



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

Civil Case 230 of 2000

**PETER DENIS MBWALI.....1<sup>ST</sup> PLAINTIFF**

**JOHN KIPSIGEL KITUR.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA LITERATURE BEREAU.....DEFENDANT.**

**JUDGMENT**

The plaintiffs Peter Denis Mbwali and John Kipsigei Kitur approached the seat of justice vide a plaint dated 7<sup>th</sup> day of February, 2000 and filed in court on the 11<sup>th</sup> day of February, 2000. The plaint was brought against the defendant Kenya Literature Bureau. The averments in a summary form is that both plaintiffs were at the material time leading to the initiation of these proceedings employees of the defendant in various capacities under a contract of employment. While in the course of their employment, the defendant on diverse dates between September 1998 and November 1998 falsely and maliciously purported that the plaintiffs were responsible for the loss of books and cash within its bureaucracy consequent upon which the defendant interdicted the plaintiffs, reported them to police and caused their unlawful arrest, confinement and in the process prolonging the plaintiffs visits to the police station for interrogation and confinement. The police interrogations were determined on the 19/4/1999 when police determined that the plaintiffs had not committed the alleged offence and released them without charge. Instead of restoring the plaintiffs to their contractual positions, the defendant unlawfully summarily dismissed the plaintiffs with loss of their benefits. That the said dismissal was unreasonable, unlawful, malicious and in breach of the plaintiffs contract of employment with the defendant. That the plaintiffs were not afforded any hearing by the defendant as required by the rules, the plaintiffs appeal to the defendant received no response, and lastly the defendant refused to pay to the plaintiffs their salaries during the period of suspension.

In consequence of the unlawful dismissal afore said, the plaintiffs claim from the defendant their salaries, leave pay, salaries in lieu of termination notice, retirement/terminal benefits particularized as:-

**(a) First plaintiff from 1/11/1998 to 30/4/1999 at Kshs.20, 425 per month of Kshs.122, 550.**

**(b) 2<sup>nd</sup> plaintiff from 1/11/1998 to 30/4/1999 at Kshs.24, 540 per month making a total of Kshs.269, 790.00.**

In addition to the above, the plaintiffs also sought benefits and general damages afore said, costs, interest and any other relief that the court may deem fit to grant.

The defendants put in an eleven (11) paragraph defence conceding that indeed the plaintiffs were their employees, they were indeed summarily dismissed from the defendant's employment; summary dismissal was justified because investigations carried out by the defendant revealed existence of fraud and theft syndicate perpetrated by the sales office, cash office and the warehouse (issuing office) involving the falsifying of order notes, cash receipts and eventual issuance of products in excess of what had actually been paid for. It is the stand of the defendants that the plaintiffs were involved because the first plaintiff was at the sales order office while the 2<sup>nd</sup> plaintiff was at the warehouse as Assistant warehouse supervisor. The defence goes further to concede that indeed there were police involvements in the investigation but deny that the defendant influenced those investigations; but contend that the police investigation notwithstanding their own internal investigation revealed strong and overwhelming evidence of involvement or neglect by the plaintiffs which behaviour warranted a summary dismissal. The defendant concede that indeed police investigations did not lead to the plaintiffs being charged in court but their failure to charge the plaintiffs in court did not mean that the defendant's property was not lost. Lastly that the plaintiffs are not entitled to the reliefs being sought because the plaintiffs dismissal was justified as all contractual and rules of natural justice were followed as their suspension without pay is contractually provided for. The plaintiffs were given a chance to show cause why disciplinary or other action should not be taken against them and lastly they appeared before the disciplinary committee. In the premises defence they urged the court to dismiss the plaintiff's suit against them with costs.

The first plaintiff Denis Peter Mwbali gave evidence as (PW1). The sum total of his testimony is that he was indeed an employee of the defendant having been confirmed in employment on 10/6/1991 vide exhibit 1. Initially he had been employed as a distribution clerk whose duty was to remove books from the shelf and put them on the table, for verification before dispatch. From the warehouse PW1 was deployed in the sales office where his duties involved receiving of customers assist customers fill in the order forms, feed that data into the computer, print out the data and hand over to the customer to use the printed data to make payments in the cash office. He was not the in charge and he was answerable to the marketing manager.

PW1 went on to state that he is conversant with the events which led to the filing of these proceedings because on 17/11/1998 he was served with a letter of suspension on allegations of having been involved in the commission of fraud against the defendant his employer (exhibit 2). The letter of suspension invited him to show cause which he did vide his response exhibit 3. After filing his response he received another letter inviting him to appear before the disciplinary committee exhibit 4 and when he appeared before the disciplinary committee he was not allowed to defend himself. He was told he would defend himself before the police. They were handed to police on 4/2/1999. The police required him to be making daily attendances from 4/2/1999 till 23/4/1999 when they were told to stay home to await further communication. They were never called back either by the police or the defendant what he received next was a dismissal letter exhibit 5, 6.

When cross-examination PW1 responded that indeed he was an employee of the defendant, he was bound by the terms and obligations of his employment he complied with those terms, he received a letter of suspension on account of allegation of fraud; he denied involvement in any allegation of fraud, he appeared before the disciplinary committee to answer allegations of fraud but he was not allowed to defend himself; at no time did he appear before the disciplinary committee to answer allegations of carelessness and negligence, he had applied for and was granted a loan from his employer which had not been fully paid as at the time he was dismissed. He concedes he was obligated to pay the said loan but if he left prematurely then that responsibility fell onto the guarantors who were to pay the loan and then demand the amount from the plaintiff. PW1 was not aware that the amount owed to the Sacco had been reduced from his terminal benefits.

The second plaintiff John Kipsigei Kitur gave evidence as PW2. The sum total of his testimony is that him PW2 was an employee of the defendant effective 20/2/1990 and rose to the rank of Assistant sales and distribution officer effective 23/4/1998 as per exhibit 3. PW2 recalls that events leading to the proceedings were sparked off on 23/9/1998 when he was sent on compulsory leave on allegation that books worthy Kshs.484, 040.00 had gotten lost (Exhibit 4). The same letter served on him on 23/9/1998 exhibit 4, also demanded an explanation from him on how those losses arose which explanation PW2 did

vide exhibit 5. PW2 was thereafter interdicted vide exhibit 6 and then suspended vide exhibit 7. On 2/2/1999, PW2 received a letter requiring him to appear before the disciplinary committee on 4/2/1999 to answer the charges. It is PW2s' evidence that this was in error because as an officer whose rank falls in scale 8, he could only appear before K.L.B. board for disciplinary measures. The management committee simply told him that he would defend himself in the next forum. He was taken to Langata police station on 4/2/1999 and continued reporting on a daily basis till 24/4/1999 when he was told not to report further. Upon return to the defendant's premises, PW2 was served with a dismissal letter dated 19/4/99 to which he filed an appeal in respect of which he received no response (Exh.12). PW2 conceded he was paid some benefits but these were from staff contribution and not what the employer contributed which he is seeking from the employer.

When cross-examined, the 2<sup>nd</sup> plaintiff reiterated the evidence in chief that he was an employee of the defendant and continued in employment till he was sent on compulsory leave and then interdicted from his employment and while still on interdiction he received a letter of suspension and requested to show cause to which he replied. He confirms the sequence of events as those of PW1 to the effect that he appeared before the disciplinary committee erroneously as he was supposed to appear before the defendant's board. He maintained he gave no responses before the disciplinary committee of any knowledge concerning the theft of the employers' property. He conceded he was not paid some dues but not all. He has come to claim what he not paid. He concedes the regulation says that if he leaves the service on account of fraud or theft from the employer he does not get the employers contribution but denies responsibility for any fraud or theft of the employer's property.

The defence also tendered evidence. The first to take the stand was one James Kimani Muraya. He gave evidence at length but the aspect relating to these proceedings is that he was an employee of the defendant from 1987 to 2003. At the time of departure he was the marketing manager reporting directly to the managing director. It is his testimony that there were several sections under the marketing department dealing with promotion, sales section dealing with receipt of the orders, and the sales section dealing with the processing of the orders for cash payment or to the Director office if they were credit sales. Lastly the warehouse which was the distribution section. All these divisions had Heads. It is DW1's testimony that the marketing section was headed by a Senior representative and a senior marketing officer, the sales division by a sales and distribution officer while the warehouse was headed by the warehouse supervisor.

Turning to the plaintiffs, DW1 stated that at the material time the first plaintiff was an employee of the defendant working as a sales clerk whose duty was to receive orders either personally from the customers or through the phone and then process them for payment. DW1 is also aware that the 2<sup>nd</sup> plaintiff was an employee of the defendant who was working as an assistant warehouse supervisor whose duties entailed ensuring safe custody of the books and to issue to customers the books that had been paid for and the ones which were being issued on credit.

DW1 went on further to state that sales on cash basis would be released against a cash receipt, while those on credit would be issued against a credit order approved by the Managing Director.

As a routine, they used to carry out stock taking on a six month basis and later on a monthly basis. It is in the course of this stock taking that they noticed discrepancies in the records between what is supposed to be actual stock and stock sold. They suspected theft. This was confirmed by anonymous calls from customers informing the institution that there was a syndicate involving the defendant's staff whereby clients could pay for less books but then get more books.

DW1 reported these anonymous calls to the Managing Director. They carried out investigation by comparing records of books supplied out as against money received and they discovered a loss of over 2 million Kenya shillings. It is DW1s' evidence that the losses revolved around the sales office where the first plaintiff Mr. Mbwali was one of the officers, cash office where Mr. Mutuma was and the warehouse where Mr. Kitur was. DW1 questioned the officers concerned who denied any knowledge. The matter was handed over to the disciplinary committee made up of all the Heads of department, chaired by DW1. It was held on the 4/2/1999. It is DW1s assertion that the plaintiffs appeared before the said committee,

they were questioned and they denied any knowledge of the theft. The investigations arrived at the conclusion that all the officers questioned had knowledge of the syndicate. The disciplinary committee recommended to the Managing Director that the officers concerned be handed over to the police for further investigation. DW1 has knowledge that police recommended prosecution but the Managing Director did not want to go through the rigour of prosecution and opted to dismiss them instead.

When cross examined DW1 responded that the first plaintiff was a sales clerk, that there was more than one sales clerk where the first plaintiff worked. It is his assertion that the Audit was carried out by the Finance Manager. Confirmed that they were alerted about the theft by the anonymous callers. It is his testimony that the officers were not given specific questions to respond to but were each addressed verbally by the members of the committee. DW1 relies on the minutes of the disciplinary committee tendered in evidence to confirm what transpired on that date. Him DW1 confirmed that the matter was reported to the police who recommended prosecution but the Managing Director opted for dismissal. He was firm each of the plaintiff knew the type of charge, held against them.

DW2 Fredrick Oduor gave evidence in his capacity as the Human resource assistant. He was not involved in the events leading to these proceedings but gave evidence from the records of employment of the plaintiffs. With regard to the first plaintiffs DW2 stated that this plaintiff was dismissed with loss of benefits but the employer decided to pay him his contribution to the pension Fund less the employer's contribution. The amount due to the plaintiff also went to offset the plaintiff's indebtedness to the in house sacco society. DW2 also confirmed that the first plaintiff was not paid for the outstanding 8 days leave because he had been dismissed from his employment.

With regard to 2<sup>nd</sup> plaintiff Mr. Kitur, DW2 also gave evidence from the records DW1 confirmed PW2s evidence that from the record PW2 had been accused of theft of property, sent on compulsory leave, interdicted, suspended and later dismissed. They worked out his dues and paid him less the employer's contribution. DW2 confirmed that indeed the 2<sup>nd</sup> plaintiff wrote to them wanting to know how the amount paid to him had been worked out.

When cross-examined DW2 confirmed that his testimony is based on the records which went to show that the employee used to contribute 5% of his earnings to the terminal Fund while the employer paid 10% of the basic salary; that the surrender value was worked out by the insurance broker and the defendant was satisfied with the working done. To DW2, once an employee is dismissed with loss of benefits be cannot get the employers contribution.

DW3 was Paulino Ngatia Njau. The sum total of DW3s evidence is that between 1984 to 2009 he was in the employment of the defendant as an accountant. She was the finance manager from January 1999 to December, 1999. She confirmed the plaintiffs had been employees of the defendant but her DW3 does not know when or how they left the employment of the defendant. DW3 was conversant with the procedure of purchase of books within the defendant either by way of cash, cheque or by credit order, the process of books to be released upon verification of the correctness of the availing documents.

DW3 went on to state that he had knowledge that there was loss discovered by an audit to the tune of Kshs. 2million arising from discrepancy in the amount received as against the books released against that amount. The books were more than the amount received against the supply of books. Suspicion was raised and investigations were carried out in 1998 to April 1999 and they confirmed the loss. DW3 prepared the summaries which confirmed the losses. The documents used to prepare the summaries are exhibit D12A-J.

DW3 stated further that investigation continued and these led to disciplinary proceedings being undertaken against the persons named to have been involved. She recalled one staff a Mr. Mutuma gave a detailed account of how the syndicate was carried out and the staff members who were involved.

When cross-examined DW3 reiterated her evidence in chief and then added that she had knowledge the first plaintiffs used to key in information on the manual forms filled in by other staff members but he could also receive orders from customers where cash sales were involved. She reiterated

the evidence of DW1, that credit sales had to receive the blessing of the managing Director. When shown exhibit 12 the order forms, DW3 stated that she was not in a position to say who had signed those forms and who had not signed them.

On further cross-examination DW3 confirmed her presence during the disciplinary committee proceedings, that the plaintiffs denied involvement in the theft and syndicate but the management felt that they should be made accountable for the loss as confirmed by the letter from Mutuma.

At the close of the trial parties filed written skeleton submissions. Those of the plaintiffs were filed on the 24<sup>th</sup> day of February, 2010 and in them the following points were raised.

(i) There is no dispute that both plaintiffs were employees of the defendant whose employment was brought to an end when on divers dates between the month of September and November 1998 the defendant maliciously purported that the plaintiffs were involved in the loss of books and cash and caused them to appear before a disciplinary committee before which they were not even given a chance to explain themselves. The defendant then handed them to the police for investigation of theft by servant and fraud which investigations were completed whereby the plaintiffs were absolved of any blame but that notwithstanding the plaintiffs were interdicted suspended and then summarily dismissed for carelessness and negligence.

(ii) The plaintiffs contend that the afore said dismissal was unlawful because the plaintiffs were never given a hearing , their appeal was never responded to and they were not paid their benefits.

(iii) The plaintiffs are not to blame for any loss of books or cash because the first plaintiff Denis Peter Mbwali worked in a section where they were four (4) of them handling papers for orders and not books and cash. That the defendant arbitrarily picked d on him for dismissal without any justification. Whereas the second plaintiff was working as an assistant ware house supervisor answerable to the other officer. PW2 indeed was addressed about loss of books to the tune of Kshs.484, 040 in respect of which (PW2) gave an explanation that he knew nothing about the said losses.

(iv) Both plaintiffs appeared before the disciplinary committee whose members included DW1 Mr. Muraya the marketing manager and DW3 Pauline Ngatia the Finance manager who headed the departments where losses occurred and who should have been investigated themselves instead of punishing junior officers.

(v) The court is invited to note that the evidence on record demonstrates that the plaintiffs were interdicted, suspended made to appear before the disciplinary committee for alledgely being involved in fraud and theft involving the defendants books and money, allegations they denied and were not allowed to explain before the disciplinary committee.

(vi) Both plaintiffs were among the group of employees who were arrested and detained by police, interrogated for several days but were eventually found blameless and instead of being reinstated back into their employment they were allegedly summarily dismissed for carelessness and negligence in the performance of their duty.

(vii) They contend the said summary dismissal is unlawful because the same is in breach of the rules of natural justice because they were not given a chance to explain the allegations in respect of which they were summarily dismissed.

(viii) The second plaintiff contends that since he was on job group scale 8 his disciplinary action could only be taken by the defendants board and not the disciplinary committee comprising Heads of Department.

(ix) The court has been invited to believe the plaintiffs testimony because it is supported by documentary proof.

- (x) The court is also invited to disbelieve the defence evidence in so far as it purported to demonstrated that the plaintiffs were given a hearing before the disciplinary committee.
- (xi) The findings of the said committee to be discounted because they carried no weight and that is why the Managing Director and the police did not act on them.
- (xii) The court to find that DW3s admission that there was a weakness in the defendants system which led to the loss of books and money should be visited against the defendants management and not the junior officers.
- (xiii) The court is also invited to note that the report as well as the documents relied upon by the defendants to pin liability on to the plaintiff comprised documents executed by other officers besides the plaintiffs and for this reason it was improper for the defendant to use the findings in that report. Stretching as far back as 1997 to pin blame on to the plaintiffs.
- (xiv) The court is also invited to believe the plaintiffs assertion that the defence acted on an alleged incriminating letter written by one Mutuma purporting to incriminate the plaintiffs in the scam without the plaintiffs being given an opportunity to be heard on the contents of the said letter.
- (xv) On quantum, the court was urged to believe that since the plaintiffs were unlawfully dismissed they are entitled to their unpaid salaries, terminal benefits as worked out both in the plaint and submissions.
- (xvi) The court also to find that the plaintiffs are also entitled to general damages for unlawful detention arrest and harassment.

The submission of the defence were filed on the 24<sup>th</sup> day of March 2010.

- (i) The defence has invited the court to note that the following are not in dispute namely that both plaintiffs were employees of the defendant on different grades earning different salaries and joined the defendant at different times, that the defendant was in the business of publishing and selling books, the plaintiffs were engaged by the defendant in its business which entailed receiving of orders for purchase of books, issuing the books against a cash payment or on acknowledged credit documentation, the plaintiffs were members of a contributory pension scheme, run by a 3<sup>rd</sup> party with its own rules and regulations and lastly that the plaintiffs and others who are not parties to the suit were dismissed from the defendants employment.
- (ii) The only dispute that the court is called upon to determine is whether the plaintiffs are entitled to salaries not paid, any benefits General damages and costs. In response, the defence contends that neither relief is available to the plaintiffs because:-
- (a) The defendant complied with the terms of employment by paying the plaintiffs half salary while on suspension and none while on interdiction.
- (b) Contends that the plaintiffs are not entitled to payment for outstanding leave, notice period and the employers (defendants) part of the pension contribution because they left the employment on grounds of dismissal for gross misconduct , neglect of duty leading to loss of confidence with the defendants employer.
- (iii) The defendants is not liable to pay any General damages because it is not in breach of any of the contractual terms.
- (iv) Contends that the defendants' action to summarily dismiss the plaintiffs from its employment was lawful and justified because:-
- (a) The plaintiffs and others hatched an elaborate defrauding scheme which involved a whole chain from

the point of initiating an order through to raising of an invoice cash sale to verifying, issuance and dispatch thereby ensuring that the defendant did not receive the proceeds.

(b) The defrauding scheme has been elaborately explained by DW3.

(c) The plaintiffs were involved with the first plaintiff Peter Mbwali playing the role of an initiator while the 2<sup>nd</sup> plaintiff Mr. Kitur playing the role of the issuer of the books.

(d) It is not disputed that the defendant lost books worth Kshs.2million.

(v) Concede the matter was reported to the police but the defendant had no control over the police and their manner of conducting investigation.

(vi) On quantum that besides what was paid, the plaintiffs are not entitled to further payments from the defendant.

(vii) Lastly that the defence evidence demonstrates clearly that the plaintiffs have not established any claim against the defendant and for this reason the plaintiff's suit against the defendant should be dismissed with cost to the defendant.

On case law the plaintiffs' counsel referred the court to the case of **JOSEPH M. MUDAMBA VERSUS KENYA REVENUE AUTHORITY MILIMANI COMEMRCIAL COURTS CIVIL CASE NUMBER 1663 OF 1999** decided by T. Mbaluto J as he then was, decided on the 23<sup>rd</sup> day of March, 2001 in which the court had been called upon to determine the issue as to whether the plaintiffs dismissal was lawful and if not what was the measure of damages and benefits which were due to the plaintiff. In this cited case the court found the dismissal unlawful awarded order the plaintiff 3 months salary in lieu of notice less statutory deduction in addition to other benefits as if he had lawfully retired. The case of **PETER MWAU MWINI AND SEVEN OTHERS VERSUS TELCOM KENYA LIMITED MACHAKOS HCCC NO.111 OF 1996** decided by Mwera J on the 18<sup>th</sup> day of June, 2003 in which the plaintiffs challenged unlawful dismissal. The court found the plaintiffs contention un contested and allowed payment of one months salary in lieu of notice in addition to other benefits payable to employees on normal termination.

In addition to the afore set out high court decisions, the court of appeal has also crystallized the position in law in this area and for purpose of enriching the jurisprudence only, this court seeks to draw inspiration from the case of **GITAU VERSUS EAST AFRICAN POWER AND LIGHTING CO. LIMITED (1986) KLR 365** where in it was held that “**wrongful dismissal cannot arise where the same is carried out in accordance with the terms of the contract**” the case of **WANJOHI VERSUS MITCHELI COTTS KENYA LTD HCCC NO.862 OF 1995** wherein it was held 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 upon by both sides**” the case of **RIFT VALLEY TEXTILES LIMITED VERSUS EDWARD ONYANGO OGANDA NAKURU CA. NO. 27 OF 1992** where in the court of appeal ruled that:-

**“Rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided for them in the contract of employment that such rules had to apply. Further that where a notice period is provided in the contract of employment 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. Likewise if the employee were to leave the employment for a better job he need not give reason 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**”

As for payment of general damages on dismissal, there is the case of **CHASE VERSUS BARCLAYS BANK OF KENYA LIMITED (1990) KLR 595** in which Ringera J as he then was ruled that **permanent employment does not necessarily mean employment for life or until retirement....**"; the case of **KENYA PORTS AUTHORITY VERSUS EDWARD OTIENO MOMBASA CA 120/87 (UR)** where citing with approval the decision in **ADDIS VERSUS GRAMOPHONE COMPANY (1909) A.C. 488** held that:-

**“where a servant is wrongfully dismissed from his employment the damages for dismissal cannot include damages for the manner of the dismissal or for his injured feelings or for the loss he may sustain from the fact that the dismissal may make it more difficult for him to obtain fresh employment”**

This court has given due consideration to the rival pleadings, evidence tendered by both sides, rival submissions, principles of case law cited by the plaintiff and that sourced by the court on its own and the court proceeds to make the following factual findings on the dispute:-

1. It is common ground and admitted by both sides that indeed the plaintiffs were employees of the defendant. They had been variously hired with the first plaintiff D.P. Mbwali not availing the first letter of appointment when employed but he has tendered in evidence a letter of confirmation dated June 10,1991. The confirmation was effective 7<sup>th</sup> June, 1991 with a call from the employer that the employer hoped he would abide by the terms of employment. The letter was produced as plaintiffs exhibit 1 likewise the 2<sup>nd</sup> plaintiffs John Kipsigei Kitur produced a letter of appointment dated 20<sup>th</sup> February 1990, indicating that he had been effected in the defendants service effective 20<sup>th</sup> February, 1991 exhibit1. He was subsequently confirmed in his employment vide a letter dated June 10,1991 effective 7<sup>th</sup> June,1991 exhibit 2 and then subsequently promoted to the position of Assistant sales and Distribution officer effective 1<sup>st</sup> April 1998 vide a letter of promotion dated 23<sup>rd</sup> April,1998 exhibit 3.

2. The two plaintiffs confirmed being so engaged until 17<sup>th</sup> November when the first plaintiff Denis P. Mbwali PW1 received a letter of suspension exhibit 2. A reading of the content reveals that the employer was alleging that between 20<sup>th</sup> February 1998 to 5<sup>th</sup> June 1998 PW1 ordered by virtue of his position as sale clerk books worth Kshs.2, 042,044.00 purportedly being orders from various customers that it had transpired that most of the said customers were fictitious and PW1 ultimate goal was to defraud the Bureau. PW1 was reminded that theft by servant was a very serious offence which could lead to severe disciplinary action being taken against him. In the same communication, the first plaintiff was invited to show course by 23<sup>rd</sup> November, 1998 why disciplinary action should not be taken against him with a caveat that he should keep off the employer’s premises and he would be without salary at the same time. PW1 responded vide letter exhibit 3 dated 21<sup>st</sup> November, 1998. In a summary PW1 stressed that his work entails receiving orders and processing them and then these are paid for to various persons in the cash office and for this reason, he had no chance of handling cash. Likewise since his duties do not entail handling books in the ware house, there is no way he could have assisted in the release of the books at the said ware house. That since customers fill in the order forms, there was no way he could have created fictitious customers. Maintains that he is innocent and investigation will prove his innocence.

(c) For Mr. John K. Kitur his journey of exit from his employment starts with the issuance to him of the letter dated 23<sup>rd</sup> September, 1998. The title of the letter reads:

“Theft of KLB publications” The central theme in the correspondence is that it had come to the notice of the defendant that between 15<sup>th</sup> July and 28<sup>th</sup> August 1998 Kiswahili books worth Kshs.484, 040.00 under the jurisdiction of the plaintiff as supervisor were stolen from the Bureaus premises in circumstances where no locks were broken and for this reason the 2<sup>nd</sup> plaintiff was asked to give an explanation how such a big consignment can be stolen without the plaintiffs’ knowledge. Added that independent investigation were going on and for that reason the plaintiff was to be sent on compulsory leave with immediate effect with a caveat that the plaintiffs presence at the institution could only be allowed with the sanction of the Managing Director. The second plaintiff (PW2) responded to exhibit 4

vide his letter dated the 5<sup>th</sup> day of October 1998 exhibit 5 to the effect that indeed they had packed Swahili books of standard 1-4 in 12 cartons and later on when he checked he noticed some changes. To him the person who gained access must have used either duplicate keys or master keys. That explanation earned the 2<sup>nd</sup> plaintiff a letter of interdiction vide a letter dated 17<sup>th</sup> day of November, 1998 exhibit 6. In it there is mention that there are additional information which had been uncovered.

3. Next came the suspension letter exhibit 4 for the first plaintiff dated 01/02/1999. The second plaintiff received two letters of suspension one dated 28/01/1999 exhibit 7 and another one exhibit 8 dated 02/02/999. Both mentioned that there was additional information concerning the losses suffered by the institution to the effect that both were required to appear before the disciplinary committee on 4<sup>th</sup> February 1999.

4. It is common ground for both sides that indeed both plaintiffs appeared before the disciplinary committee on the appointed date. The plaintiffs allege that they were not given a chance to explain anything. DW1 Muraya was in fact the chairman. His testimony as supported by that of DW3 went to confirm that the plaintiffs and others were given a chance of being heard. Reliance has been placed on the minutes of the alleged meeting exhibit D1. A perusal of the content of the said minutes reveals that one staff namely F.K. Mutuma had written a letter confessing to the fraud and named the plaintiffs as having been part of the fraudulent syndicate. There is mention that the first plaintiff had totally denied any knowledge of the existence of the syndicate thereby confirming the content of PW1 response to the defendant's letter to him to show course. Where as in the case of the 2<sup>nd</sup> plaintiff Mr. Kitur, he denied knowledge of the existence of the syndicate nor knowledge of existence of any discrepancy on issue notes versus cash sales. Regarding theft of the books through the garage he acknowledged having packed books in cartons and thereafter noticed that some were missing. It was alleged that him and one Ojwang had the keys. They suspected the askaris. There is mention that one Mr. Ojwang and Macenya were not interviewed as they were beyond the disciplinary jurisdiction of the disciplinary committee. It is evident that there is no mention that these officers were confronted with any documentary records confirming their participation in the syndicate.

5. It is common ground that indeed the disciplinary committee made findings vide it min3/99. These read:-

**“Min3/99 Findings upon deliberation. The committee was left with no shadow of doubt that M/S Mutuma, Ojwang and Kitur were deeply involved in the syndicate. Although Mbwali denied knowledge, he was also party to the syndicate infact clearly implicated by Mr. Mutuma. M/S Mutua and Mulu although denying knowledge were also thought to be the conduit for the delivery of parcels left behind for collection after work.**

### **RECOMMENDATION**

**“The committee was convinced that it was in the interests of the organization for these individual to be made accountable for their wrong doings. The case should therefore be handed over to the police for further investigations”**

6. As observed earlier on, there is no mention that the committee gave the plaintiffs the letter of Mutuma to have their views on the said content. There is no mention that records were used in the interview; one Ojwang who is said to have been in possession of the keys with PW2 was condemned and yet he had not been interviewed. The evidence used to find the employee's culpable was not disclosed.

7. The disciplinary committee had indeed recommended police action. It is common ground on both sides that indeed the matter was handed to the police for investigation. PW1 and 2 confirm so and they produced their attendance sheets exhibit 5 and 9. They all show that police were carrying out investigations into the offence of theft by servant contrary to section 281 of the penal code. Entries made on both sheets indicate that indeed the plaintiffs attended the police station as from 9/2/1999 upto 23/4/999.

8. The attendances gave rise to the content of a communication from Divisional C.I.D. Head quarters Langata ref.CID/sec/4/4/Vol/11/16 dated 31<sup>st</sup> March, 1999. The contents read:-

**“The Managing Director Kenya Literature Bureau**

**P.O. BOX.30022**

**NAIROBI**

**RE: THEFT BY SERVANTS.**

**Suspects:-**

1. **Silvanus Ojwang**
2. **John Kitur**
3. **Moses Mutua**
4. **Joseph Malenya**
5. **Erustus Mulu**
6. **Denis Peter Mbwali**
7. **Fredrick Mutuma**

**I am writing in respect of the above matter details whereby you are fully aware.**

**Following your report; this office instituted investigations and we are of the view that all the above suspects be arraigned before court to be dealt with appropriately.**

**The investigating officer however intimated to me that it is your wish to have the matter settled out of court.**

**Please advise us on your official’s position so that we may update our records.**

**Thanks**

**Mohamed 1. Amin**

**Division C.I.D. Officer**

**Langata”**

The content of exhibit D3 indicate clearly that police had recommended prosecution in order to un earn the truth.

9. The defendants response to exhibit D3 was not exhibited. But it is clear that there is in place dismissal letters addressed to the plaintiffs separately, both dated 19/04/1999. In respect to the first plaintiff D.P. Mbwali the letter ref.KLB/13/K/547/conf(2) it reads in part:-

**“After investigations and careful consideration of your case, it was noted with regrets that being a sales clerk in the Bureau you carelessly performed your work which from the nature it was your duty to perform carefully and properly leading to the loss of Kshs.2,024,979.25. The management has as a result lost confidence in you as an employee of the Bureau.**

**In view of the fore going it has therefore been decided that you be dismissed from service with loss of all benefits with effect from 17/11/1998. Your final dues if any will be paid in accordance with the Bureau terms and conditions of service”**

(b) Whereas that of J.K. Kitur ref.No.KLR/13/K/548/conf(13) read in part:-

**“After investigation and careful consideration of your case, it was noted with regrets that in addition to the loss of books worth Kshs.484, 040.00 of which we hold you responsible, you also carelessly performed your work which from the nature it was your duty to perform carefully and properly by failing to properly reconcile the issue notes together with cash sales receipts before issuing books to customers. This led to a loss of Kshs.2, 024, 96.925 between 20/2/98 and 5/6/98. In view of the foregoing, the management has lost confidence in you as its employee. It has therefore been decided that you be dismissed from service with loss of all benefits with effect from 28/1/1999. Your final dues if any will be paid in accordance with the Bureaus terms and conditions of service.”**

10.A construction of the content of both correspondences reveals that the body which carried out the investigation to reveal the loss of books worth the amount stated has not been disclosed. At least it is not the disciplinary committee vide exhibit D1 as it does not say so. And certainly not the police exhibit D3 as all that the police did was to recommend a prosecution probably to establish the loss.

(ii) There is no mention of the nature of the evidence used by the defendants to establish that there had been a loss of the amount mentioned.

(iii) Neither is there mention that the plaintiffs had been confronted with that evidence and given an opportunity of being heard on the same.

(iv) It is evident that the earlier accusations of theft which led to the plaintiffs being taken to the police station for investigation had been dropped and new accusation of careless and negligent performance of duty preferred. But there is no mention that these fresh accusations had been brought to the plaintiffs' attention and responded to.

(v) There is no mention as to why the defendant's management opted out of the prosecution recommended by police and in favour of the internal disciplinary action.

11.To fortify their case, the defendants have relied on the Audited accounts late June 1997, June 1999 and entries in exhibit 12(a-J). This court has perused the said Audited accounts and it has found that the specific losses of 2,024,979.25 mentioned in the dismissal letters have not been reflected. If anything profits were noted. Profits/losses were recorded against the canteen which the plaintiffs had no issues with. At least it was not the areas mentioned in the correspondences assessed that the canteens was one of the areas where the plaintiffs carried out operations.

(ii) No explanation was given as to why the Audited accounts of June, 1998 were not availed.

(iii)The schedules made in exhibit 12 (A-J) do not assist much as the sales orders have no dates. The schedule is alleged to have been for the month of April 1999 but this is not indicated in the sheets heading.

(iv) DW3 while scheming through the said schedules pointed out transactions allegedly attributable to the plaintiffs but these are not backed up by documents under the hand of the plaintiffs.

12.There is reliance on the staff pension and life Assurance scheme produced as exhibit 14. The relevant clauses are clause 9 stipulating how a beneficiaries benefits are calculated and clause 14(a) and (b) and 15 which deal with prescriptions on what happens if a contributor leaves the company employment before the retirement age. Clause 14(b) reads:-

**“If you leave before retirement, you may do one of the two things:-**

**(a) You may leave the contribution with the insurers and receive at normal retirement age the amount of pension purchased by the contributions you have made up to your date of leaving the company.**

**(b) You may take the cash surrender value of the benefits in respect of the contribution you have paid up to the date of leaving the company. The cash surrender value will be calculated as a refund of all the contribution paid together with compound interest at 8% per annum.**

**“15 Am I entitled to any part of the company’s benefits? Provided you are not leaving because of fraud or misconduct where you are entitled to the benefit of the company contribution you can elect to receive them in the same manner as the option selected in respect of your own benefits”**

13. There is also reliance on the terms and conditions of service for the Kenya literature Bureau clause 5 prescriptions deals with rules of conduct of the contracting party clause 5.1.1, 5.1.2. and 5.1.3 enjoins employees to owe total loyalty and have the best interests of the institution at heart, in the discharge of their functions both within and outside the institution in so far as the business of the institution is concerned.

(b) Clause 6 makes prescriptions on disciplinary measures.

Scheming through the prescriptions reveals that under clause 6.2.1. dismissal is one of the disciplinary measures that the defendants Managing Director may impose with a caveat that the same is subject to the prescriptions in clause 6.2.2., which provides clearly that disciplinary measures against officers in job group 8 and above is vested in the board. Clause 6.2.3. donates to the Managing Director the power to interdict and suspend if the Managing Director is satisfied that it is in the interests of the Bureau that the employee should cease forth with the exercise of the powers and functions of his post provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him. Where such an action is being anticipated against officers in job group 7 and above, the matter has to be reported to the board for action. Clause 6.3.3. makes provision that where the managing Director considers it necessary to institute disciplinary proceedings against an employee he shall forward to the employee a statement of the allegations on which each charge is based and then invite a response for grounds of exculpation. Vide clause 6.3.2. an employee to whom disciplinary proceedings are to be held shall be entitled to receive a free copy of any documentation evidence relied on for the purposes of proceedings or to have access to it. To be excluded are office orders, minutes, reports or recorded reasons for the decision.

(b) Summary dismissal is provided for in clause 6.4.1. That which is relevant to these proceedings are 6.4.1.(c).

**“The Managing Director/the board may summarily dismiss an employee**

**(c) If an employee willfully neglects to perform any work which it was his duty to have performed or if he carelessly and improperly performs any work which from its nature it was his duty to have performed carefully and properly.**

**(g) If an employee commits or on reasonable and sufficient grounds is suspected of having committed any criminal offence against or to the substantial detriment of the Bureau or the bureaus property.**

**(h) If an employee is dishonest or commits such an act of misconduct as to prejudice the standing of the Bureau.**

**(i) If an employee misappropriates the Bureaus funds”**

When disciplinary action was first taken by the defendants management it fell under clause 6.4.1 (g). The second disciplinary action appears to have been taken under clause 6.4.1(c). Vide clause 6.4.2 an employee who was summarily dismissed shall receive salary and other remuneration benefits due and up to the date of dismissal less any money owing by him to the Bureau. He will however forfeit any non contribution, superannuation benefits which would have been due if he had left in normal circumstances entitling him to the benefits.

14. There is provision for appeals against actions taken on disciplinary grounds, vide clauses 6.5.1 and 6.5.2 whereby the Board is mandated to appoint a committee to act as an appeals committee on disciplinary matters and the employee shall have a right of appeal to the committee established under sub paragraph 6.5.1. above.

It is common ground that the plaintiffs moved to exercise their right of appeal under these clauses following their dismissal from the plaintiffs' establishment when they moved to exercise their right of appeal under the terms and conditions of employment vide a letter dated 6<sup>th</sup> May, 1999 exhibit 7 in the case of the first plaintiff D.P. Mbwali and vide a letter dated 23<sup>rd</sup> June, 1999 from the plaintiffs counsel on account of both plaintiffs and a 3<sup>rd</sup> employee not party to these proceedings. The defence appears not to have responded to the said communication.

15. It is common ground that the defendant moved to purport to pay the plaintiffs and others not party to these proceedings what the establishment believed was due to the employees. DW2 who gave evidence from the records stated that they sought assistance from an insurance broker who had been charged with brokering the insurance retirement scheme for the defendant's employees. These workings have been shown on exhibit D4(a) and 4(b) DW2 used the same to work out the benefits allegedly due to the first plaintiff D.P. Mbwali and which were used to offset this plaintiffs indebtedness to Kalibu Sacco Society limited exhibit D5,6,7,8(a) (b). exhibit D7 is the application form, D6 shows the workings of the amount of loan applied for, the amount of shares held by the first plaintiff, the outstanding loan which showed a balance of Kshs.58,672.00, the amount allegedly due to the first plaintiff of Kshs.12,679.65 as per exhibit D5 and 14,301.00 as per exhibit D6 which all went to off set the Sacco loan. Whereas the workings for the 2<sup>nd</sup> plaintiff Kitur were done vide exhibit D9 and 10 one showing Kshs.25,225.00 of 16.6.99, Kshs.20,819.25 of 23/2/2000.

16. It is common ground that the second plaintiff Mr. Kitur raised question on how the surrender value was worked out vide his letter exhibit D11 dated 4<sup>th</sup> August, 1999 which appears not to have been responded to.

This court has given due consideration to the afore set out undisputed back ground information and in its opinion, the key question for consideration by this court is whether on the basis of the facts assessed herein, the plaintiffs are entitled to their plea of unlawful dismissal or whether the defendants action of summary dismissal of the plaintiffs from their employment with the defendant was justified as claimed by the defendants. In doing so the court has taken note of the totality of the pleadings filed by both sides, the evidenced adduced by witnesses filed by both sides, submissions of both sides, the courts findings on the undisputed factual position of the facts common to both sides as assessed above. Upon doing so the court has arrived at the conclusion that the plaintiffs' summary dismissal from the defendant's employment by the defendant was unlawful. The reasons for saying so are as follows:-

(1) It has been admitted by both sides that it is undisputed that the plaintiffs were employees of the defendants, variously employed and were serving as such as at the time the events leading to their contested summary dismissal were set in motion. The undisputed facts as established by the assessment are that the defendants lost books worth over 2 million shillings. Theft by servant was suspected and the establishment decided to set in motion disciplinary measures. The moment disciplinary measures were contemplated the defendant was obligated to call to the fore the provisions of clause 6.2.1 which was subject to clause 6.2.2. in that they were obligated to categorize the plaintiffs into category of those falling under the disciplinary mandate of the disciplinary committee comprising the departmental heads and the one falling under the disciplinary mandate of the board.

(2) The first plaintiff D.P. Mbwali (PW1) has not contested the jurisdiction of the disciplinary committee. But the second plaintiff Kitur PW2 has contested the jurisdiction of the disciplinary committee over him arguing that he fell into the category of job group 8 and for this reason disciplinary measures over him could only be undertaken by the board. The defence did not contest this assertion and this being the case it follows that all the disciplinary measures undertaken by the defendant against the 2<sup>nd</sup> plaintiff Mr. Kitur are null and void. This nullity runs through the entire disciplinary process leading to summary dismissal

and in the process faulting it totally. It follows that the 2<sup>nd</sup> plaintiffs' appearance before the disciplinary committee on 4/2/999 is null and void and of no consequence.

(3) As for the disciplinary procedure against the first plaintiff D.P. Mbwali, the same stands faulted because:-

(i) Clause 6.3.2 was not complied with as he was not confronted with evidence against him namely the documents from which the information forming exhibit D12 (a-J) was extracted and also the incriminating letter written by Mutuma.

(ii) Even if it were to be taken by this court that the suspension letter formed the basis of charges under clause 6.3.2. These were not accompanied by a statement of facts relied upon by the defendant.

(iii) The first plaintiff PW1 gave in an explanation exhibit 3 on the loss of books. The managing Director made an election under clause 6.3.4 on the recommendation of the disciplinary committee vide their minutes exhibit D1 and decided on the disciplinary punishment against this officer which was to the effect that the matter be reported to police.

(iv) Indeed a report was made to the police and PW1 complied vide exhibit 5 and the police recommended prosecution vide exhibit D3. The defendant had no alternative but to fruitfully that recommendation. It means that any departure from the recommendation where by the managing Director thought of any other alternative then they had to start the process all over again.

(v) The dismissal letter exhibit 6 talked of dismissal on the ground of careless performance of duty. There is no mention that the careless performance of duty stems from the previous charges of theft of books leading to the initiation of police investigations into the offence of theft by servant. For this reason the court finds that the offences of careless and negligence performance of duty were new charges and in order to be relied upon to found a summary dismissal the defendants management ought to have complied with the requirements in clauses 6.3.2,6.3.3. and 6.3.4 of framing the charges, bringing the charges to the attention of the plaintiff together with the evidence relied upon to support the charges, inviting a response from this plaintiff and upon receipt of the responsee give an opportunity to appear before the disciplinary committee, make representation before appropriate action is taken against him.

(vi) There was no compliance with clauses 6.5.1 and 6.5.2 on appeal after receipt of communication on the dismissal vide exhibit 6. This plaintiff filed an appeal exhibit 7 fortified by the letter of intention to sue exhibit 9. There is nothing to show that these appeals were ever heard as there is nothing to show that the defendants management formed a committee to hear them in accordance with the regulation.

(4) In the alternative to number 2 above, should the court be wrong in holding that the disciplinary measures undertaken against the second plaintiff J. Kitur (PW2) stood faulted on account of him PW2 falling in to the category of officers in job group 7 and above falling under the Board of Directors as the disciplining body on account of PW2s letter of promotion dated 23<sup>rd</sup> April,1998 exhibit 3. being silent on the job group promoted to, the court adopts the reasoning for faulting the summary dismissal of the first plaintiff PW1 in number3 above and adopts the same arguments to operate for the 2<sup>nd</sup> plaintiff herein in that he was not confronted with the evidence in support of the charges contained in the letter of interdiction, suspension exhibit 6, 7 and 8.

(ii) The offences alleged to have been committed was theft of books leading into the matter being reported to the police which reporting gave rise to the police investigation evidenced by attendance in exhibit 9 culminating in the police recommendation for prosecution vide exhibit D3.

(iii) It on the record that the defendants management opted out of the recommended prosecution and instead opted for dismissal on account of careless and negligence performance of duty vide exhibit 10 which was a new offence which required the defendants to restart the entire process while at the same time ensuring that there is compliance with the afore mentioned regulations.

(iv) The plaintiffs appealed against the dismissal letter exhibit 10 vide exhibit 11. The defendant ought to have constituted a committee to hear that appeal which they never did and they therefore contravened the regulation on appeal.

(5) The plaintiffs pleaded breach of principles of natural justice in that they were not heard. The court of appeal stated in the case of **RIFT VALLEY TEXTILE LIMITED VERSUS EDWARD ONYANGO OGANDA (SUPRA)** that principles of natural justice can only be invoked in case of breach if it can be demonstrated that these had been incorporated in the contract of employment. Applying this to the rival arguments herein, this court is satisfied that principles of natural justice had been incorporated in the terms and conditions of employment governing the contractual relationship of the disputants herein as assessed with regard to exhibit 9. These are embedded in the requirement that in the course of disciplinary measures being taken against an employee the employee should be confronted with the accusation backed up by evidence in support of those accusations and even after being processed through the disciplinary procedures and found unsuitable to continue working as an employee, there are appeal procedures available. In the circumstances of this case, this court has already found that although the disciplinary procedures were initiated against the plaintiffs certain procedural steps as pointed out were not followed thereby rendering the entire process totally defective. The fatality of the disciplinary process results in the defendant's determination of the plaintiffs' tour with them into one of normal termination with payments of full benefits accrued.

### **ASSESSMENT OF DAMAGES**

On the basis of the finding that the plaintiffs dismissal from their employment was unlawful and that the same is converted into a normal termination with full benefits the court proceeds to assess damages. The damages claimed are under two heads namely general and special damages. General damages are for the unlawful reporting of the plaintiffs on allegation of theft, the undergoing of interrogation over several days, detention and harassment during the interrogation. The reporting of the matter to the police has not been denied by the defendants. The defendant has sought to absolve itself of any blame by alleging that they have no control over the police and the way the police conducted their investigation or how they did it. No case law was cited to court but the court on its own wishes to draw inspiration from the case of **KARIUKI VERSUS EAST AFRICA INDUSTRIES LIMITED AND ANOTHER (1986) KLR 383** wherein the instigators of the plaintiffs prosecution was held liable in damages. The case of **EY BEMA VERSUS WEST NILE DISTRICT ADMINISTRATION (1972) EA 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 it was instigated by the defendant, the case of **SEKADDU VERSUS SSEBADDUKA (1968) EA 213** where it was held inter alia that:-

**“Once the detention or imprisonment is established the only shift to the defendant to show that it was reasonably justified “and lastly the case of: KASANA PRODUCE STORE VERSUS KATO 91973) EA 190 where it was held inter alia that an action for false imprisonment lies where there has been an imprisonment without an order of a court.**

Applying the afore set out guiding principles to the rival arguments herein, there has been demonstration that the defendant laid claims of loss of books worth over two million shillings against their junior employees among them the plaintiffs, they were called upon to respond to those claims. They responded. The defendant was not satisfied with those responses. The defendant was convinced that a criminal offence had been committed and reported to the police. Police carried out investigation and recommended a prosecution in order to establish the blame worthiness of the plaintiffs. The defence without assigning any reasons opted not to proceed with the prosecution. The plaintiffs' counsel has termed this about turn on the part of the defendants, a move to sacrifice the junior officers in order to save

those in the management and the court agrees with that submission. The plaintiffs have established a case against the defendants for instigation of their arrest and detention and harassment over the days they were undergoing interrogation and they are entitled to damages.

On assessment of general damages, the court takes judicial notice of the guiding principles in numerous case law that the court has judicial notice of namely:-

- (i) Assessment of damages at large is a matter of the courts' discretion which discretion has to be exercised judiciously and with a reason.
- (ii) These should not be inordinately too high or too low.
- (iii) They should be commensurate to the injury suffered and not to enrich a party.

Bearing all these in mind and doing the best it can, the court awards Kshs.250, 000.00 as general damages for each of the plaintiff for instigation of the unlawful arrest and harassment during the interrogation.

As for special damages the guiding principles on their assessment is that these have to be specifically pleaded, particularized and then strictly proved. See the case of **OUMA VERSUS NAIORBI CITY COUNCIL (1976) KLR 297** wherein the court drew inspiration from the decision in the case of **RAT CIFFE VERSUS EVANS (1892) 2QB54** wherein Bowen L.J had this to say:-

**“ The character of the acts themselves which produce the damage and the circumstances which these acts are done, must regulate the degree 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 in pleading and proof of damages having regard to the circumstances...”**

See also the case of **HANN VERSUS SINGH (1985) KLR 716** where in the court of Appeal crystallized the principle into one of:-

**“Special damages must not only be 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.**

Applying that to the rival arguments herein the court is satisfied that the pleading is proper. Proof is by way of production of exhibit 4 governing the staff pension scheme reliance on the evidence of DW2 that the plaintiff benefits were worked out using the said provision save that the contributions of the employer had been withheld in accordance with the terms and conditions of employment exhibit 9 on account of gross misconduct which action this court has found unlawful. Upon finding the action unlawful there is no other basis upon which the defendant can withhold those benefits from the plaintiffs.

The defendants produced the payment voucher through DW2. With regard to the first plaintiff D.P. Mbwali the pay slips was not produced but the vouchers show how much he was earning as at the time of departure. The voucher exhibit D8 (a) (b) and D5 show that PW1 benefited from 2 assessments one from KNAC(Kenya National Assurance Company Limited of Kshs.12,679.65 and another from Kshs.14,301.00 . Total Kshs.26, 980.65. It is on record that this figure did not reach PW1 because he owed money to Kelibu Sacco which had not been paid off as at the time of termination as confirmed by the content of exhibit D6 and 7 a matter admitted by PW1. PW1 attempted to say that this was a matter between him and the guarantors but does not deny that the said amount was outstanding and payable and that he would have paid the same to the guarantors if it had been recovered from the guarantors. The court appreciates that the proper procedure should have been to follow the guarantors but no harm was caused by unilaterally turning to the benefits payable to the plaintiff since the regulations PW1 has turned to benefit him state clearly that “payments of terminal dues has to take account of any money owed by the employee to the establishment and which has to be recovered from such terminal benefits. The court will therefore approve that reduction. When Kshs.26, 989.65 is reduced from Kshs.58, 072.00 it leaves a balance of Kshs.31, 091.35 outstanding to be deducted from the amount found due and payable to the first

plaintiff D.P. Mbwali.

As for the second plaintiff Joseph Kitur PW2, reliance is placed on the payment voucher also produced through DW2 of exhibit D9 of Kshs.20,819.25 from KNAC (Kenya National Assurance Company) and exhibit D10 of Kshs.25,225.00 from a total of Kshs.46,047.25. It is on record that PW2 questioned the workings vide exhibit D11 dated 4<sup>th</sup> day of August 1999 and the defendant responded vide exhibit 13(b)

It is common ground that the workings above were on the content of exhibit 14 the literature on staff pension and life Assurance scheme which the defendant does not dispute. They do not also dispute the workings as pleaded and as demonstrated in the submission. Their quarrel was that these were not payable on account of the summary dismissal. It means that once the summary dismissal is faulted as it has been done, then there is nothing to prevent the plaintiffs from getting the amount claimed which the court allows at Kshs.122, 550.00 for D.P. Mbwali less amount owed to Kelibu Sacco still outstanding of Kshs.31,091.35 leaving a balance of Kshs.91,458.65.

As for Kitur PW2, the court allows KSHS.147, 240.00 less amount already paid of Kshs.46, 047.25 leaving a balance of KSHS.101, 192.25 payable.

For the reasons given in the assessment the court proceeds to make the following final orders.

(1) An order be and is hereby made and ordered that the defendants summary dismissal of the plaintiffs from its employment is unlawful because the defendant did not comply with the provisions of clause 6 of the terms and condition of service for the Kenya literature Bureau exhibit because:-

(a) The second plaintiff John Kipsigel Kitur said that he was in job group 8 by virtue of which his disciplinary action could only be undertaken by the board a matter not controverted by the defendant. It therefore means that all the disciplinary measures purportedly undertaken by the defendant against this plaintiff are null and void.

(b) In the alternative and should this court be in the wrong because the letter of promotion does not specify the job group promoted to and in the processing making him second plaintiff and the first plaintiff D.P. Mbwali falling into the same category and are liable to be disciplined by the disciplinary committee then the process leading to their suspension does not hold because they were not confronted with evidence relied upon by the defendant to prove loss of books worth over Kshs.2 million.

(c) The Audited accounts for June, 1997 and June 1999 produced in evidence do not reveal losses of over Kshs.2 million.

(d) Audited accounts for June, 1998, the period when the losses were allegedly discovered were not produced and no explanation was given as to why these were not produced.

(e) Exhibit 12(a)-J relied upon by the defendants to prove the 2 million loss does not show the dates of the orders assessed and who handled them. Secondly the information was prepared after the plaintiffs had been dismissed and for this reason the plaintiffs had no chance of being given an opportunity to comment on them.

(f) Following suspension from duty, the plaintiff were handed to the police for investigation into the offence of theft by servant resulting in a recommendation that prosecution be undertaken. The defendants management backed out of the prosecution option without any justification and for this reason the court agrees with the submissions of the plaintiffs counsel that the action was taken to punish the junior officers at the expense of saving the management staff who may have been involved in the occasioning of the losses if any.

(g) Having opted to discipline the plaintiffs on account of theft by servant and having opted not to go a head with the prosecution on that account, and having decided to dismiss the plaintiffs from their

establishment. Instead, then the defendants could only have dismissed the plaintiffs from their employment on account of the allegation of theft by servant. The moment they changed to accusation of careless and negligent performance of duty the defendant was obligated to restart the process of laying the charges, confronting the plaintiffs with those charges together with the evidence supporting them, receive the plaintiffs' responses, afford them a hearing before the disciplinary committee and then take disciplinary action.

(h) Even after a decision had been taken to summarily dismiss the plaintiffs, the defendant was obligated to comply with the appeal procedures in favour of the plaintiffs. Despite the plaintiffs having submitted their appeal to the defendant, the defendants did not put in place an appeals committee to hear those appeals.

(2) The plea for general damages for unlawful dismissal is declined because case law on the subject that this court has judicial notice of lays down the principle that in cases of unlawful dismissal an employee is not entitled to general damages but to the value of the notice and accrued terminal benefits.

(3) An order be and is hereby made that the plaintiffs are entitled to general damages for unlawful arrest, confinement, harassment and embarrassment because these had been instigated by the defendant. The general damages are assessed at Kshs.250, 000.00 for each plaintiff.

(4) An order be and is hereby made and ordered that upon faulting of the plaintiffs dismissal as being an unlawful the plaintiffs termination of employment with the defendant is converted into a normal termination with payment of accrued benefits calculated in accordance with the guide lines provided in the staff pension and life insurance scheme.

(5) The computation done by the plaintiffs as forming the claim and as demonstrated by the plaintiffs counsel in their submissions on how it was worked out is approved by the court firstly because it is in line with the guide lines. Secondly the defence did not dispute its computation but only disputed its entitlement.

(6) For the reasons given in number 4 and 5 above, the court makes the following assessment of special damages:-

(A) For D.P. Mbwali Kshs.122,550.00 less Kshs.31,091.35 which was outstanding on the Kelibu outstanding loan of Kshs.58,072.00 after it had been reduced by Kshs.26,980.65 which had been found to be due to the plaintiff as own contribution to the insurance scheme. This leaves a resulting figure of Kshs.91, 458.65 as the amount due.

(B) For John Kipsigel Kirur the court allows Kshs.147, 240.00 less what he had been paid earlier on of Kshs.46, 047.25 leaving a balance of Kshs.101, 192.25 as the amount due.

(7) The general damages awarded will carry interest at court rates from the date of judgment till payment in full.

(8) The special damages under item 6 above will carry interest at court rates from the date of filing till payment in full.

(9) The plaintiffs will have costs of the proceedings.

(10) The delay in the drafting and delivery of the judgment which is regretted was caused due to a systemic heavy work load.

**SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA**

**DATED READ AND DELIVERED BY HON. JUSTICE MAJANJA ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2012.**

**JUDGE**