



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 375 OF 2004**

**DARN OTIENO.....PLAINTIFF**

**VERSUS**

**STANBIC BANK KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

The plaintiff Darn Otieno approached the seat of justice by way of a plaint dated 16<sup>th</sup> day of April 2004 and filed the same date and subsequently amended on the 12<sup>th</sup> day of November 2004 and filed on the 20<sup>th</sup> day of April 2005. The complaint raised against Stanbic Bank Kenya Limited, the defendant herein is contained in paragraphs 2,3,4,5,6,7,8,9,10,12,13,14,15,16,17,18,19,20 and 21 of the said amended plaint, the salient features of the same in a summary form are that:-

(i) The plaintiff is an individual, whereas the defendant is a limited liability company duly incorporated under the Company’s Act cap 486 laws of Kenya and by the time the events leading to the initiation of these proceedings were set in motion the defendant was by then known as Grindlays Bank International (Kenya) Limited.

(ii) The Interaction of the disputants has a long history starting way back on the 2<sup>nd</sup> day of April 1979 when the defendant in its original attire employed the plaintiff as a clerical officer at first on temporary basis but subsequently admitted him to permanent terms of employment on or about 25<sup>th</sup> October 1979 with effect from the 3<sup>rd</sup> October 1979 with attendant benefits of rising through the ranks to the position of a senior systems administrator in charge of the defendants Data centre within the defendants information and Technology (IT) department and earning a basic salary of Kshs. 118,847.65 together with a monthly computer allowance of Kshs.20,000.00 and an average yearly salary increment of approximately 10%. The plaintiffs’ employment Tour with the defendant also draws inspiration from the letters of correspondences exchanged between the plaintiff and the defendant and more particularly the defendants’ personal policy governing non unionisable staff as well as the letter dated 24<sup>th</sup> August 2001 which all went to confirm that by virtue of the content of these documentation the plaintiffs employment Tour with the defendants would terminate when the plaintiff attains the age of 55 years.

(iii) By reason of the existence of the documentation afore said in number (ii) above, the plaintiff belives strongly that their existed implied terms in the said contract of employment namely:-

**(a) A strong presumption in the said documentation that the plaintiff would work till the retirement**

age of 55 years.

**(b) That upon such retirement the defendant would issue a clean certificate of employment as provided for by the then employment Act cap 226 laws of Kenya.**

**(c) That the defendant would participate in the defendants' staff pensions Fund plan and that the defendant would pay its contributions in respect of the plaintiff as provided by the said plan.**

**(d) That the plaintiff would be accorded enjoyment of Hilton Health Club facility provided by the defendant at an annual subscription of Kshs. 50,000/.**

**(e) That the plaintiff would have and enjoy a medical allowance under a medical scheme provided by a medical allowance at various Hospitals and pharmacies within the country at a total costs of Kshs. 400,000/= p.a .**

**(f) That the plaintiff would be entitled to payment of leave allowance to be paid by the defendant for each month worked by the plaintiff during the year until his retirement age.**

(iv) The source of grievance which compelled the plaintiff to move to the seat of justice and seek the courts' intervention arises from the events of on or about 4<sup>th</sup> day of November 2003, when the defendant maliciously and without any justifiable cause wrongfully directed and procured the Kenya police Anti-Fraud Unit to arrest the plaintiff and take him into custody on a charge that the plaintiff had been involved in fraudulent transactions which had taken place at the defendants' company's Kenyatta Avenue Branch on both the 16<sup>th</sup> and 29<sup>th</sup> October 2003, which actions culminated in the said police taking the plaintiff into custody at both Langata and Kileleshwa police stations until 6<sup>th</sup> November 2003 at 6.00 p.m. when the police released and discharged the plaintiff from custody without preferring any charges against him.

(v) By reason of what has been stated in number (iv) above, it is the assertion of the plaintiff that he was deprived of his liberty for these two days as he was incarcerated without any justification and thereby he was injured in his credit, character and reputation and he suffered considerable mental and bodily pain and anguish and was put to considerable trouble, inconvenience anxiety expense, injury in his employment and suffered loss to be quantified. It is further the plaintiff's assertion that the defendants action complained of were out of spite and intended to humiliate, disgrace, ridicule and subject him to a lie detector (polygraph) test.

(vi) In furtherance of the defendants' actions complained of in number (v) above, the defendant without any justifiable cause suspended the plaintiff from work on 7<sup>th</sup> November, 2003 on allegations that there were certain irregularities in the plaintiffs area of operation and ultimately without notice terminated the plaintiffs employment with the defendant on the 2<sup>nd</sup> February 2004 on allegations that a number of irregularities had been noted in the plaintiffs area of operations resulting in the procedures and systems lapses, compromising of the banks security systems thereby exposing the bank to financial risks.

(vii) It is the plaintiff's contention that the defendants action complained of afore said were nothing but a ploy to cover up the fact that the defendants own internal investigations had exonerated the plaintiff of any blameworthiness in connection with events which had led to the plaintiffs arrest and incarceration.

(viii) That by reason of the afore said actions on the part of the defendant the plaintiff who had worked with the defendant for 25 years had in fact been rendered un employable by reason of the complained of suspension and eventual termination which according to the plaintiff is actionable because the same is contrary to the Banks personnel policy governing non unionisable staff, in breach of natural justice as the plaintiff was not given a chance to defend himself and therefore null and void more so when the same has curtailed the plaintiff's chances of securing alternative employment in consequence thereof the plaintiff suffered loss and damage in consequence of which the plaintiff seeks special damages to the tune of Kshs. 26,015,572.00 made up of:-

- (i) Loss of salary from the said 2<sup>nd</sup> day of February 2004 to the 1<sup>st</sup> day of February 2014 being the would have been end of the plaintiffs employment Tour with the defendant to the tune of Kshs.16,661,718.00.**
- (ii) Loss of increase in earnings from 2<sup>nd</sup> day of February 2004 to 1<sup>st</sup> February 2014 to the tune of Kshs. 1,666,172.00,**
- (iii) Loss of leave allowance from 2<sup>nd</sup> February 2004 to 1<sup>st</sup> February 2014 to the total tune of Ksh.1,188,476.00,**
- (iv) Loss of use of email club subscription at the Hilton Health club from 2<sup>nd</sup> February 2004 to 1<sup>st</sup> February 2012 to the tune of Kshs. 500,000.00.**
- (v) Loss of benefits of the contribution under the staff pension Fund plan from 2<sup>nd</sup> February 2004 to 1<sup>st</sup> February 2012 to the total tune of Kshs. 1,999,406.00.**
- (vi) Loss of benefits under the medical scheme for the said period of Kshs. 4,000,406.00.**

In addition to the fore going particularized claims the plaintiff also claimed from the defendant the following reliefs.

- (b) General damages for wrongful arrest and false imprisonment.**
- (c) General damages for unlawful dismissal from 2.2.2004 till payment in full.**
- (d) General damages for unlawful subjection to a lie detector machine.**
- (e) Aggravated damages**
- (f) Costs**
- (g) Interests in (a) (b) (c) (d) and (e) at commercial rates.**
- (h) Clear certificate of service.**
- (i) Further or other relief this Honourable court may deem fit and just to grant in the circumstances.**

The defendant was served with the plaintiffs pleadings. They entered appearance and filed an initial defence dated 29<sup>th</sup> day of April 2004 and filed on the 30<sup>th</sup> day of April 2004 and subsequently amended on the 22<sup>nd</sup> day of December 2004 and filed on the same date. The salient features of the same in a summary form are to the effect that they admitted paragraphs 1,2,3,4 and 7 of the amended plaint. Denied that the personnel policy document constituted a term of the contract of employment as the same was simply meant to aid the employees understand their terms of the contract of employment; that the staff pension Fund is administered by the Trustees of the Fund; the health club facilities were a privilege and not a right; the medical scheme was subject to the plaintiff being employed and falling sick; while the leave allowance was subject to the plaintiff proceeding on leave. All the afore going were subject to the plaintiff remaining in the defendants employment. Further that it is mandatory under the banking practice in Kenya that any fraud in any bank must be reported to the Kenya police anti-Fraud Unit for investigation.

- (ii) Denied paragraphs 6, 8, 10, 11 and 12, 15, 16,17,18,19 and 20 of the amended plaint and put the plaintiff to strict proof.**
- (iii) In addition to the above, asserted that if the plaintiff was arrested, the arrest was by the Kenya police**

Anti-Fraud Unit over whom the defendant had no control. The fact that there was fraud is undisputed. The defendant is a stranger to allegations in paragraph 9 of the amended plaint save that if the plaintiff was at all arrested, the arrest was based on reasonable ground and suspicion pending investigation by the Kenya police Anti-Fraud Unit. That if the plaintiff was subjected to a lie detector, the same was with the consent of the plaintiff. In the alternative no damage, mental anguish nor suffering was ever occasioned to the plaintiff, that the suspension of the plaintiff had factual reason. Concedes terminating the plaintiffs employment on account of the reasons set out in paragraph 15 of the amended plaint but denies that the termination was unlawful and without justification. To the defendant, the plaintiffs' employment was terminated because he failed to perform his duties according to expectation and allowing loopholes and irregularities in the area of his control as a result of which the bank lost confidence in him. Disputes the allegations that the termination curtailed the plaintiffs' future job opportunities as the skills acquired by the plaintiff were not peculiar to the defendant and as such they could not prevent the plaintiff from securing employment elsewhere.

In consequence thereof denied that they are liable to pay the plaintiff the sum of KSHS. 26,015,572/= or any sums at all and further denied being liable to meet any damages at all as prayed in the plaint, that the entire suit is misconceived and prayed for the suit to be dismissed with costs to them.

In response to the amended defence, the plaintiff filed a reply there to dated 6<sup>th</sup> April 2004, and filed on 6/5/2004 and which was amended on the 13<sup>th</sup> day of January 2005, and filed on the 18<sup>th</sup> January 2005 in which the content of the amended plaint were reiterated and then stressed the following points namely that the plaintiffs contract of employment with the defendant is informed by the content of the letter of appointment dated 2<sup>nd</sup> April 1979, and the personnel policy governing non unionisable staff and the letter of 24<sup>th</sup> August 2001, which stipulated the plaintiffs retirement age to be fifty five (55) years; reiterates that the defendant is liable to the plaintiff for the loss and damages as claimed for in the amended plaint that the defendant is also to be held liable for the plaintiffs unlawful arrest and subsequent subjection to the lie detector; still maintains that the termination of the plaintiff's employment with the defendant was factually without justification; still reiterates that the termination curtailed the plaintiffs future employment opportunity; that he is entitled to loss of future earnings, general and aggravated damages as claimed in the amended plaint, denied the defendants assertion that his suit is misconceived and urged this court to dismiss the defendants amended defence and grant him all the reliefs sought in his amended plaint.

At the close of the pleadings, parties filed agreed issues filed on the 3<sup>rd</sup> day of July 2008, and then elected to file documents relied upon in support of their stand in the case, written skeleton arguments, case law relied upon by each side followed by oral highlights on the same and then invited the court to give a judgment thereto. Those of the plaintiffs are dated 28<sup>th</sup> November 2007 and filed on the 29<sup>th</sup> November 2007 and a further set dated 8<sup>th</sup> day of April 2008, and filed on the 7<sup>th</sup> day of April 2008 as well as oral high lights stressed that the defendant never gave the plaintiff an opportunity to be heard; principles of natural justice ought to have been accorded to the plaintiff before any action was taken against him, the defendants action of reporting the plaintiff to the police having the plaintiff arrested and causing him to be subjected to a lie detector was malicious and in excusable considering that the plaintiff had a clean record with the plaintiff and the defendant is liable to pay to the plaintiff both special and general damages considering that him plaintiff was not prosecuted by the police.

On case law the plaintiff referred the court to the case **of KARIUKI VERSUS EAST AFRICAN INDUSTRIES LIMITED & ANOTHER (1986) KLR 383** decided by Butler-sloss J as he then was where in the defendant was held liable to the plaintiff in damages for instigating the prosecution of the plaintiff which action was taken as evidencing malice against the defendant.

The case of **EGBEMA VERSUS WEST NILE DISTRICT ADMINISTRATION (1972) EA 60** where in it was held inter alia that **“a cause of action for false imprisonment is distinct from that of malicious prosecution. Where police make a decision to prosecute the defendant is not liable as they are not servants of the defendant.**

The skeleton arguments for the defendants dated 7<sup>th</sup> day of April 2008 and filed on 8<sup>th</sup> day of April 2008 stressed that the onus of proof lies on the plaintiff to prove the factual aspect of the content of his plaint which the plaintiff declined to do; the defendants' action of terminating the plaintiffs' employment with the defendant is faultless as the same was done in accordance with the terms of the contract by giving the plaintiff one month's salary in lieu of notice; the defendant cannot be held liable for the police action of arresting and detaining the plaintiff because there has been no demonstration that it is the defendant who so directed the Anti Banking fraud police unit to arrest and detain the plaintiff; in the amended defence the defendant specifically denied that the plaintiff was actually arrested; that it is the defendant who directed the police to detain the plaintiff and put the plaintiff to strict proof. No evidence has been adduced by the plaintiff to controvert the said defendant's assertions in the amended defence; the police were not made parties to the proceedings herein and for this reason no complaint can validly be raised against them. Neither did the plaintiff particularize the wrongful acts committed by the defendant against him and then go a head to prove them as it is required by law; there has been no demonstration of existence of false imprisonment of the plaintiff at the direction of the defendant; issue of unlawful termination of the plaintiff's employment with the defendant does not arise as the plaintiff has already demonstrated that the same was terminated in accordance with the terms of the contract of employment by giving the plaintiff one month's salary in lieu of notice; general damages are not available to the plaintiff as their relationship was contractual; the plaintiffs entitlement is limited to the value of notice Aggravated damages are not available to the plaintiff because the plaintiff suffered no high handed, punitive situation in the circumstances of this case; future earnings are not available to the plaintiff since the contract was terminated in terms of the terms of the contract.

A total of six (6) agreed issues were filed namely:-

1. **What were the terms of the plaintiff's contract of employment with the defendant?**
2. **Did the defendant maliciously and without justifiable cause wrongfully direct and procure the Kenya police Anti Fraud Unit to arrest the plaintiff as stated in paragraph 8 and 9 of the plaint?**
3. **Did the defendant procure the unlawful imprisonment of the plaintiff as suggested in the plaint?**
4. **Whether the plaintiff's termination of service and dismissal from employment by the defendant was unlawful?**
5. **Whether the plaintiff is entitled to general damages for wrongful arrest, false imprisonment, unlawful dismissal and unlawful subjection to a lie detector?**
6. **Whether plaintiff is entitled to special damages?**

The court has been invited to determine these on the basis of pleadings, written skeleton arguments and principles of case law cited.

In response to issue number one, it is common ground that the control core of the employment contract between the disputants is a letter dated 2<sup>nd</sup> April 1979 exhibited by both sides. Of importance to the argument is the content of clause 3 thereof. It reads:-

**“Your terms and conditions of service will be as laid down in the collective agreement at present in force in respect of this Bank and for the future as to whatever terms and conditions of service are in force at the time. You will also be subject to the general rules of staff in the bank.”**

This court has gone through the bundle of documents filed by either side and has not traced document titled.

**“Collective Bargain agreement”**

What has been exhibited by either side as policy documents appear to be policy guidelines on the conduct of the parties towards each other while employees are in the course of their employment with the defendant during the subsistence of the employment contract. This means that the afore stated letter of employment dated 2<sup>nd</sup> April, 1979 is the only document evidencing terms of employment between the disputants.

Issues number 2 and 3 are interrelated and will be interrogated as one. From the content of the pleadings and the documentation filed by the defendant, it is not disputed that indeed the defendant allegedly detected malpractices in one of their departments then headed by the plaintiff which alleged malpractices caused the defendants to report the matter to the Anti Banking Fraud Police Unit for investigation. According to the defendants, the reporting of the matter for investigation was a routine banking policy matter which was required of them as a banking institution. They went further to argue that the moment the report was made the issue no longer rested with them. It was up to the relevant police unit to decide as to who to detain for interrogation, who to interrogate and not to interrogate and as such their role ended at the reporting stage and have no responsibility for what transpired thereafter. Alternatively that the plaintiff should not be heard to complain since he voluntarily and willingly agreed to be subjected to the investigation by way of poly graph examination.

According to the plaintiff he concedes to have submitted himself to the poly graph examination and signed a consent to that effect but states that the same was under duress and that the defendants move to subject him was malicious and without justification notwithstanding that particulars of malice and unjustification are not given in the amended plaint. With regard to blame worthiness and liability for the alleged harm caused, the plaintiff asserts the defendant as the initiator of what the plaintiff was subjected to is liable to pay compensation to the plaintiff. Whereas the defendants state that they are not liable for the actions of the Anti Banking Fraud Police Unit. Case law cited provides some necessary guidelines.

The case of **KARIUKI VERSUS EAST AFRICA INDUSTRIES LIMITED AND ANOTHER (1986) KLR 383** where in the instigator of the plaintiffs' prosecution was held liable in damages; the case of **E Y BEMA VERSUS WEST NILE DISTRICT ADMINISTRATION (1972) E.A. 60** where the predecessor of the Court of Appeal held inter alia that: - "Damages **for an action for false imprisonment are distinct from those awarded for an action for malicious prosecution**; the case of **GITAU VERSUS EAST AFRICAN POWER AND LIGHTING CO. LIMITED (1986) KLR 365** whose central theme is that "facts constituting malice must be particularized and proved. Where malicious prosecution is relied upon it has to be proved that prosecution was instigated by the defendant; the case of **SEKADDU VERSUS SEBADDUKA (1968) EA 213** where it was held inter alia that: - "Once **the detention or imprisonment is established the onus shifts to the defendant to show that it was reasonably justifiable.**" and lastly the case of **KASANA PRODUCE STORE VERSUS KATO (1973) EA 190** where it was held inter alia that "**an action for false imprisonment lies when there has been an imprisonment without any order of a court.**"

This court has given due consideration to the afore set out case law principles and applied them to the rival arguments on the blame worthiness and responsibility to pay compensation and or damages for the plaintiffs detention during the polygraph examination allegedly done at the instigation of the defendant and the court makes a finding that the cases cited are distinguishable from the circumstances displayed herein because they were decided on the basis of an assessment having been made on the facts presented to those courts, the law applied and then a decision reached on its merits. Herein the scenario is different because the court has been invited to make a decision on the basis of bare pleadings and written skeleton arguments which are self centered to each side.

Although the reporting, detention and subjection of the plaintiff to the poly graph examination is not denied by the defendant, it is responsibility to so detain and carry out examination by way of poly graph which has been denied. This leaves a vacuum in the said argument which could have easily been filled in by adduction of oral evidence and cross-examination of relevant witnesses by each side on the one hand, and on the other hand by bringing the Anti Banking Fraud Police Unit on board as parties so that they would demonstrate both in their pleadings and testimony and cross-examination on whose behalf they were acting, on their own behalf or on behalf of the defendant. In the absence of this link, the court is not

in a position to pin blame worthiness on to the defendant noting that the defendant has no complaint against the Anti Banking Fraud Unit . The person with a complaint against them is the plaintiff who is the proper party to have brought them on board as defendants. In the premises the court finds that the plaintiff has no remedy against the defendant on account of detention and subjection of the plaintiff to the polygraph examination because; the defendant's assertion that the reporting was routine and in accordance with the banking policy has not been ousted; particulars of undue and non justification of the initiation of the investigation process were not particularized; the non participation of the Anti fraud police Banking Unit is fatal as it was necessary for them to participate both by way of pleading and oral testimony and submission to show whose agent they were as far as the subjection of the plaintiff to the polygraph examination was concerned before any blame worthiness could be pinned onto the defendant; the case law relied upon arose from court proceedings wherein the court had an opportunity to watch the demeanor of witnesses, assess facts placed before it, applies the law and then arrive at a conclusion which is distinguishable herein as all the court has are bare pleadings, submissions and principles of law.

With regard to issue number 4, it is undisputed that the relationship between the defendant and the plaintiff was that of an employer and employee which as per the content of the employment letter dated 2/4/79, it was indicated clearly that the nature of employment was pensionable and had a retirement age tagged to it. It is common ground that the plaintiff's employment was abruptly brought to an end before the retirement age was attained. By reason of this termination the plaintiff has asserted that the same was unlawful and therefore attracts damages. Where as the defence asserts that it was lawful as the same was effected in accordance with the terms of the contract. It is now trite and this court has judicial notice of the same that what amounts to or does not amount to an unlawful termination of employment has now been crystallized by case law some of which have been cited to this court for the court's guidance.

There is the case of **CHASE VERSUS BARCLAYS BANK OF KENYA LIMITED (1990) KLR 595** in which Bosire J (as he then was) now JA held inter alia that “**permanent employment does not necessarily mean employment for life or until retirement. It merely means that the employment is to continue for an indefinite period with an element of permanency and a degree of security of tenure. Where remuneration is to be received at a progressive rate. There is no new contract formed on each occasion his salary is thus increased. Where an employee changes grades, the original contract is replaced but the provisions as to termination are carried forward or re-enacted each time a new contract was created. The term dismissal and termination are not one and the same. A dismissal arises due to breach of a term of the contract of employment whereas a termination arises where a party to a contract exercises a right under the contract to lawfully bring it to an end by a notice even without a breach.**”; The case of **GITAU VERSUS EAST AFRICAN POWER & LIGHTING CO. LIMITED (1986) KLR 365** where it was held inter alia that “**Wrongful dismissal cannot arise where the same is carried out in accordance with the terms of the contract**”; The case of **WANJOHI VERSUS MITCHELL COTTS KENYA LIMITED HCCC NO. 1862 OF 1995** where it was held inter alia that “**where termination has been effected in accordance with a term of the contract, the employer need not even assign a reason for invoking an employment clause agreed on by both sides**;

Also the case of **RIFT VALLEY TEXTILES LIMITED VERSUS EDWARD ONYANGO OGANDA NAKURU CA NO. 27 OF 1992** where in the court of appeal made observation 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. Further that where a notice period is provided in the contract of employment .... then an employer needs 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 likewise if the employee were to leave the employment for a better job he needs not give reasons as it would be ridiculous for the employer to insist that the employee does assign a reason for leaving the employment.**” Lastly the case of **IMANJE VERSUS KENYA NATIONAL CO. LIMITED (1986) KLR 350** where it was held inter alia that: - “**termination of a contract of employment can be said to be wrongful if it is made in breach of the terms of the contract.**”

It is the stand of the defendant that indeed the plaintiff's contract of employment with them was terminated before the contracted retirement age had been attained but the same was done in accordance with the terms of the contract. As observed herein, the contract of employment namely the letter dated 2<sup>nd</sup> April 1979 does not itself contain the clauses on termination. But its clause 3 thereof imports into that contract the terms and conditions of employment contained in the collective Bargain agreement which as observed earlier on herein was not exhibited in the bundle of documents filed by either side. It is the defendants' assertion in their submissions that they acted within the terms of the said collective agreement as evidenced by the content of document found at page 74 of the bundle of documents. A perusal reveals that items paid were balance of leave days, half pay for November 2003, one month's salary in lieu of notice less value of the indebtedness to the defendant.

To controvert the defendants assertions the plaintiff submits that the terms of the Human Resource document policy was not observed. This document has indeed been exhibited by the plaintiff in its bundle of documents. Its applicability as part of the contract of employment cannot hold as the letter of employment dated 2<sup>nd</sup> April 1997 does not incorporate the content of this document in its terms and conditions of employment. Neither does the content of the document itself. These do not state that they are part of the contract of employment. As observed earlier on, this document as well as the counter part exhibited by the defendant despite slight variation in the introductory content, are nothing but a form of code of conduct to be observed by both contracting parties in the course of employment and not terms of the contract. There is therefore nothing which has been put forward by the plaintiff to oust the defendants' assertion that they acted within the contract by bringing the said contract to an end by opting to pay the plaintiff his terminal dues with one month salary in lieu of notice.

With regard to issue number 5, as to whether the plaintiff is entitled to general damages for wrongful arrest, false imprisonment, unlawful dismissal and unlawful subsection to a lie detector, the court adopts the assessment and findings on issues number 1, 2, 3 and 4 as being applicable to the disposal of issue number 5 as well and then proceeds to make the following conclusions on the same.

0. General damages for unlawful subsection to a lie detector are not available to the plaintiff because:-

(a) The defendant has exhibited a consent signed by the plaintiff to undergo lie detection procedures. The plaintiff alleges duress but being documentary in nature, the said document cannot be controverted by a written submission as that would be in contravention of the provisions of section 62,63,64 and 65 of the evidence Act cap 80 laws of Kenya which makes provision that a document speaks for itself and no oral testimony is permissible to controvert it. As long as the document stands, it is sufficient proof that the exercise was voluntary.

(b) Even if it can be established that the plaintiff was subjected to the lie detector under duress, liability will only attach to the defendant if it can be demonstrated that after the defendant admittedly reported suspected malpractices in the department then headed by the plaintiff, he went a head and gave directions to the said Anti Banking Fraud Police Unit on how to conduct the investigations in which case the said Anti Banking Fraud Unit could safely be termed as having acted as an agent of the defendant ,a matter not demonstrated to exist as the said Anti Fraud Police Unit was not brought on board as a party herein to shed light as to whether they acted independently as asserted by the defendant or that they were under the directions of the defendant as regards every move they made in the course of their investigation as asserted by the plaintiff.

0. As for general damages for unlawful arrest and false imprisonment, it is on record that no oral testimony was given by either side on the one hand, and on the other hand none participation of the Anti Banking Fraud Police Unit leaves a vacuum in the transaction complained of and as such, it is not possible for this court to know the mode used to enable the plaintiff respond to the summons by the said Unit. It is only oral testimony, tested on cross-examination and supported by either the pleadings or the oral testimony of the personnel of the said Anti Fraud Police Unit which could have proved that indeed the plaintiff was arrested and falsely imprisoned in order to give rise to liability for damages. This liability will attach to the defendant only if it can be

demonstrated that personnel of the said Anti Banking Fraud Police Unit who have not even been brought on board herein, were not free agents of their actions but agents of the defendant, a matter not demonstrated to exist herein.

1. As for general damages for unlawful dismissal, the same is not available to the plaintiff because there is no dispute that the relationship between the plaintiff and the defendant is one of master and servant and this being the case, principles governing the bringing to an end of that relationship and the payment of compensation or damages for wrongful termination have been crystallized and in a summary form these are:-

(i) In the case of **GITAU VERSUS EAST AFRICAN POWER AND LIGHTING CO. LIMITED (SUPRA)** the guiding principle is that the applicable principles in compensation for wrongful dismissal are:-

**(a) The damages are meant to compensate the employee for loss of his wages.**

**(b) Normally the damages recoverable will be the amount of wages or salary for the period of proper notice which amount will represent what the employee has lost by being dismissed without such notice.**

**(c) Where the employee has been given the amount which represent his salary or wages for the period for such notice, no action for wrongful dismissal will lie against the employer.**

(ii) The case of **WANJOHI VERSUS MITCHEL COTTS KENYA LIMITED (SUPRAA)** where in **Waki J (as the then was)** held inter alia that “law on general damages for wrongful dismissal is well settled, such damages are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with the terms by giving either the proper notice or salary in lieu thereof. General damages are not recoverable.”

(iii) In the case of **KENYA PORTS AUTHORITY VERSUS EDWARD OTIENO MOMBASA CA 120/87 (UR)** in which the court of appeal drew inspiration from the decision in the persuasive authority of **ADDIS VERSUS GRAMOPHONE COMPANY (1909) A.C.488** in which the plaintiff who had been dismissed in a harsh and humiliating manner sought damages and the house of Lords held inter alia that:- “Where a servant is wrongfully dismissed from his employment the damages for dismissal cannot include damages for the manner of the dismissal, for his injured feelings or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment.

**(b) Where a contract of service includes a period of termination of the employment, the damages suffered are the wages for the period during which his normal notice would have been correct.**

(iv) **The case of IMENJE VERSUS KENYA NATIONAL CO. LIMITED (SUPRA)** whose holding is that even where the contract of employment had been breached, the quantum of damages the plaintiff would have recovered would be the total income he would have received during the period of notice.

(v) The case of **MUTHUURI VERSUS NATIONAL INDUSTRIAL CREDIT BANK LIMITED (2003) KLR 145** where Ringera J (as he then was) ruled that “the measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice.

**(c) Exemplary damages are not available just because of the circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant and also from considering the fact that the dismissal will make it more difficult for him to obtain fresh employment.**

When the afore set out case law principles are applied to the rival arguments herein on the issue of whether general damages are payable to the plaintiff for the alleged wrongful termination of the contract

or not, the court is satisfied that none is payable because:-

- (a) The plaintiffs' contract was terminated in accordance with the terms and conditions of employment.
- (b) The defendant as an employer was entitled to bring that employment to an end without assigning a reason and irrespective of whether an opportunity to be heard was given or not.
- (c) It has not been disputed that terminal dues were paid. There has been no allegation of miscalculation of the said dues.

Turning to the last issue of whether special damages pleaded are payable or not, the correct position in law is that special damages must be specifically pleaded, particularized and then strictly proved. See the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 297** where in at page 304 the court drew inspiration from the decision in the case of **RAT CLIFE VERSUS EVANS (1892) 2QB54** where Bowen L.J had this to say:-

**“The character of the acts themselves, which produce the damage and the circumstances under which these acts are done, must regulate the decree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both un pleading and proof of damage as unreasonable having regard to the circumstance and to the nature of the acts themselves by which the damage is done...”**

This has now been crystallized into a clear and plain principle as stated by the Court of Appeal in the case of **HANN VERSUS SINGH (1985) KLR 716** wherein it was held inter alia that **“ Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depend on the circumstances and the nature of the acts themselves....”**

When applied to the plaintiff's amended claim, it is clear that the plaintiff complied with this requirement as he has both pleaded and particularized his claim. The particulars are set out in paragraph 21 of the amended claim. They relate to **“loss of salary, loss of increase in earning, loss of leave allowance, loss of use of Annual club subscription, loss of benefits under the staff pension Fund, loss of benefits under the medical scheme. These losses are claimed as running from the 2<sup>nd</sup> day of February 2001 to first February 2014 being the date of termination up to the would have been date of normal retirement from the defendants service had the plaintiff employment with the defendant not terminated.”** In essence, the plaintiff is claiming what he would have earned from the defendant up to retirement age had his services not been brought to an abrupt end.

As to whether these are available to the plaintiff or not depends very much on the position in law. There being no dispute that the relationship between the plaintiff and the defendant was one of employee and employer and this court having ruled that the said relationship was brought to an end in accordance with its terms of engagement, and known principles of law, the plaintiff can only get that which is permitted by law, when such a relationship is brought to an end. Case law sampled on the subject shows that such a contract is not specifically performable. See the case of **CONSOLATA KIHARA AND 241 OTHERS VERSUS DIRECTOR KENYA TRYPAOSOMIASIS RESEARCH INSTITUTE (2003) KLR 232 and MUTHUURI VERSUS NATIONAL INDUSTRIAL CREDIT BANK LTD (2003) KLR 145** where it was held inter alia that ordering payment of the would have been future earnings will be tantamount to specifically ordering the defendants to retain the plaintiff in their employment whether they like it or not till he attains the would have been his retirement age in the year of 2014.

2. Having found that the defendant acted within the parameters of applicable principles of law in terminating the plaintiffs services by giving one months salary in lieu of notice as per the decision in the case of **GITAU VERSUS EAST AFRICAN POWER AND LIGHTING CO. LIMITED (SUPRA) IMENJE VERSUS KENYA NATIONAL CO. LIMITED (SUPRA)** among others that an employer or employee is at liberty to bring a contract of employment to an end without assigning reasons will be, ordering payment of the sums claimed will be tantamount to telling the defendant that their termination of

the plaintiffs' employment with them in the manner done was wrong thereby denying them a relief which this court has already given them. This could be nothing but giving a relief with one hand and then taking it away with another which cannot be allowed in law.

For the reasons given in the assessment, the court is inclined to dismiss the entire plaintiffs' claims as against the defendant for the following reasons:-

- (1) Although it is undisputed that the plaintiffs' employment with the defendant is one of being permanent and pensionable, it did not mean that it was to be, held in perpetuity. It was subject to termination by either side acting within the terms of the contract with or without assigning reasons.
  - (b) The defendant exercised this option by paying the plaintiff his employment dues and one month's salary in lieu of notice.
  - (c) The termination clause in the collective bargain agreement was not ousted by the plaintiffs assertion that content of the Human Resource Policy document was applicable as that is not the document imported into the contract of employment vide a letter dated 2<sup>nd</sup> April 1979 vide clause 3 thereof.
- (2) The defendant did not maliciously and without justifiable cause wrongfully direct and procure the Kenya police Anti Banking Fraud Unit to arrest the plaintiff because:-
  - (a) Particulars of malice and non justification were not particularized.
  - (b) The said Anti Banking Fraud police Unit was not brought on board for them to demonstrate through pleadings, submissions and or oral evidence that they did not act independently but were under the direction and control of the defendant in order for liability to attach to the defendant.
- (3) The holding in number 2 above operates to cover the none attaching of liability to the defendant with regard to the alleged unlawful imprisonment because it was necessary for the plaintiff to demonstrate that the defendant did move the Anti Banking Fraud Police Unit to carry out the arrest and determination as agents of the defendant and that they did not act independently.
- (4) The defendant's termination of the plaintiffs' services with them and the eventual dismissal from the employment of the defendant was not unlawful as the same had been brought to an end by giving one months salary in lieu of notice and the payment of the employment terminal dues in accordance with the terms of the collective Bargain agreement.
- (5) No general damages for wrongful arrest, false imprisonment, unlawful dismissal and unlawful subjection to a lie detector are payable to the plaintiff because:-
  - (a) Subjection of the plaintiff to the poly graph examination (lie detector, was voluntary as per the documentary proof exhibited whose content cannot be varied orally or by submission.
  - (b) Unlawful arrest and imprisonment can only arise if the Anti Banking Fraud police unit had participated in the proceedings and it had been demonstrated that they did not act independently but were under the direction and control of the defendant when dealing with the plaintiff which has not been demonstrated to be the correct position and also to prove that indeed they did arrest the plaintiff.
  - (c) It has not been demonstrated to show that the defendant did more than just reporting malpractices in the department then headed by the plaintiff.
  - (d) Case law on the subject clearly shows that the only damages available to an employee who alleges to have been wrongfully dismissed are those pertaining to the value of the notice of termination which would have been given, and any outstanding employment dues accrued and not paid to the employee. Herein the defendant displayed a document not challenged by the plaintiff to be untrue, showing that all the employment dues inclusive those from the pension Fund had been paid to the plaintiff by the

defendant.

(6) Special damages claimed by the plaintiff are not recoverable because they relate to what the plaintiff would have earned upto to the retirement age had his services not been terminated which damages as per case law assessed has shown that these are not usually available in such cases.

(b) Ordering their payment would amount to ordering the defendant to specifically perform the contract by retaining the plaintiff in their employment up to the retirement age whether they like it or not, a relief not available in employer employee contract relationships notwithstanding that the plaintiff complied with the rules with regard to the pleadings and particularization. It is the proof that such relief is claimable and awardable to a claimant which has not been proved.

(7) The defendant will have costs of the suit paid by the plaintiff.

(8) The delay in the drafting and delivery of this Judgment which was occasioned by a heavy workload is highly regretted.

**DATED, READ AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 2012.**

**R.N. NAMBUYE**  
**JUDGE OF APPEAL**