issue was framed), on the evidence and the pleadings, these are punitive or exemplary damages which the appellant had claimed in the plaint and he adduced evidence to prove such damages.

The contract of employment entitled the appellant to various benefits set out in para 6 of his plaint. From the evidence, the appellant was denied many of these privileges. He is supported by PW2 on the issue of harassment, embarrassment and humiliation. The respondent's evidence does not rebut this. In these circumstances, I think that, much as the judgment of the trial judge is a little confusing, and subject to what I say later about the quantum of "*general*" damages, the conclusions of the trial judge to award damages were justified.

Before awarding Shs 30m/=as damages, the trial judge expressed himself in these words:

> ***"The plaintiff did indeed suffer damages for those entitlement he was not awarded by the defendant. He suffered loss, embarrassment when humiliated by the defendant's resident Manager, Mr. Kassim. The court wondered why the Resident Manager..... ..... was not called as a witness. Also another witness whom I feel should have been availed to the court was the Chief Accountant of the defendant company. By so doing I am not shifting the burden of proof to the defendant but it appears they deliberately left out (Sic) moreover to hide something. All the same, I am of the view that the plaintiff was able to prove his claim .....and I am of the view that taking into account the inflation in the country has some subsided (Sic) and doing the best in the circumstances, I am of the view that general damages of shs 30m/= will properly compensate the plaintiff for wrongful dismissal harassment/embarrassment....."***

In this passage, the judge found as a fact that the respondent offered no evidence to rebut the appellant's claims. I agree with that conclusion. Joseph Cecil (DW),the only witness who testified on behalf of the respondent, knew nothing about what the appellant went through, because he joined the respondent's service threes years after the dismissal of the appellant.

Recently this Court decided cases involving termination of contracts in circumstances almost similar to those in this appeal. One of the cases is

Gulaballi Ushillini (supra). The second case is **Kenqrow Industries Ltd. Vs. C.C.Chandran.** Civil Appeal No. 7 of 2001 (sc) (unreported). In **Gulaballi Ushillini's case** (supra) the facts are slightly different but the principles applied there apply in this appeal.

In 1989, the respondent set up a pharmaceutical factory in Ntinda. It recruited the appellant from India. After she had worked for several months, the factory was closed. She returned to India in April, 1990. She was however persuaded to come back. She returned and started to work in January 1991. Her salary was shs 200,000/= plus oversees allowances of US $ 2000 p.m. In June, she was given a letter of appointment for 2 years. In January 1992 she went on leave to India but returned in February and found the factory closed. The company provided her with accommodation and a car at Company expense. She was however not provided with work till May 1993 when she filed a suit against the company for breach of contract of employment. She claimed for special damages inclusive of salary and general damages. The Principal Judge who tried the case awarded her Shs 10,200,000/= as salary and US$ 10,200 by way of overseas allowances as special damages for a period of 4 years and 3 months. He also awarded her Shs 4,900,000/= as general damages. The company appealed to the Court of Appeal where arguments were basically on quantum of damages.

The Court of Appeal reduced the special damages to Shs 1, 200,000/= and US$ 12,000 but confirmed the general damages. **Ushillini** appealed to this Court and she substantially won the appeal. **Mulenga, JSC,** wrote the lead judgment. I respectfully agree with his statement of the law and I quote him on damages and use his own words: -

"In deciding that issue (of damages), the Court of Appeal appreciated that the employment in the instant case, was for a fixed period. The Court made a distinction between a contract which makes no provision for termination prior to expiry of the fixed period, and one in which there is a provision enabling either party to terminate the employment. The learned Justices stated the law to be that in the event of wrongful termination by the employer, the employee in the former contract would be entitled to recover as damages, the equivalent of remuneration for the balance of the contract period, whereas in the latter case the wronged employee would be entitled to recover as damages, the equivalent of remuneration for the period stipulated in the contract for notice. I respectfully agree that this is the correct statement of the law. I would add that it is premised on the principle of restitutio in integrum. Damages are intended to restore the wronged party into the position he would have been in if there had been no breach of contract. Thus, in the case of employment for a fixed period which is not terminable, if there is no wrongful termination, the employee would serve the full period and receive the full remuneration for it. And in the case of the contract terminable on notice, if the termination provision is complied with, the employee would serve the stipulated notice period and receive remuneration for that period, or would be paid in lieu of the notice"

In the case of **Kengrow Industries Ltd.** I adopted this passage when I discussed the award by the trial judge of damages to the respondent whose services had been terminated in circumstances similar to those in this appeal.

In paragraph (c) of his plaint, the appellant prayed for exemplary damages. In the trial court parties made written submissions. The appellant's counsel raised the question of the mistreatment of the appellant by the respondent's servants. Counsel then prayed for punitive (instead of exemplary) damages to be awarded to the appellant. Counsel never provided authorities to guide the judge in awarding either punitive or exemplary damages. On the other hand **Mr. Shunobi,** counsel for the respondent, merely contended that the appellant was not entitled to any damages. Consequently the judge used his discretion to fix Shs 30m/= as general damages which I really understand to be punitive damages.

In this Court in the memorandum of appeal, prayer (a) asked us to allow the appeal. In prayer (b) we were asked to set aside the judgment and orders of the Court of Appeal and to reinstate the award of general and special damages plus interest granted by the High Court to the appellant.

During the hearing of the appeal before us, Mr. Byenkya concentrated his attack on the findings of the Court of Appeal where damages were not canvassed. So he asked us to "*do what is proper*" He however asked us to restore the judgment of the trial judge. Mr. Shonubi submitted on issues raised by Mr. Byenkya regarding the legality of the contract and the dismissal of the appellant. He did not say anything about the damages, although as pointed out

already, in the memorandum there was a prayer for this Court to restore the judgment of the High Court.

It is my considered opinion that since the trial judge had awarded US$18700 as special damages representing loss of salary for the balance of the contract of employment which the appellant would have served, the judge erred when he included in the award of Shs 30m/= an element of damages for wrongful dismissal.

As I said earlier, in the plaint the appellant prayed for exemplary damages but the learned trial judge described them as general damages. It is now recognised that courts in East Africa can award punitive and or exemplary damages in torts and contracts. This is clear from the decision of **Obonqo Vs Kisumu Municipal Council** (1971) EA 91, a decision of the E. A Court of Appeal. Spray, V.P., in his lead judgment, at page 96B, stated: -

> ***"It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit of them goes to the person who was wronged, their object is entirely punitive. In the present case, it is not clear how far damages***

at large were contemplated either in the consent judgment or in the proceedings that followed. Certainly the judge made no general award, possibly because he considered that the consent judgment precluded it. Aggravated damages were, therefore, inappropriate. On the other hand, I am satisfied that the intention was that the damages should be punitive and that the judge was entitled in law to award exemplary damages".

On damages it is now established that an appellate court will not reverse a judgment, or part of judgement, of a court below on a question of damages unless the appellate court is satisfied that the judge acted on a wrong principle or that the amount awarded was so extremely large or so very small as to make it an entirely erroneous estimate of the damage: See **Singh Vs Kumbhai**(1948) 15 EACA 21, **Henry. H. Ilanga Vs M. Manyoka** (1961) EA705 and O**bonqo's case** (supra) at page 96.

I have held that the trial judge erred by including an element of damages for wrongful dismissal in the award of 30m/=. He acted on a wrong principle. I have pointed out that the trial judge was not guided by any authorities in that award. In my opinion since the appellant had been awarded US$ 18700 as salary for the residue of the contract which was terminated, punitive damages of Shs 30m/= would be inappropriate and too high. Considering that the appellant was subjected to high handed mistreatment, and bearing in mind the award of US $18700, I think that Shs 5m/= would be adequate.

There was no complaint about interest awarded at 45% p.a. Counsel for the appellant did not given reasons for claiming such high rate of interest. No explanation was given by the trial judge for such a high rate of interest.

However under S.26 (2) CP Act, rate of interest is awarded on discretionary basis unless it is agreed to by the parties.

I think that in these proceedings the award of interest on the decretal amount at the rate of 45% was uncalled for and is too high. On the facts, it is patently unjust. I would award interest at 10% p.a. on $ 18700 from 17/3/1999 till payment in full. I would award interest of 8% on Shs 5m/= from the date of judgment till payment in full.

In conclusion, I would allow the appeal with costs here and in the two courts below. I would set aside the judgment and orders of the Court of Appeal. I would restore the award by the trial judge of $ 18700 representing salary for the residue of the contract. I would award interest thereon at the rate of 10% p.a. from date of judgment of High Court till payment in full. Instead of Shs 30m/= awarded as damages by the trial judge, I would award the appellant

Shs 5m/= as punitive damages with interest thereon at the rate of 8% p.a. from date of judgment of the High Court till payment in full.

JUDGMENT OF ODER. JSC

I have had the advantage of reading in draft the judgment of my learned brother, Hon. Justice Tsekooko, JSC. I agree with him that the appeal should partially succeed. I also agree with the orders proposed by him.

I have nothing useful to add.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment of my learned brother, Tsekooko, J.S.C, and I agree with him that this appeal ought to be allowed with costs in this court and in the courts below. I also agree with the orders he has proposed.

JUDGMENT OF MULENGA JSC.

I have had the benefit of reading in draft the judgment of my brother Tsekooko, JSC. I agree with him that the appeal should be allowed. I also agree with the orders he has proposed.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother Tsekooko JSC, and I agree with him that the appeal should be allowed. I agree with the orders he has proposed.

As the other members of the Court also agree, this appeal is allowed with orders as proposed by Tsekooko JSC

Dated at Mengo this 16th of January 2004.