The fact that the actual writ was issued over a year after probate is, in my view, immaterial. The plaintiffs were still within time to sue for damages.

Of the authorities quoted by counsel in this case I find that of *The King (on the prosecution of John Whittome)* v. *Marchland Smeeth and Fen District Commissioners* [1920] 1 K.B. 155 helpful. In this case McCardie J. said, inter alia, at page 172:

> "What is the commencement of the proceedings for the purpose of applying the Act of 1893 to the claim for damages? Upon the whole, I think that the true date to fix is the motion for the rule nisi. This is the juristic basis of the litigation in the course of which the claim for damages arises. Just as in the case of the Summary Jurisdictions Acts it has been held that the laying of the information is the commencement of the prosecution, so here I hold that the motion for the rule marks the initiation of all the proceedings before me."

Similarly, it is my view that the application for leave to serve out of the jurisdiction of this court is the commencement of the proceedings under section 2 (3) (*b*) of Cap. 19.

I think the learned trial judge misdirected himself by putting the weight he seemed to have put on the fact that the writ was issued over a year after the personal representative had taken out a grant.

In my opinion, the appeal should be allowed and the judgment of the learned trial judge set aside and the case be sent back for trial on its merits.

Freetown
July 26,
1962
Ames P.,
Dove-Edwin
J.A.,
Bankole Jones
J.

[COURT OF APPEAL]

MOHAMED T. A. TUNIS . . . . . *Plaintiff/respondent*

v.

LYOUBI BROTHERS . . . . . *Defendants/appellants*

[Civil Appeal 5/62]

Contract of Employment—Wrongful dismissal—Measure of damages—Whether judge correct in not allowing appellants to amend statement of defence to include plea of fraud.

Respondent was employed by appellants as a sales agent under an agreement in writing for a term of five years from January 1, 1960, at a salary of £15 per month for two months and thereafter at a salary of £30 per month. Respondent was wrongfully dismissed in June 1961, and thereupon brought suit against appellants. During the trial, appellants asked to be allowed to amend their statement of defence so as to include a plea of fraud. The judge denied this request and gave judgment for the respondent. In assessing damages, the judge awarded respondent, inter alia, £1,290, which was equivalent to £30 per month for 43 months—the amount of time remaining in the contract when respondent was dismissed.

Held, (1) that the trial judge was correct in not allowing appellants to amend their statement of defence by introducing an allegation of fraud; and

(2) That the judge was incorrect in awarding respondent £30 per month for 43 months, because this amount constituted special damages which had not been

specially pleaded and because respondent was under a duty to take all reasonable steps to mitigate the loss caused by appellants' breach and could not claim any part of the damages which were due to his neglect to take such steps.

Cases referred to: *Hayward and another* v. *Pullinger and Partners Ltd.* [1950] W.N. 135; *British Westinghouse Electricity Co.* v. *Underground Electric Railways* [1912] A.C. 673; *Walter Loeb* v. *Solomon Nasser* (1937) 3 W.A.C.A. 227.

Edward J. McCormack for the appellants.
Cyrus Rogers-Wright for the respondent.

BANKOLE JONES J. The plaintiff in the court below sued for damages, both general and special for wrongful dismissal. He had been employed as a sales agent under agreement in writing dated January 1, 1960, for a term of five years from January 1, 1960, at a salary of £15 per month for a probationary period of two months and thereafter at a salary of £30 per month.

It was also a term of the agreement that the respondent should be paid a commission of 2d. in the £ on all goods sold.

The learned trial judge awarded the respondent the sum of £1,495 18s. 0d. to cover both kinds of damages claimed and this was what he said:

> "As regards damages I find that the plaintiff's services were wrongfully terminated in June, 1961. There was then an unexpired period of three years and seven months of the contract yet to run. I therefore award the plaintiff 43 months' salary at £30 a month—which works out at £1,290—together with the sum of £1 18s. 0d. which I consider reasonable expense as train fare from Blama to Freetown. In the result I award the plaintiff the following:

General damages	£1,291 18s. 0d.
Salary for April and May, 1961	£60 0s. 0d.
Commission on £4,101 3s. 0d. @ 2d. in the pound	£34 0s. 0d.
Account on deposit with defendants	£110 0s. 0d.
Total ...	£1,495 18s. 0d.

The appellants filed three grounds of appeal against this judgment, only the first two of which their counsel argued. The first ground is as follows:

> "The learned trial judge erred in allowing the plaintiff to amend his statement of claim during the trial and not allowing the defendants also to amend their statement of defence to include a plea of fraud and dishonesty, and by rejecting the evidence of the defendants to prove fraud of the plaintiffs."

The record shows that when the application was made to amend the plaintiff's statement of claim, Mr. McCormack, who appeared for the defendants, at first objected to it being granted but later withdrew his objection when counsel for the plaintiff withdrew his application in respect of one of three of the amendments sought.

The learned trial judge accordingly, and rightly in my opinion, allowed the remaining amendments. It did not necessarily follow that because of this the

learned trial judge erred in disallowing the application for the amendment of the statement of defence in the manner required, namely, by the inclusion of a plea of fraud and dishonesty. The law is that the defence of fraud must be specially pleaded: Order 16, rr. 6, 15, 18, of our Supreme Court Rules; and courts of law have shown a studied disinclination to granting an amendment at the trial when a plea of fraud is raised for the first time. In Bullen and Leake's Precedents of Pleadings (11th ed.) at pp. 815–816 is the following passage:

> "The court is always slow to allow a party to amend his pleading by introducing for the first time allegations of fraud. Even if such application is made before the hearing, the court will wish to be satisfied as to the truth and substantiality of the proposed amendment . . . and such application made at the hearing will rarely, if at all, be granted. . . . The course taken by the Court of Appeal in allowing an amendment of the pleadings on the appeal to introduce a charge of fraud was disapproved by the House of Lords in *Bradford Third Equitable Benefit Building Society* v. *Borders* [1942] 1 All E.R. 205."

The learned trial judge, in my view, was right in not allowing the amendment. This ground therefore fails. The second ground of appeal read:

"Misdirection in law

"*Particulars of misdirection*

(a) The learned trial judge misdirected himself in holding that the agreement (Exhibit 'A') is for a fixed term of five years and could not be summarily terminated otherwise than for fraud.

(b) That the judge misdirected himself by not considering what, in the circumstances, would be a 'reasonable notice.'

(c) That the judge was wrong in awarding the plaintiff 43 months' salary amounting to £1,290 by way of general damages when all he was entitled to was loss of salary for a period of reasonable notice."

As to (a) I do not agree with the submission that the written agreement between the parties (Exhibit "A") constituted a divisible contract which created a series of contracts of a month-by-month employment of the respondent, determinable by a month's notice. The authorities cited are, with respect, not applicable in this case. The agreement was clearly one for a fixed period of five years and could not be summarily terminated otherwise than for fraud. The other particulars of misdirection, namely, (b) and (c), can be conveniently considered together. The issue raised here is whether the learned trial judge was right in awarding, as general damages, salary for the unexpired period of the contract of employment or whether he should have awarded such damages calculated on the respondent's loss of salary for a period covering "reasonable notice."

In the first place, the award to the respondent by way of general damages appears to constitute special damage and on the authority of *Hayward and another* v. *Pullinger and Partners Ltd.* [1950] W.N. 135 this could not be recovered unless specially pleaded. It was not so pleaded here. In the second place the principle of the law applicable to a case of this kind appears to be that a plaintiff is under a duty to take all reasonable steps to mitigate or minimise the loss consequent on the breach on the defendant's part and is debarred from claiming any part of the damages which is due to his neglect to take such steps: *British Westinghouse Electric Co.* v. *Underground Electric*

Railways [1912] A.C. 673, 689; *Walter Loeb* v. *Solomon Nasser* (1937) 3 W.A.C.A. 227.

It seems to me, therefore, that whilst the learned trial judge was right in construing the agreement as one for a fixed and definite period, yet, with respect, he went wrong in not applying the correct principle when he came to assess the general damages suffered or likely to have been suffered by the respondent. I do not think that it is right for a plaintiff to sit in happy idleness because he has been wrongfully dismissed, and expect the defendant to pay him his full wages as general damages for the unexpired term of his agreement, however long that may be. His duty, admittedly the standard of which is not a high one, since the defendant is a wrongdoer, is to take all reasonable steps to procure himself a like employment as soon as he can possibly find one.

I feel that in this particular case, taking all the circumstances into consideration, including the nature of his employment and the difficulty of getting such another or a like one and without intending it to be a precedent in all other cases, the respondent could have mitigated his loss within 12 months, and 12 months' notice from the appellants would have been reasonable. I accordingly vary the judgment of the learned trial judge, and substitute the sum of £360, representing 12 months' salary, as general damages.

Mr. McCormack did not argue the question as to whether or not the respondent was wrongfully dismissed, nor did he quarrel with the amount of special damages awarded. On these matters I agree with the findings of the learned trial judge except to add that the sum of £1 18s. 0d., the train fare paid by the respondent, should have been included under the head "special damage" and I so include it. The judgment I have arrived at, therefore, is as follows:

General damages	£360	0s. 0d.
Special damages	£205	18s. 0d.
Total ...	£565	18s. 0d.

[COURT OF APPEAL]

Freetown
July 26,
1962

Ames P.,
Dove-Edwin
J.A.,
Bankole Jones
J.

REGINA *v.* ABU BANGURA

[Criminal Appeal 11/62]

Criminal Law—Homicide—Murder—Whether there was sufficient evidence of identity of deceased—Self-defence—Provocation—Manslaughter—Whether evidence warranted conviction of murder.

Appellant was found guilty of murder and sentenced to death by the Supreme Court. The evidence for the prosecution was that a chief gave judgment against appellant's wife in a court case; that appellant thereupon became angered, hurled abuses at the chief and indiscriminately stabbed two men who had been present at the hearing of the case and a third, the deceased, who had not been present; and that this attack was wholly unprovoked. Appellant testified that