REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 75 OF 2006

JONAH RACHA ABDI.....APPELLANT

VERSUS

KENYA FORESTRY RESEARCH INSTITUTE.....RESPONDENT

(Being an appeal from the Judgment delivered by the Hon. M.W. Murage, Principal Magistrate

on the 4th August, 2004 in the Kikuyu SPM's Court Civil suit No. 93 of 2003)

JUDGMENT OF THE COURT

1. Background

This appeal arises from the Judgment and Decree of the subordinate court at Kikuyu Senior Principal Magistrate's Court dated 4th August, 2004. The Appellant, Jonah Racha Abdi, was the unsuccessful plaintiff in a suit he commenced by way of a plaint against Kenya Forestry Research Institute (KEFRI), the Respondent in this appeal, in which he claimed damages, special and general, costs of the suit and interest arising from an alleged irregular and unlawful dismissal from employment; false arrest; and malicious prosecution.

2. Judgment and how the court evaluated all facts and evidence

By a judgment delivered on 4/8/2004, the Principal Magistrate found that the Appellant had not proved his case against the Respondent on a balance of probability and dismissed the claim with costs. According to the trial magistrate, the Respondent was justified in dismissing the Appellant. She also found that the conduct of the Appellant pointed to his culpability in the loss of the Respondent's bus starter. She concluded that although the Appellant was not accorded an opportunity to be heard before he was dismissed from employment, this failure did not infringe on his fundamental rights. She further concluded that as the Appellant did not exhaust the avenues available by appealing to the Board of Management he could not be heard to complain to the court. In total, she dismissed the Appellant's claim for special and general damages with costs to the Respondent.

3. Appeal

Being aggrieved by the findings and decision of the Principal Magistrate, the Appellant filed this appeal

on 14th February 2006 out of time vide an order of leave granted by Hon. Justice Mutungi J on 15th December, 2005 vide NRBI. HCC Misc Application No. 89 of 2005 supported by a certificate of delay issued on 14th December, 2004 by the Principal Magistrate. The Memorandum of Appeal sets out 7 grounds of appeal. These are that:

> 1. *the trial magistrate erred in law and fact in holding that the Appellant was lawfully dismissed when the dismissal was based on a backdated dismissal letter, baseless allegations and upon criminal charge that was withdrawn by the Respondent;*
>
> 2. *the trial magistrate erred in law and fact in finding that the Respondent did not infringe the Appellant's fundamental rights to be heard when the Respondent had admitted not serving the Appellant with a hearing or appeal of notice to the disciplinary hearing;*
>
> *3. the trial magistrate erred in law and fact in failing to find that the Appellant's dismissal was wrongful as he was not afforded a hearing against the rules of natural justice;*
>
> *4. the trial magistrate erred in law and fact in holding that there was no breach of the employment contract when there was no ground established to dismiss him summarily;*
>
> *5. the trial magistrate erred in law and fact in failing to find the Appellant was entitled to 3 months salary payment, unpaid dues, salary balance and lost pension ignoring the Appellant's evidence in total which was not challenged by the Respondent;*
>
> *6. the trial magistrate erred in law and fact in dismissing the claim for malicious prosecution when it was clear that it was the Respondent who initiated and terminated the criminal hearing maliciously upon irregular disciplinary proceedings; and*
>
> *7. The trial magistrate erred in law and fact in totally dismissing the Appellant's case with costs when he had proven his case on a balance of probability.*

The record of appeal was compiled, filed and served upon the Attorney General by the Appellant.

The record shows that when the appeal came up for hearing before Hon. Lady Justice Joyce Khaminwa on 7/3/2011, only the Appellant's counsel was present, although there is evidence that a hearing notice had been affected on the Respondent's legal representative, the Attorney General's Office on 12/1/2011 as shown by affidavit of service filed in court on 4/3/201, sworn by Bernard Ngugi a process server. The Hon. Lady Justice Joyce Khaminwa allowed the appeal to proceed to hearing, absence of counsel for the Respondents notwithstanding. Mrs. Muhuhu counsel for the Appellant made oral submissions and the appeal was set for judgment on 11/5/2011. The judge was unable to deliver her judgment after she was subjected to the vetting process which is still ongoing at the time of writing this judgment.

The appeal came up for mention before me on 31/7/2014, and only the Appellant's counsel attended court. There is ample evidence that the Respondent's counsel was served with a mention notice for that day. I sought to know from counsel representing the Appellant whether the appeal could proceed *denovo* but they declined indicating that they were satisfied with the submissions on record and sought a date for judgment. I was satisfied that the Respondent's counsel had been served with a mention notice on 28th July 2014 as per the Affidavit of Service filed on 31/7/2014 sworn by a process server Bernard M. Ngugi and their absence notwithstanding, I set down the appeal for judgment.

As I have stated, the Respondent did not make any submissions in opposition to this appeal. I have however carefully perused the entire record of appeal before me and noticed that the Appellant's submissions on appeal are very scanty and do not provide any useful guide to the court. I have nonetheless relied on the grounds of appeal as contained in the Memorandum of Appeal, pleadings, testimonies of parties and their witnesses, documentary evidence produced in the court below by both parties and submissions made in the court below. Iam satisfied that the record of appeal has sufficient material together with the authorities cited by the parties' advocates in the court below which the

Appellant's counsel in support of this appeal, asked the court to re-examine, to enable me assess the appeal on its merits.

4. Re-evaluation and re-examination of the evidence

This being the first appeal, this court is fortified by section 78 of the Civil Procedure Act and guided by the principles espoused in several decisions among them, ***SELLE&ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD &ANOTHER (1968)EA 123,*** to re-evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect.

However, this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

The appellate court's responsibility under Section 78 of the Civil Procedure Act is to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction.

It has long been held that the appellate court will only interfere with a lower court's judgment if the same is founded on wrong principles of fact and or law. ***in Mkube vs. Nyamuro [1983] KLR, 403-415, at 403)*** the Court of Appeal held that ***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it 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 his conclusion. Per Law JA, Kneller & Hannox Ag JJA.***

Facts of the case

From facts of the case in the court below, supported by the pleadings and testimonies of parties and witnesses, the Appellant was employed as a security guard by the Kenya Forestry Research Institute (KEFRI), a public institution, by a temporary letter of appointment dated 1/5/1992. He rose to become a security supervisor and worked until 2001 when it was alleged that the Respondent's bus starter was stolen between 12th and 14th September, 2001. The Appellant was suspected of being responsible for the loss of the bus starter either directly or through failure to prevent a felony. He and Paul Waweru Njoroge were arrested and jointly charged in Kikuyu court criminal case no. 1287/2001 with the offence of stealing motor vehicle parts belonging to MV Reg. No. GKQ 577 Nissan Bus and in the alternative, failing to prevent a felony. The criminal charges were withdrawn by the Respondent complainant on 9/11/2001 before the hearing, and the Appellant was acquitted under section 204 of the Criminal Procedure Code.

Following his arrest on suspicion of the alleged theft, the Appellant was interdicted by the Respondent employer on 14/8/2001 vide letter dated 3rd October, 2001. He however continued to receive half salary pending determination of the criminal case. He was later dismissed from work vide letter dated 24/7/2002 which stated that the matter had been deliberated on 22/3/2002 and a decision reached to relieve him of his duties with effect from **14/9/2001**. He was paid his terminal benefits amounting to Kshs. 136,891 through the Respondent's Contributory Staff Retirement Benefits Scheme, which he received under protest, claiming the calculations were incorrect.

Being dissatisfied with the Respondent's decision to dismiss him from service on account of the alleged theft, the Appellant by his plaint filed in court on 15th April, 2003, sued the Respondent for special and general damages alleging that his dismissal from employment backdated to 14th September, 2001was unlawful and irregular. The Appellant enumerated particulars of the alleged illegality as follows:

a. backdated a dismissal letter from 24th July,2002 to 14th September, 2001

b. dismissed the Appellant without giving him a hearing against the rules of natural justice

c. dismissed him on unfounded and unproven baseless, unfounded allegations

d. dismissed him without any prior oral or written warnings

e. dismissed him on the basis of a criminal case Kikuyu Cr. Case No.1287 of 2001 that was never heard but withdrawn by the Respondent on the first hearing

f. dismissed him on a suspension that was illegal in the first instance

g. dismissed him without giving him three months notice in lieu.

The Appellant further claimed that he suffered loss as a result of the dismissal and prayed for his due benefits from the Respondent.

The particulars of special damages claimed were enumerated as follows:

a. three months salary in lieu of notice-Kshs. 26,286

*b. service payments 27.79days*10 days= 81,887- staff retirement benefit-contribution*

c. unpaid off days 50 days= 13,600

d. leave 2002= 7,969

e. salary balance during suspension(1/2)= 33,910

f. lost pension dues+interest at 21.83% from September, 2001 to July,2002=7840

total sum claimed……..171,492

The Appellant also claimed general damages for unlawful termination, false arrest, malicious prosecution and untold mental torture and financial distress and special damages of **Kshs. 13,500** made up of legal fees paid to his lawyer, witness expenses and proceedings in the criminal case before the Kikuyu court.

The Respondents filed a defence through the Attorney General denying the Appellant's allegations, contending that the Appellant's dismissal was warranted in the circumstances for complicity in the theft of the Respondent's property as well as gross negligence and that the Appellant had been paid his entire pension. They also denied the claim for false arrest, malicious prosecution and untold mental torture and financial distress and prayed for dismissal of the Appellant's case with costs and interest. The Appellant filed reply to defence on 1/8/2003 reiterating what was pleaded in the plaint and joining issues with the defence maintaining that his dismissal by the Respondent was irregular and unlawful.

5. The Appellant's testimony

In his testimony before Hon. M.W. Murage, Senior Resident Magistrate Kikuyu Law Courts, the Appellant testified and gave evidence complaining that:-

- *he was dismissed without Notice of three months having worked for over 10 years;*
- *he was never accorded a hearing before a decision to dismiss him was reached thereby breaching the rules of natural justice that stipulates that no person shall be condemned unheard*
- *he claimed for Kshs 26,286*

- *he also claimed salary and medical allowance, although the latter was not part of the pleadings*
- *service gratuity for the 11 years worked amounting to Kshs. 81, 877 although the pleadings sought for 10 years*
- *leave allowance*
- *50 days off duty from 1992-2002*
- *13,600 leave for 2002*
- *7669 balance of salary deducted*
- *33,910 salary balance during suspension*
- *7840*

The Appellant produced a letter addressed to the Respondents seeking dialogue to which he received no response. His advocates issued them with three demand letters to which they responded but refused to compensate him as claimed.

The Appellant further claimed for special damages being legal fees paid to his advocate for legal representation in the criminal case amounting to Kshs 10,000, 3500 transport to court in the criminal case from Muguga with 5 witnesses at 300 per journey and 100 for their lunch each. As a result of the dismissal, he had suffered mental torture and financial distress as he was the sole breadwinner for his family, of an unemployed wife and four children.

He claimed to have been detained in the cells for 9 days. He prayed for a total of Kshs.**189,992** and general damages plus costs of the suit.

Other documentary evidence in support of his claim were:- letter dated 10/10/2002 claiming for proper calculation of his pension due, three demand letters by his advocate, receipts for legal fees paid to his advocate for legal representation in the criminal case at Kikuyu, response letters by the Respondent dated 8/10/2002 and 6/11/2002, letter of temporary appointment dated 15th May, 1992, letter of interdiction dated 3/10/2001, dismissal letter dated 24th July, 2002, staff retirement benefits discharge form dated 21st August, 2002, pay slip for July, 2002 and charge sheet in Kikuyu Criminal Case no. 1287/2001 together with the proceedings before the said criminal court which revealed, among other things, that the Appellant was arrested on the 4/9/2001,plea taken on 20/9/2001 when he was granted cash bail of 50,000,further appearances in court on 4/10/01,2/11/01, 9/11/2001 and on the 9/11/2001 when the charges were withdrawn on the request of the complainant Respondent, with a view to having the matter handled internally by the management of the Respondent.

6. Case for the defence

The Respondent called two witnesses, Ms Ruth Macharia the Personnel Administrative Officer and Mr. J.K.Mutua the head of security at the Appellant's former place of work. The two employees of the Respondent testified and produced documentary evidence to show that the Appellant was indeed employed by the Respondent on a permanent basis. The witnesses explained the circumstances leading to the dismissal of the Appellant, following the theft of the bus starter and after withdrawal of the charges in court and conducting an internal disciplinary procedure where admittedly, the Appellant was never given an opportunity to be heard before he was dismissed with pension calculated and paid to him. They produced a Personnel Manual for May, 1999, payment voucher for retirement benefits of Kshs. 136, 891.00 paid to the Appellant, the Appellant's national Identity card copy, letters seeking a withdrawal of the criminal case against the Appellant from court, letter by the head of the Respondent's security submitting proceedings in the criminal case to the Director of the Respondent Institute, and Committee

disciplinary proceedings that recommended the Appellant's dismissal.

7. Submissions

Counsels for both parties filed extensive rival written submissions in the court below to guide the court reach a decision. They also cited and submitted several authorities on the subject.

The Principal magistrate summarized the facts of the case and set out issues for determination as follows:

a. Whether the dismissal was lawful

The trial magistrate found that the Appellant's dismissal was justified as it was done after the theft of the bus starter at the defendant's premises while the Appellant was on duty as supervisor. In her view, the Appellant was charged with theft and he was dismissed because he was negligent and changed the security arrangements without consultations by giving one guard an off thus reducing the manpower. He also did not hand over as he left work on the morning of 14th when it was discovered the theft had occurred. According to the trial magistrate, the dismissal followed deliberations by the Respondent who followed the regulations which bound the Appellant in accordance with the contract of employment as per exhibit 6 produced by the Appellant.

The magistrate observed that the statement of charge as required by regulation 5:6(b)(ii) was supposed to be forwarded by the Director of the Institute to the Appellant but that this appears not to have been complied with. She nevertheless found that in paragraph 5:6 (b) (v) of the said regulations, the Appellant was supposed to appeal but he did not lodge an appeal to the Board of Management. In her view, failure to inform him of the charges did not infringe his fundamental right to be heard because he did not exhaust the machinery available to him. Given the totality of the evidence, she found that the dismissal was lawful and therefore the Appellant could only be entitled to what was provided for in the contract. She also found that the dismissal was justified.

Whether the Appellant was entitled to the relief sought.

The trial magistrate found that there was no proof of all the claims for special and general damages and dismissed the claims with costs.

The applicable law

From the onset, this court will decide this appeal based on the old employment law. At the time of dismissal, the substantive Employment Law was the Employment Act Cap 226(repealed) and the Regulation of Wages and Conditions of Employment Act Cap 229(repealed). The process leading to the termination of the Appellant's employment commenced with an interdiction on 3/10/2001 and his subsequent dismissal on 24/7/2002 as back dated to 14/08/2001. At this point, the two statutes cited above were in operation. Cap 226 in particular did not have any specific express provision on the right to a hearing before termination, unlike the 2007 Employment Act. An employer could terminate at will, without cause, subject to the employer's rules and regulations in place and on payment in lieu of requisite or reasonable notice.

In this regard, the conduct of the Respondent as far as the procedural fairness requirements are concerned will be tested against what was provided in the Respondent's Personnel Manual produced in evidence - *The Personnel Manual, May, 1999.*

In deciding this appeal, this court is aware that it cannot force a marriage between the Appellant and the Respondent employer, but in such a case where the employer's own procedural underpinnings are flagrantly ignored or neglected by the same employer, this court would not hesitate to interfere.

8. The Appeal and my findings

Being dissatisfied with the findings of the learned magistrate, the Appellant filed this appeal, challenging the Principal Magistrate's findings as being erroneous. The Respondent did not oppose the appeal herein.

Having evaluated all the evidence in the lower court as presented and the submissions by counsels and considering the authorities cited, I frame the issues for determination as follows:-

1. whether the Appellant's dismissal was wrongful.

It was submitted by the Respondent's counsel that in matters of simple contract of employment, the rules of natural justice do not apply unless they form part of the contract. They relied on the decision by Hon. Justice Alnashir Vishram J in **NRBI HCC 1077/91 HENRY NJENGA VS SHELL CHEMICALS CO OF EA LTD** where the learned Judge, referring to the decision in the case of **RIFT VALLEY TEXTILES LTD VS EDWARD ONYANGO OGANDA NKR CA 27/92,** COCKAR, OMOLLO, and TUNOI JJA, held that *"the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply…."*

Based on the record before me, in my view, it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him. This is because the right to be heard is a fundamental human right that is not given by the State, as human rights are generally universal and inalienable rights of human beings, only given recognition by the Constitution and laws of the land. It matters not, therefore, that the case herein was heard before the Employment Act, 2007 was in place. Section 17 of the repealed Employment Act, Cap 226 provided inter alia:-

> *Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, **but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal*** (emphasis added).

The above provision presupposed that the person being subjected to a dismissal ought to have been given a fair hearing by an impartial body and accorded an opportunity to deny or dispute the allegations before a decision is reached. This was admittedly not done by the Respondent. If that were not to be the case, then the Respondent's action offended the clear provisions of the old Constitution on the right for a *fair hearing* by an adjudicating authority, in the terms of s.77(9) thereof. That subsection of the old Constitution provided:

> ***"A court or other adjudicating authority prescribed by law for the determination of the existence of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicatory authority, the case shall be given a fair hearing within a reasonable time."***

In addition, the Henry Njenga case did not make any reference to the court's own earlier decision in the case of **ONYANGO OLOO VS. ATTORNEY GENERAL [1986-1989] EA 456** only a few years earlier, where the same Court of Appeal had held that:-

> *"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore, the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at[emphasis added]...It is improper*

and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

In the above case, the court was emphatic that *the principle of natural justice gets into termination cases, notwithstanding the established law that in matters of contract between parties, no observance of natural justice is needed.*

In a later Court of Appeal case of **ERIC MAKOKHA V. LAWRENCE SAGINI & others CA 20/1994,** the court observed that: where one's employment is statutorily underpinned meaning that a special procedure is provided by statute for the removal of an officer from employment, the same should be adopted. The Court stated

"*The word statutory underpinning is not a term of art. It has no recognized legal meaning… we should give it its primary meaning. To underpin, is to strengthen. As a concept, it may also mean that employee's removal was forbidden by statute unless the removal met certain formal laid down requirements. It means some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by statute were observed. It is possible this is the meaning of what has become the charmed words "statutory underpinning."*

In this case, I discern that there was a specific procedure provided for in the Respondent's Personnel Manual on the disciplinary process to be followed before a dismissal of an employee could be effected.

In the **RIFT VALLEY TEXTILES LTD VS EDWARD ONYANGO OGANDA NKR CA 27/92,** it was clear that the issue of the employee's right to be heard was not canvassed. What was in issue was whether the learned Judges' finding that *"Since the plaintiff was not given notice of three months as agreed in the letter of appointment, his summary dismissal was against the rules of natural justice and that the defendant should be ordered to pay aggravated damages for the wrongful dismissal."* The CA was of the view that"-

"*where a notice period is provided in the contract of employment, as was the case in that case, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better paid job and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves.(emphasis added). As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot find a cause of action*."

Facts of that case were very different from the appeal herein. In that case, there was no claim that the employee was not accorded an opportunity to be heard whether orally or in writing on the allegations before a decision to dismiss him was arrived at. *The dispute was over the employer's failure to give the employee reasons for issuing notice of termination*. The two cases are distinguishable.

Analysis of the disciplinary proceedings vis avis the right to be heard

The disciplinary proceedings held on 22nd March, 2002 produced in evidence by the Respondent D-1 show Minute 3/RM&T/JSAC/1/2002-DISCIPLINARY CASES, d) THEFT OF STARTER FOR **GK Q517-BUS.** Underneath, the name of the Appellant P NO 6700 is No. 4 together with John Mbare, Paul Waweru Njoroge and Huron Muchane in that order. the proceedings continue with a paragraph- ***the committee was informed that -……..***At the top of the said disciplinary proceedings is quorum of who were present starting with the chairman Mr. Patrick N. Omesa and ending with Miss Ruth W. Macharia (DW1) as Secretary, and absent with an apology from Mrs. Jane Njuguna. The disciplinary proceedings /minutes recommended the Appellant's dismissal and were signed on 16th June 2002. Beneath are remarks for recommendations for endorsement for implementation.

There is no indication that the Appellant or any of his colleagues were present or informed to attend the disciplinary proceedings and respond to the allegations whether in writing or orally. There is also no record of who was testifying against the Appellant in the disciplinary proceedings subject matter of the case. The disciplinary proceedings, in lengthy prose simply state at the commencement of each paragraph that ***the committee was informed that…….w***ith a conclusion that the Committee looked at the facts given in the case and noted negligence of duty in (sic) the part of Mr. Racha and Mr. Waweru and recommended them for dismissal from the service of the Respondent institute.

The unsettling question is who was informing the committee of all the allegations leveled against the Appellant and his co-accused persons? This is not disclosed. This court concludes that the disciplinary proceedings were mere hearsay tales based on tittle-tattle and conjecture. They were extremely irregular and an absolute nullity.

This court restates that the disciplinary committee proceedings infringed on the rights of the Appellant to be heard before being condemned. This is against the principles of the rule of law and the right to fair trial. In addition, the decision reached was based on criminal proceedings that did not determine the Appellant's guilt or culpability. Iam conscious of the fact that whether or not the Appellant was acquitted of the criminal proceedings, the Respondent only needed to prove, on a balance of probability that the Appellant had grossly misconducted himself or that he was negligent in the manner in which he performed his duties leading to the loss, to warrant disciplinary action. They need not have proven beyond reasonable doubt that he was responsible for the theft. Nevertheless, the criminal proceedings had been withdrawn before any evidence was tendered and it was expected that the matter would have been investigated internally as indicated to court. There is no evidence that there was any investigation conducted by the Respondent. Investigation involves recording of statements of possible witnesses to shed light on what could possibly have happened and who would, in the circumstances be liable. It also involves interrogating the suspects and getting to hear their side of the story. In this case, according to DW2 who was the Appellant's superior, he did not even talk to the Appellant concerning the alleged theft whether before or after the Appellant was arrested and charged in court. The Respondent, after withdrawing the complaint did not even require the Appellant to explain himself out on what could have transpired between 12th and 14th when the bus starter was alleged to have been stolen. This ought to have been done either before or during the disciplinary proceedings. DW1admitted that indeed, the Appellant was not given any opportunity to be heard in response to the allegations leveled against him.

The disciplinary procedure adopted by the Respondent clearly contravened the express provisions of Regulation 5.6 (b) (ii) on disciplinary procedures for serious offences which required that ***where the Director considers it necessary to institute disciplinary proceedings against an employee, he shall forward to the employee a statement of the charge framed against him and shall* invite the employee to state in writing, before a specific date, any grounds on which he relies to exculpate himself.**

In the said disciplinary procedures, there is no discretionary power given to the Director to elect not to frame the charge and serve the same upon the Appellant and invite him to provide his defence in writing. The Regulation is couched in mandatory terms. As a consequence, the decision reached to dismiss the Appellant without according him an opportunity to be heard was in total breach of the rules of natural justice. I hold that the trial magistrate erred in law and fact in failing to find that the Appellant was not accorded an opportunity to answer to the charges against him and to exculpate himself from the allegations leveled against him.

In this case, the need for hearing was entrenched not in the contract of employment but a as an obligation under the regulations set by the Respondent. The Respondent clearly flagrantly ignored it. I say flagrantly, because the Respondent offered no explanation why it did not follow its own regulations in disciplinary matters affecting the Appellant. Such a breach makes the termination of a contract of employment malicious, and motivated by spite. Its conduct meant to hurt the employee. The need for a hearing, I think is to prevent the employer from acting capriciously and whimsically and cannot be taken away by any court of law.

In addition, the charge against the Appellant which the Respondent relied on during the disciplinary proceedings to dismiss him was theft of motor vehicle parts and failing to prevent a felony as per the charge sheet produced in evidence as Appellant's exhibit P-1 which quotes the registration number of the motor vehicle from which the starter was stolen as **GKQ 577 Nissan Bus**. Contrary to the charge sheet, the Respondent entirely relied on the matter of the theft of the starter for motor vehicle Reg. **No. GKQ517** to discipline the Appellant, which is reflected in the Committee disciplinary proceedings, letter of dismissal dated 24th July, 2002 and paragraph 3(ii) of the defence filed on 19th June 2003. Throughout the proceedings, the Respondent never sought to clarify in evidence which of the two motor vehicles' spare parts was allegedly stolen by the Appellant. It could only have been one and not both.

I would have ignored the discrepancy if the Respondent had not entirely relied on the criminal charges to dismiss the Appellant and if they had conducted investigations into the matter and accorded the Appellant an opportunity to counter or admit the allegations against him. They appeared to be in a hurry to have him dismissed from service and forgot the serious material contradiction in their own documentary evidence which they fully relied on to purport to discipline the Appellant. Furthermore, in the said irregular disciplinary proceedings and dismissal letter, the Respondent took the opportunity to allege that this was the second bus starter that had been stolen when the Appellant was on duty as a supervisor. No such allegations were put to the Appellant to respond to, and no proceedings of previous accusations were produced in evidence to prove the allegations. It was an allegation unsupported by any evidence. I find that the Respondent was determined to have the Appellant leave employment with malice as the accusations appear totally unfounded. It was upon them to prove on a balance of probability the Appellant's culpability which they did not.

The Respondent did not have any option but to call upon the Appellant to answer to the charges against him before being condemned, noting that the charge sheet in the criminal case referred to a motor vehicle whose registration number differed with that with which the charges before the disciplinary proceedings alluded to. Failure to do so infringed on his fundamental right to be accorded a fair hearing and therefore the dismissal was not only unlawful, but also arbitrary, unfair and awfully unwarranted.

I adopt the view as was held in ***D'SOUZA V. TANGA COUNTY COUNCIL*** **[1961] E.A. 377 that** the disciplinary bodies of the Respondent had to be classed as *tribunals,* and therefore they were required by law to comply with the relevant tribunal law. The Personnel Manual, 1999 which governed staff discipline, at the Respondent's employ, provided for a Junior *Staff advisory Committee*, and the *Board of Management was* the appellate Forum. For purposes of public law, these were tribunals; and so they were required to adhere to *rules of natural justice* when discharging their functions. In **it was held that**

> ***t****he law requires that prescribed disciplinary procedures, in the circumstances, would have to be followed; and even if no procedure were prescribed, some form of inquiry would have to be conducted; and any tribunal set up must endeavour to attain fair determination; the person accused must know the nature of the accusation; a fair hearing is required, with both sides to the*

disputed question having an opportunity to represent his/her/its case; relevant information at the centre of the question must be availed to both sides.

In the Court of Appeal decision in ***ONYANGO V. ATTORNEY-GENERAL*** **[1987] KLR 711**, it was held that it was to be implied that, even where there was no relevant statutory provision, a public authority to which power has been entrusted, will adhere to rules of natural justice.

I further note that the trial magistrate dismissed the Appellant's case on the basis that even though the Director did not frame and forward the statement of the charge to the Appellant, the Appellant was entitled to appeal within 14 days and that he did not lodge the appeal to the Board of Management and that therefore this failure to serve him with a statement of charge did not infringe his fundamental right to be heard because he did not exhaust the machinery available to him. I have perused the dismissal letter dated 24th July, 2002 produced in evidence as P-3. I have also perused DW 3 exhibit on the Personnel Manual produced by the Respondent witness. Paragraph 5.6(b)(v) is clear that an employee on whom punishment is inflicted by the Staff Advisory Committee shall reserve the right to appeal to the Board of Management against the Committee's decision. The appeal shall be lodged within 14 days after the decision is communicated to him. However, there is nothing in the dismissal letter giving the Appellant the right of appeal within the period stated by the trial Magistrate.

The trial magistrate found that the procedure for dismissal was not followed but nonetheless trivialized the non-compliance thereof as non-consequential was an erroneous conclusion. In my view, she missed the point by a wide margin. In my considered view, it is the body making the adverse decision which is obliged to afford the party to be affected an opportunity of being heard and not the appellate body. It was upon the Respondent to prove that the Appellant's dismissal was in accordance with the regulations. The Personnel Manual produced, in essence, operated against the Respondent as it lay bare how the Respondent flouted its own the procedures for disciplining staff before their eventual dismissal. I find the finding by the learned magistrate erroneous and misconceived and set it aside.

During the purported disciplinary proceedings, none of the Appellant's colleagues were called to give evidence to support the allegations that he had changed security arrangements or that he had left duty before briefing his superior or that he did not hand over on the material day when the bus starter was allegedly found missing. Neither did DW2 J.K.Mutua, who stated that he was the Appellant's overall boss in charge of security, testify in the disciplinary proceedings to prove the allegations. Since it was the Respondent alleging that the Appellant had changed security arrangements without authority and left duty without handing over, it was expected that at the disciplinary proceedings, DW2 would give his version to be recorded on the facts to prove the culpability of the Appellant. This was not done.

In my view, summary dismissal is not dismissal, without a hearing or in the absence of the Employee. The right to be heard is never discarded. The Respondent had the duty to hear the Claimant. All KEFRI did was slam him with a backdated dismissal letter, without regard to procedural guarantees. Dismissal was unfair on account of procedure. Iam fortified by the decision in **NRBI HCC IN MENGINYA SALIM MURGANI VS KENYA REVENUE AUTHORTY [2008] eKLR** wherein Hon. Justice J.B.Ojwang, as he then was held that:

> ***"in a public institution, invariably, there will be codes of management which lay down the rights and expectations of the employees, as well as procedures of discipline and termination employment. Disciplinary procedures in public bodies are tribunal matters, requiring fair procedures of resolution, these being expressed in particular in rules of natural justice.***

In the case of the Appellant herein, the discharge from his employment was required to be in line with the Personnel Manual, which document would serve as the basis of fairness and natural justice, in any matter of a disciplinary kind. I therefore find that the dismissal of the Appellant was not justified.

I find that there was no justification for the Respondent to backdate the Appellant's letter of dismissal and allow the ground of appeal that the learned magistrate erred in law and fact in holding that the Appellant's dismissal was justified for the reasons that indeed, the Appellant's dismissal was backdated to

the time when the alleged loss of the starter took place, after which the Claimant was kept on interdiction for a period of close to one (1) year on ½ pay prior to the dismissal vide letter dated 24th July, 2002. The letter of dismissal backdated the same to the 14th September, 2001. The effect of this action by the Respondent was to backdate the Appellant's loss of income by about one year. This, in my view, was an unjustifiable extreme measure, especially because the criminal case against the Appellant had already been terminated by the court at the instigation of the Respondent on the ground that the Respondent intended to resolve the matter internally.

Whether there was breach of contract

As I have already stated that the Appellant was entitled to be heard on any allegations against him, and that his right to be heard was curtailed by the disciplinary committee. He was never accorded an opportunity to enable him respond to the allegations, I find that the Respondent breached the contract of employment**.**

What would be his entitlement for breach of contract?

As admitted by the Respondent, this was a permanent and pensionable employment. The letter of temporary employment did not specify the tenure of the temporary employment or when the offer of permanent employment would be given. It nevertheless stated that the offer of temporary employment was with effect from 1st May, 1992 and that another offer of permanent employment would be given. As a permanent employee in the public sector, the Appellant's legitimate expectation to continue working for the Respondent until the retirement age was unjustifiably curtailed. The Respondent produced the Appellant's national identity card showing that the Appellant was born in 1965. He had worked for the Respondent for 10 years. H e was only 37 years when his services were terminated.

The Appellant pleaded in his plaint at paragraph 7 for general damages for unlawful termination of his employment. He also prayed for 3 months salary in lieu of notice. However, this court is bound by the established law that no general damages are awardable for unlawful termination of employment. The practice by the courts then was to award him what was reasonable in the circumstances. In ***ALFRED J. GITHINJI V. MUMIAS SUGAR CO. LTD.*****, CIVIL APPEAL NO.94 OF 1991,** there was a proposition that, where employment is illegally terminated, but the employment contract does not provide a mode of termination, the Court is to determine the level of compensation on the basis of discretion, as to what is *reasonable.* The Court, in that case, thus stated the principle:

> ***"Our view is that where a contract of service…is for an indefinite period with an element of permanency and a degree of security of tenure in that it does not provide for its termination by giving of notice, or payment of any salary for its termination in lieu thereof, what the employee who is wrongfully dismissed will be entitled to, is what is reasonable in the circumstances."***

Wrongful termination is a concept of the common law and the authorities limited any damages to the notice or reasonable notice period as one of the primary remedies for unfair or wrongful termination. In **C.A. CIVILAPPEAL NO. 197 OF 1992 C.P.C. INDUSTRIAL PRODUCTS (KENYA) LTD.VS. OMWERI ANGIMA** (unreported) the court upheld an award of 15 months' salary for wrongful dismissal which was coupled with malice.

In the instant case, it is uncontroverted that the Appellant was employed on permanent and pensionable terms in a public institution. He did not produce the letter of employment setting out the terms and conditions of service, nonetheless, the Respondent's witness in charge of personnel matters, Dw1 admitted this fact. The temporary letter of employment providing for one month's salary in lieu of notice was only relevant where the termination related to the temporary employment. It is inapplicable in the circumstances as it stated that the Appellant would be issued with a letter of permanent employment. In my view, therefore, the Respondent as a public authority had created a legitimate expectation in its employees, including the Appellant herein, that if they work diligently, then they will continue to so work until they retire at the age of 55 years as was then. The Trial magistrate stated that as the Appellant was aware of the case because he was charged, interdicted and finally dismissed summarily, he was not

entitled to notice. She did not make any findings on the claim for damages for wrongful termination. I find failure to make a finding erroneous. Based on the principles espoused in the authorities cited above, and doing all I can in the circumstances, **I award the Appellant salary equivalent to 12 months as reasonable compensation for wrongful termination of his employment.**

Whether the Appellant was entitled to expenses incurred in Cr. case 1287/2001

These were special damages pleaded and receipts were produced in support thereof to cover legal fees, witness expenses and payment of proceedings. The Appellant claimed for reimbursement on account of an allegation that this was a claim based on false imprisonment and malicious prosecution. The Appellant did not lay his claim as required by law to prove the claim for false imprisonment. He did not plead particulars of malice. In a claim for malicious prosecution, the Appellant should have met the test required namely: - that there was a prosecution, initiated by the Respondent, actuated by malice, determined in his favour. In such proceedings where there was a prosecution, the Attorney General should have been enjoined on behalf of the police or Director of Public Prosecution who arrested and or prosecuted him.

I say no more except that I decline to make any award herein. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established. On the claim for false arrest, although the Appellant stated that he was in cells for 9 days, he did not indicate whether he was in cells waiting processing of bail or detained by the police before he was charged in court. If the latter was the case, indeed he could have joined the Attorney General as a party, as false arrest could only be brought against the police who arrested him. Damages for false detention are only applicable where the Appellant was detained before being charged in court, not being remanded pending processing of bail. The record shows he was released on bail the same day he was arraigned in court to take a plea. The Appellant does not particularize the dates that he was in detention. He therefore did not prove the claim for false arrest. The same fails.

The criminal case was never heard 2/11/2001 when it came up for hearing. This was still the prosecution case not for defence. Witness expenses are only recoverable where it was clear that they appeared to testify, not to observe the proceedings. He was never put on his defence to warrant witnesses attending court. His claim for witness expenses therefore had no basis and the same fails.

The Appellant had an advocate representing him in the case. Mrs. Muhuhu came on record on 2/11/2001. However, as he did not lead any evidence to prove his claims for malicious prosecution and false arrest, the claim for special damages for legal fees paid to his advocate in the criminal case was not supported and the ground of appeal fails.

I however d**iffer with the trial magistrate's finding that the evidence before court showed that there was sufficient evidence to link the Appellant's conduct to the theft and that therefore the claim for malicious prosecution cannot therefore succeed.** As I have stated, there was no evidence linking the Appellant to the theft of the bus starter. If that were the case, there is no reason why the Respondent withdrew the complaint on a hearing date only to go and issue him with a dismissal letter without according him an opportunity to be heard on the allegations. Ironically, the defence alleged that the withdrawal was on humanitarian grounds, yet the reasons advanced in the criminal court in support of the application for withdrawal was that the Respondent wished to handle the matter at the institutional level. Where was the humanity of the Respondent when they never accorded the Appellant an opportunity to be heard in response to the charges of theft or negligence of duty? It was inhuman to condemn the Appellant without according him a hearing. It was against the principles of natural justice. However, as I have stated, the claim for malicious prosecution and false arrest was not well grounded. It had to be pleaded and proved. It was not. In this regard, the Appellant's ground of Appeal No. 6 fails.

Service payments

The Claimant's employment provided for a staff retirement benefits scheme managed by Genesis Kenya

Investment Management Ltd. The Claimant was paid his pension under the scheme at the rate of 16% of his basic salary per month although he protested indicating that he had not been paid all his dues under the scheme. H e did not prove by how much he was underpaid.

In both the pleadings and testimony the Claimant made reference to the claim for service payments for 10 years. The Claimant did not explain whether the claim for service payments was contractual or statutory. The contract of employment produced made no reference to service payments and there is no express contractual term I can rely on. The Respondent on the other hand did not explain how they arrived at the two surrender values by the employee and employer, all totaling to 136,891.00. Neither does the Appellant explain how his claim for Kshs.***81, 887*** was arrived at. The business in which the Respondent operated was covered by the Regulation of Wages (Protective Security Services) Order, 1998. Regulation 17 thereof provides for gratuity at the rate of eighteen days pay for each completed year of service after five years service with an employer. But this would only be applicable if there was no contributory scheme to which both the respondent and Appellant contributed. The Claimant served for 10 years and therefore would be entitled to gratuity as provided for in the said Regulation of Wages Order. The formula to compute the gratuity would be to take the basic salary and house allowance and divide by twenty six and multiply by the number of days. The Claimant was getting a consolidated monthly pay of Kshs 9155. This less medical allowance divided by twenty six gives Kshs 961/-. Because the Claimant served for 10 years he would be entitled to gratuity equivalent to 180 days. Kshs 961/- multiplied by 180 days give Kshs 172,980/- from this figure, I would deduct amount paid 136,891 as contribution to the scheme leaves a balance of Kshs.**36, 089**. But this is not the case here.

In my view, the Appellant was not entitled to service pay as pleaded as he was a member of the Respondent's Staff contributory pension scheme under which a sum of Kshs 136,891 was made to him. He did not prove how the 81,887 was arrived at and if it was an underpayment, he would have said so. Instead, he pleaded it under service payments for 10 years. I find that this claim was not merited and disallow it.

However, the Appellant sought lost pension dues plus interest at 21.83% from date of dismissal to July 2002 amounting to Kshs. 7840. My take on this claim is that the letter of dismissal backdated the same to the 14th September, 2001. The effect of this action by the Respondent was to backdate the Appellant's loss of income by about one year. There was no basis for this. However, the said letter of dismissal PEX 3 was clear in the last paragraph that *he did not lose service benefits on dismissal*. Further, the Form of Discharge P EX4 is clear that the calculations for his pension contributions were based on 100% entitlement until 1/08/2002. Clearly, the Appellant did not lose any pension dues. I therefore decline any award on this head.

Unpaid off 50 days

It is not clear how the Appellant arrived at the figure of Kshs. 13,500 pleaded. The submissions on record do not provide any clue to this figure. They did not prove this entitlement as there was no stipulation that the same was due and payable under the contract of employment. I therefore disallow the claim.

Annual leave 2002

In both the pleadings and testimony the Claimant stated he did not take his annual leave for 2002. An employee covered by the Regulation of Wages (Protective Security Services) Order was entitled to annual leave of 26 days with full pay, not 21 days as contained in the Appellant's temporary letter of employment. He was therefore entitled to his leave days or one month's salary in lieu thereof. The claim by the Respondent that he could only be refunded travelling allowance after proceeding on leave has no basis in law. I note that his leave allowance for 2001 as per the Respondents' letter dated 8th October, 2002 was 7969.50. I however do not find any formula for such calculations and basis. As the Respondent insisted that he could only be refunded for expenses incurred, it is possible that this figure was arrived at based on his claim for expenses incurred. I therefore allow the claim for leave for 2002 save that according to the pay slip, his half salary was Kshs.3405. it therefore follows that full salary for the month would be Kshs. 6, 810, not Kshs. 7969 as pleaded.

Salary balance during suspension

The Appellant was on half pay for the period he was on interdiction from14/9/2001 to 22/7/2002 when he was dismissed. During this period, he was not allowed to leave his duty station without permission from the Security Officer. Having found that his dismissal was unwarranted and therefore wrongful, I allow his claim for the half salary for the period he was on suspension. This would be at the rate of Kshs. 3,405 for 10 months totaling to Kshs. 34,050.

Conclusion and orders

In conclusion, the appeal succeeds on the following:-

a. That the dismissal of the Appellant did not accord with the principles of natural justice, fairness and equity and therefore unfair and wrongful.

b. The Appellant is awarded 12 months' salary for unlawful termination of employment @ 6810 per month totaling Kshs. 81, 720 less any statutory deductions.

c. The claim for one month accrued leave for 2002@ Kshs.6810 is allowed

d. ½ salary balance deducted during interdiction for 10 months totaling Kshs. 68100 is allowed.

e. The Appellant will have costs of the lower court.

f. The Respondent to bear costs of this appeal.

Dated and delivered at NAIROBI this 30th day of September, 2014

ROSELYNE EKIRAPA ABURILI

JUDGE

In the presence of

…….for the Appellant

…….for the Respondent

…….Court clerk