



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 705 OF 2007
HARRIDON ANDALA

ASHIKHUBE.....PLAINTIFF

F

VERSUS

THE STANDARD GROUP

LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff in this case, **Harridon Andala Ashikhube** commenced this suit by way of a plaint dated 13/09/2007 and filed in court on the 08/10/2007. The plaintiff alleged that on or about 26/11/2006, one Mr. John Mutegi of the Defendant's Company made a report at the Kasarani Police Station implicating the Plaintiff with the misappropriation of the Defendant Company's monies by falsifying documents to show that company motor vehicles had consumed fuel from the Makadara Total Petrol Station. The Plaintiff was at all material times an employee of the Defendant Company as a driver and supervisor, identified by staff No. 3837 and earning a salary of Kshs 21620/= per month as salary and house allowance.

2. The Plaintiff averred that as a result of the report so made to Kasarani Police Station the plaintiff was arrested and detained in custody for 35 hours on 06/12/2006, that the said arrest, which was at the instigation, encouragement and direction of the Defendant's servants, workers or agent one John Mutegi, was unlawful and malicious. The plaintiff also averred that the plaintiff's arrest and detention were done without any investigation of whatever nature having been carried out and further that there were no reasonable grounds for the defendants or its servants or agents suspecting either that an offence in relation to the plaintiff misappropriating or stealing fuel from the defendant having been committed, or that the plaintiff might have committed the same. The plaintiff averred that it was him who investigated and reported the theft of the said fuel to the defendant and that the defendant did not act on the plaintiff's report but instead turned around and caused the unlawful and malicious arrest of the plaintiff.

3. The plaintiff averred further that as a result of his unlawful and malicious arrest he was, on the 13/12/2006, served with a letter requiring him to proceed on compulsory leave pending investigations into the fuel fraud. The plaintiff further averred that on 15/01/2007, he was served with a letter terminating his services with the defendant. The plaintiff said that the said termination was unlawful on the following grounds:-

(i) *The Defendants' notice to the plaintiff was given contrary to the law.*

(ii) *The notice of termination referred to the employment contract of 01/06/2006 yet the plaintiff was employed by the defendant and was co recognized upon the change of management on the 07/09/1995 from Lonhro East Africa Ltd to Standard Newspapers Ltd.*

(iii) *That the said notice of termination has denied the plaintiff his terminal benefits as from 19/11/1986 to*

the date of termination.

(iv) The said notice of termination does not provide for the plaintiffs terminal benefits as required by law.

4. By the matters aforesaid the plaintiff said he had sustained loss and damage and prays for judgment against the defendant for:-

(a) *Damages including aggravated and exemplary damages for false arrest and detention.*

(b) *Damages for defamation of character*

(c) *Special damages in the sum of Kshs. 3,577,823/= being terminal benefits*

(d) *Interest on (a) and (b) above.*

(e) *Costs of this suit.*

(f) *Any other relief this court may deem fit to grant.*

5. In its defence dated 19/11/2007 and filed in court on 20/11/2007, the defendant denied the plaintiff's allegations save the fact that a report was made to the police about missing Bon voyage receipts. The defendant alleged that the plaintiff who collected the said receipts failed to forward the same to the defendant. The defendant also alleged that the plaintiff's suit is vexatious and an abuse of the court process. The Defendant also alleged that there were reasonable grounds upon which the defendant made a report to the police. The defendant denied allegations of unlawful and malicious prosecution of the plaintiff and asked that the plaintiff's suit be dismissed with costs to the defendant.

6. The plaintiff herein testified as PW1. The plaintiff stated that he was married with 3 children and that he had worked for the defendant since 1986 as per the letter of appointment dated 19/11/1986 which letter the plaintiff produced as PExhibit 1. The plaintiff stated that initially worked as Messenger/Scooter Driver on 3 months' probation and that he was later confirmed in that position on 13/03/1987 as per letter of confirmation dated 27/03/1987 produced as PExhibit 2. The plaintiff stated that he worked with the defendant for about 20 years, during which time he rose through the ranks to the level of driver/supervisor.

7. It was the defendant's testimony that on or about the 26/11/2006 while he was on duty in the course of his employment, he received a telephone call from one John Mutegi, the plaintiff's immediate supervisor and transport co-ordinator enquiring why the fuel cards for motor Vehicles Registration Nos. KAV 883S and KAV 885S were being used illegally. The plaintiff stated that he informed Mr. Mutegi that he (plaintiff) had already withdrawn the fuel cards in question by 21/08/2006 when the said motor vehicles were involved in accidents and that he had handed over the fuel cards to one Mr. Muloki, the plaintiff's supervisor. The plaintiff testified further that on or about 22/08/2006 he had called one Julia Kirubi with a view to confirming whether the fuel cards had been delivered to her (Julia Kirubi) by Muloki and that he (plaintiff) was informed by Julia Kirubi that very time that Mr. Muloki was in Julia Kirubi's office delivering the fuel cards.

8. The plaintiff also stated that he carried out his own private investigation to check out the complaints raised by John Mutegi and to confirm who was using the said fuel cards. The plaintiff testified that he obtained receipts from Makadara Total Service Station for fuel consumed between 05/09/2006 and 18/10/2006 and handed over the said receipts to Mr. Mutegi as per PExhibit 6.

9. The plaintiff testified further and stated that from 22/08/2006 he heard nothing about the receipts until 06/12/2006 when he was called to report to Kasarani Police Station alongside one M/s Maritim, Muloki and Busala, with M/S Maritim and Busala being the new supervisors of the defendant. The plaintiff said he was arrested alongside the other men who had also been asked to report to Kasarani Police Station and that they were locked up until the evening of 07/12/2006 when they were released without charge. The plaintiff also testified that though they were released without charge (due to failure

by the defendant as complainant to appear at the Police Station), they were requested to report to the Police Station on every Thursday for one and a half years when the officer commanding the station discharged the plaintiff from any further reporting. The plaintiff stated that he and his colleagues continued reporting to the police station weekly until the plaintiff received the letter terminating his services. The plaintiff told the court that he was never and has never been charged with any offence before a court of law.

10. The plaintiff further testified that before his services were terminated he was sent on compulsory vide a letter from the defendant dated 13/12/2006 produced as PExhibit 2. On the issue of termination of his services, the plaintiff testified that he was paid two (2) months' salary in lieu of notice and was paid Kshs 305316/= being his pension contribution and a further Kshs 197585/= being the defendant company's pension contribution, but that he was never paid service pay for the 22 years that he worked for the defendant.

11. It was the plaintiff's contention that his dismissal was unlawful since he was never informed of the outcome of the investigations into the fuel fraud. The plaintiff also contended that the defendants' acts of dismissing him was malicious upfront since the plaintiff had already withdrawn the fuel cards and handed them over to his (plaintiff's) immediate supervisor.

12. The plaintiff has urged this Honourable Court to grant him compensation for defamation of character by the defendant for being referred to as a "*thief*" and for maliciously reporting the plaintiff to the Police when the defendant knew that the plaintiff had not committed any offence. The plaintiff has also asked to be compensated for the trauma suffered by himself and to be paid special damages as pleaded in the plaint.

13. The defendant did not call any witnesses, but as already indicated the defendant filed defence in which it denied the plaintiff's claims for damages, both general and special. The defendant also denied the plaintiff's allegations of unlawful and malicious arrest and urged this Honourable court to dismiss the plaintiff's suit with costs.

14. The parties respective counsel filed written submissions in support of their respective positions taken in the matter. Counsel for the plaintiff M/S Owino and Owino Company Advocates submitted that the plaintiff had proved his case on a balance of probabilities as required by law. On the issue of liability counsel submitted that both plaintiff and defendant are agreed that there existed a contract of employment between the plaintiff and the defendant as per PExhibit 1 and PExhibit 2. Counsel also submitted that the plaintiff worked well for the defendant during his (plaintiff's) 20 year plus tenure. Counsel further submitted that the defendant did not controvert the plaintiff's testimony that he (plaintiff) offered exemplary service to the defendant.

15. Secondly, counsel for the plaintiff submitted that the defendant did not pay the plaintiff's full terminal dues having paid only 2 months salary in lieu of notice and the plaintiff's own pension contribution and the defendant's pension contribution all totaling Kshs 502901/= and that the defendant's failure to pay the plaintiff his (plaintiff's) terminal dues was contrary to the provisions of the Employment Act, Act No. 11 of 2007 which requires an employer to pay the employee all terminal benefits upon termination of service. Counsel for the plaintiff submitted that the plaintiff was entitled to be paid for the service rendered by the plaintiff for the 20 years worked.

16. As to whether or not the defendant's acts were malicious, counsel for the plaintiff submitted that the defendant's acts were malicious because the defendant disregarded two important facts one that the plaintiff had already recovered the fuel cards in dispute and handed them over to Mr. Muloki and two that the plaintiff had carried out his own investigations into the alleged fuel scam and handed his findings to the defendant through Mr. John Mutegi.

17. Counsel for the plaintiff submitted that despite all the information that was provided by the plaintiff to the defendant, the defendant went ahead to have the plaintiff arrested without carrying out its own investigations into the allegations apart from the fact that Defendant failed to appear at the Police Station

to record statements after the plaintiff was arrested. Counsel for the plaintiff also submitted that the defendant was malicious for purporting to say that the plaintiff's employment with the Defendant commenced on 19/06/2006 when the Defendant was aware that the Plaintiff's employment with the Defendant commenced on 19/11/1986 – see PExhibit 1. Counsel relied on **Nairobi HCCC No. 1774 of 1994 – John Kamau Icharia –vs- Paul Njiru and another** and urged this Honourable court to find that the defendant's actions against the plaintiff were both unlawful and malicious and to make appropriate awards to the plaintiff.

18. Counsel for the defendant also submitted that the plaintiff was defamed by the defendant by referring to the plaintiff as a thief and making all the defendant's employees look at the plaintiff as a thief. Counsel submitted that the plaintiff had been subjected to shame, ridicule and mental and psychological torture as a result of being labeled thief by the defendant. Counsel for the plaintiff relied on the case of **John Patrick machira –vs- Wangethi Mwangi & another – Nairobi HCCC NO. 1709 of 1996** and urged the court to find that the plaintiff deserved to be compensated for the defamation in the sum of Kshs, 2,000,000/= and to award general damages as the court deems fit and just to grant in the circumstances of this case.

19. In response to the plaintiff's submissions counsel for the defendant M/S Ochieng Onyango, Kibet and Ohaga Advocates through Mr. Willis Werimo Echessa Advocate, submitted that the plaintiff's entire suit lacked merit and that the same should be dismissed with costs to the defendant.

20. The first issue taken up by counsel for the defendant was that since the defendant was never arraigned in any court of law, nor charged with any criminal offence, then the plaintiff's claims for malicious prosecution cannot stand. In this regard counsel for the defendant relied on the case of **Murunga –vs- The Attorney General (1979) KLR 138** a case that sets out the principles to be applied by a court in deciding the issue of whether or not there is malicious prosecution. In a claim for malicious prosecution, the plaintiff must show the following:-

- (a) *That the prosecution was instituted by the defendant or by someone whose acts the defendant is responsible for;*
- (b) *That the prosecution terminated in favour of the plaintiff,*
- (c) *That the prosecution was without reasonable or probable cause and*
- (d) *That the prosecution was actuated with malice.*

21. Counsel for the defendant submitted that all the four ingredients above must be proved conjunctively. Counsel submitted that from the evidence on record and from the testimony of the plaintiff, there can be no ground whatsoever, for this Honourable Court to make a finding in favour of the plaintiff on the claim for malicious prosecution. Counsel submitted that the plaintiff was bound by his pleadings and that as was held by the Court of Appeal in the Case of **Mbaka Nguru –vs- James G. Rakwar – Civil Appeal No. 133 of 1998.**

“It will suffice to say that the plaintiffs who do not plead their damage properly and who then do not prove the same do so at their own risk. They will not get these damages however sympathetic the court may feel towards them.

The rules of pleadings and modes of proof must be adhered to.”

22. Counsel for the defendant thus submitted that the plaintiff had not established a case in malicious prosecution and urged this Honourable court to dismiss that claim.

23. In reply to the defendant's submissions on the issue of malicious prosecution, counsel for the plaintiff submitted that the defendant's behaviour in having the plaintiff arrested was malicious in the extreme and that such behaviour must be punished appropriately, especially in view of the fact that the defendant did not as much as bother to record a statement with the police to support the theft claims made

against the plaintiff. Counsel for the plaintiff also submitted that the defendant's malice was further exposed when immediately upon plaintiff's arrest, the plaintiff was issued with a letter of interdiction and soon thereafter with a letter terminating the plaintiff's services. Counsel for the plaintiff submitted that the defendant was bent on using the Police to terminate the plaintiff's services.

24. I have considered the applicable principles governing action based on malicious prosecution and in particular the case of **Murunga –vs- The Attorney General** (Supra) and I do agree with counsel for the defendant that the plaintiff does not have a cause of action on this limb of his claim against the defendant. It is not claimed by the plaintiff that there was prosecution of any kind in this case, although there is evidence that the plaintiff was arrested and detained in Police cells for about 35 hours and then released without charge. It is also not in dispute that the plaintiff continued to report to the police once a week for one and a half years until his services with the defendant were terminated. Since all the four ingredients for a case in malicious prosecution have not been proved by the plaintiff, I am unable to find in his favour.

25. In their further submissions, counsel for the defendant made extensive submissions on whether or not there was false arrest and detention of the plaintiff. Referring to **Winfield and Jozxlowicz on Tort, 13th Edition Sweet and Maxwell at Page 58**, counsel submitted that false imprisonment is defined as *“The infliction of bodily restraint which is not expressly or impliedly authorized by the law.”*

26. Counsel also submitted that from the evidence on record, the plaintiff's arrest and detention was not made by the defendant in its capacity as a private citizen. Counsel submitted that it was the police in the execution of their duties under section 14A(1) of the **Police Act Cap 84, Laws of Kenya and Section 21 of The Criminal Procedure Code, Cap 75 Laws of Kenya**, who were carrying out their duty and powers conferred upon them by the law. The defendant's counsel submitted that if the plaintiff had any misgivings on how and why the arrest was carried out then he (plaintiff) should have sued the Attorney General on behalf of the Police as provided under section 12 of the **Government Proceedings Act, Cap 40 Laws of Kenya**.

27. Counsel submitted that the police in the circumstances of this case cannot be said to have been the agents of the defendant who is a private person. Counsel argued that the plaintiff was never arrested at any one time by the defendant nor was the plaintiff detained at the defendant's premises but at the Kasarani Police Station after being arrested by the police. Counsel for the defendant quoted a passage from the case of the **Henry Giflex Ombati –vs- University of Nairobi – HCCC NO. 2682 of 1998** in which Visram J (he is now Judge of Appeal) relied on the holding by the **Court of Appeal in Jadiel Nyaga – vs- Silas Mucheke – Nyeri Court of Appeal Civil Appeal No. 59 of 1987** (unreported) where the Court of Appeal stated as follows:-

“The respondent's case as it appears in the Complaint was that he claimed damages for false arrest, malicious prosecution and false imprisonment. He did not join the police in the suit although it was clear that the acts complained of were in fact committed by the police. The Appellant had made a complaint or the report to the police and nothing more. What followed had nothing to do with him. The decision to arrest the Respondent was made by the police who must have found some merit in the report. They decided to detain, to charge and to prosecute the Respondent. The mere fact that the prosecution aborted for failure of the prosecution witness including the Appellant to attend the hearing is not here or there. It was the responsibility of the police to bond possible prosecution witness including the Appellant. They did not do that but instead the prosecutor told the court that he had no witness to call instead of applying for an adjournment to try and secure these witnesses. The blame for the abortive prosecution was squarely on the police but not the Appellant. The Respondent's suit was a non-starter for failure to join the police who were the main actors on the stage as far as the Respondents' claim was concerned. It is trite law that false arrest and false imprisonment may very well be founded where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution is in favour of the accused... The police investigated the complaint and arrested the Respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false. Police

action cannot be attributed to the Respondent who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the Respondent was brought without reasonable or probable cause.”

28. Counsel for the Defendant submitted that despite the plaintiff’s allegations that a false report was made to the police and that there was no probable cause for the plaintiff’s arrest the plaintiff did not call any evidence to prove that the police acted against the plaintiff with malice or that there was no probable cause for the report.

29. I have carefully considered the plaintiff’s evidence and from that evidence, it is clear that there was concern regarding the illegal use of some fuel cards in respect of two Motor Vehicles being Registration Numbers KAV 883S and KAV885S. The plaintiff testified that a Mr. John Mutegi asked the Plaintiff about the cards. The Plaintiff also said that he had taken some steps to retrieve the said fuel cards and to return them to headquarters. The plaintiff confirmed that his investigation had shown that fuel was being misappropriated. Counsel for the defendant submitted, and I think quite rightly so that it was not in doubt that there was theft of fuel. The defendant’s agent made a report of the theft to the police and once the plaintiff and others presented themselves to Kasarani Police Station, they were arrested by the Police and locked up at the Police Station for 35 hours.

30. It therefore seems clear to me that from the evidence on record, there was a justification for the report made to the police by the Defendant. It is also clear that the report concerning the theft of fuel was true. The plaintiff himself testified that he went to Makadara Total Petrol Station where the fuel cards in question had been used for illegally and as a result, the plaintiff stated in answer to a question in cross examination that from his investigations there was indeed theft of fuel. The plaintiff also admitted that he was arrested by the Police of Kasarani Police station and further that the police had a duty to investigate crime such as theft of fuel.

31. From the above, find that the arrest of the plaintiff following the report of the admitted theft of fuel could not be attributed to the defendant in this case. Further, the report which the police acted upon was true. It was in bad taste for the defendant not to go to the Police Station to record statements but that fact alone does not mean that the defendant was responsible for the arrest and detention of the plaintiff. Further, the plaintiff in this case was never prosecuted and the mere fact that the plaintiff was released from custody without charge does not make the arrest and the confinement of the plaintiff false and/or malicious. Counsel for the defendant relied on the case of **Rebecca Kaome Ntarangwe – VS- Duncan Kariuki & Another** where Aganyanya J (as he then was) held that where there was some reason for suspecting theft, a plaintiff who was temporarily deprived of her freedom by reason of such suspicion by way of arrest could not succeed in a claim for damages for wrongful or unlawful detention even against the police.

32. I wholly agree with Aganyanya J. I accordingly find that in the instant case the plaintiff’s claim for wrongful arrest and detention cannot succeed. In fact the case was not one of mere suspicion that there was a theft. The plaintiff himself confirmed in his testimony that the investigations he himself carried out in the matter confirmed that there was theft of fuel using these very fuel cards that John Mutegi of the defendant company has asked the plaintiff about.

33. The third issue on which both parties submitted was in respect of the plaintiff’s claim for damages for defamation of character. The plaintiff alleged that he was defamed by being called a thief as pleaded at paragraph 13(v) of the plaint. Counsel for the defendant submitted that this claim by the plaintiff must fail for the following reasons, that is to say that –

(a) *The plaintiff did not give evidence as to which specific person called him a “thief” and whether such a person is employed by the defendant and in what capacity,*

(b) *The plaintiff did also not specifically name (or call as a witness) any individual/third party to whom the words were uttered/published thus the essential limb of publication is not satisfied.*

(c) *The plaintiff in addition to failing to plead the particulars of malice in his plaint did not give any testimony to show malice attributable to the defendant.*

34. Counsel for the defendant also submitted that the plaintiff did not give any particulars of malice as required by the provisions of Order 6 Rule 8 of the Civil Procedure Rules and that in the circumstances of this case, what this court is left to consider is the testimony of the plaintiff which also fell short of proving any malice on the part of the defendant. Counsel for the defendant submitted that for the plaintiff to succeed on his claim for defamation he must show that his estimation went down in the eyes of right thinking members of society; that they thought worse of him after the libel/slander spread. Counsel submitted that the plaintiff did not succeed on satisfying the assertion that he was defamed and is therefore not entitled to damages.

35. Counsel for the defendant relied on two authorities to buttress his position that the plaintiff completely failed to establish that the tort of defamation was committed by the defendant against the plaintiff. In the case **Daniel N. Njuguna –vs- KGGCU Limited – Civil Appeal No. 281 of 1998** cited by counsel for the Defendant, the Court of Appeal, among other things stated as follows:-
“Leaving aside any questions of privilege upon which the learned Judge dismissed that aspect of the appellant’s claim we note from the record that the appellant was the only person who testified in support of his claim. In these circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in absence of the defence of qualified privilege.”

36. The second case relied upon by counsel for the Defendant is **George Mukuru Muchai –vs- The Standard Limited, Nairobi HCCC No. 2539 of 1997** where Aganyanya J (as he then was) stated the following:-

“In my view the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he/she himself/herself feels the words portray about him/her”

37. In light of the above authorities, counsel for the defendant submitted that there was no evidence of malice and that there were no pleaded particulars of malice and that even if such particulars were given and evidence adduced in support, counsel thought that a claim for Kshs.2,000,000/= in general damages would definitely be on the higher side. Counsel urged this honourable court to dismiss the Plaintiff’s defamation claim.

38. I have carefully considered the authorities cited to me. I wholly agree with the law as stated by the Court of Appeal in the **Daniel N. Njuguna case (above)** and by Aganyanya J (now JA) in the **George Mukuru Muchai case**. I have considered the evidence given by the Plaintiff during the hearing hereof. The Plaintiff stated thus in the pertinent portion of his testimony:-

“What the Defendant did ruined my name by facilitating my arrest and calling me a thief. I was also kept away from my family when I slept at the police station. After my arrest, my friends deserted me and I am not able to get another job because every prospective employer wants to know why I left Standard. All my colleagues at Standard knew of the allegations against me.

I also suffered mental anguish and developed fear of other people. My children also suffered mental anguish when I was arrested. I also suffered financial embarrassment and loss.”

Here was a chance for the Plaintiff to call one of his former friends who had deserted the Plaintiff after the Plaintiff was referred to as a thief by the Defendant. The Plaintiff did not call any such friend. Here was also a chance for the Plaintiff to sermon any of his former colleagues at Standard (unless the Plaintiff could show that such colleagues refused to testify for fear of reprisals if they were still employed at Standard) to show that they all knew that the Plaintiff was a thief of company fuel. No such former colleague was called. Here was also a chance for the Plaintiff to call a person employed at the bank where the Plaintiff banked or any other person who was aware of the Plaintiff’s financial status before and after

the arrest and being labeled “thief” to tell the court how such a label had financially affected the Plaintiff. No such person was called by the Plaintiff.

39. All in all it was only the Plaintiff’s testimony to support his allegation that he (Plaintiff) had been defamed. Even then, the testimony fell short of the standard of proof required for a defamation claim. That evidence alone was not sufficient. There was no third party’s evidence to show how the world out there viewed the Plaintiff after the alleged defamation. It is only the Plaintiff himself who said that his friends deserted him and that he suffered mental anguish.

40. For the reason that there was no third party to support the Plaintiff’s claim for defamation, the claim must fail.

41. Even if I had found that the Plaintiff’s claim for defamation was proved, I would have made an award of only Kshs.100,000/= in damages. The **J. P. Machira case** relied upon by the Plaintiff applies to a Plaintiff who held a high and visible position in society unlike the Plaintiff herein.

42. The Plaintiff also claimed the sum of Kshs.313,329.00 in respect of the service of 20 years he offered to the Defendant at the rate of 22 days for every year worked. In response to this claim Counsel for the Defendant submitted that the Plaintiff failed to refer to any specific provision in the contract of Employment, P Exhibit 1 – dated 19/11/1986 to support his claim that he was entitled to the claim. Counsel for the Defendant also submitted that the Plaintiff did not produce any pay slips to confirm how much the Plaintiff earned in salary and allowances. I have looked at the Plaintiff’s letter of appointment, but cannot see a single clause indicating that either on termination or retirement the Plaintiff would be entitled to the benefit the Plaintiff now claims. If such a benefit was contained in the standing Orders referred to in Clause 12 of the letter of appointment, then the Plaintiff ought to have produced a copy of the said standing Orders which the Plaintiff was required to acquaint himself with. In fact the plaintiff made reference to no other document apart from the letter of appointment which governed the Plaintiff’s contractual relationship with the defendant.

43. I agree with counsel for the Defendant that the Plaintiff had the onerous duty of proving every allegation made in the Plaintiff. The Plaintiff failed to prove that he was entitled to the claim for Kshs.313,229.00 or any part thereof. That claim must therefore fail.

44. The Plaintiff also claimed payment for yearly salary review at 10% for 10 years in the sum of Kshs.672,354.00. In opposition to this claim, counsel for the defendant submitted that the Plaintiff did not lay any basis for the claim for example by referring to a clause in the letter of appointment or such other document as would support the claim. Counsel for the Defendant also submitted that the Plaintiff did not state the basis for the rate of the salary review as being 10% or the frequency with which the reviews were to be carried out.

45. In his testimony during the hearing of the case, the Plaintiff stated that the “*letter of appointment specifically provided for service pay on termination of employment.*” Apart from that general statement the Plaintiff did not refer to any particular clause in the letter of appointment, nor have I myself been able to see such a clause. What this means is that there is no evidence before this Honourable court to prove that the Plaintiff was entitled to such a claim and accordingly, the claim must fail.

46. The other claim by the Plaintiff is the sum of Kshs.2,592,240/= which is the sum total of service pay for 20 years and yearly salary review at 10% for ten years. I have already made findings on the claim for service pay and the claim for yearly salary review at 10% for ten years. The findings I have made are that the Plaintiff did not place any evidence before this honourable court to show that he was entitled to the said claim and having failed so to show, the composite claim for Kshs.2592,240/= has no legs to stand on and must of necessity fail. Further, counsel for the Defendant submitted that while giving evidence, the plaintiff categorically stated that he had no problem with the termination of his services, and that he sued the Defendant herein for the Defendant’s failure to pay the Plaintiff service salary for the 20 years worked. My considered view is that this claim is unsustainable.

47. The final issue for determination is whether the termination of employment of the Plaintiff with the Defendant was wrongful. On this issue I find as follows:-

- *The plaintiff was asked about the fuel cards and their illegal use.*
- *The Plaintiff retrieved the cards and returned them to the Defendant.*
- *The Plaintiff and others were directed to go to Kasarani Police Station to record statements and eventually they were arrested by police.*
- *The Plaintiff carried out his own investigations and handed a report over to headquarters.*
- *The Plaintiff was sent on compulsory leave.*
- *While findings of any further investigation were awaited, the Plaintiff's services with the Defendant were terminated.*

48. I note from the record that the letter sending the Plaintiff on compulsory leave notified the Plaintiff that he was being sent on compulsory leave till further notice. The reason given for the compulsory leave was "*the current investigation on fuel fraud.*" This letter was dated 13/12/2006. The letter of termination is dated 12/01/ 2007. The letter of termination made no reference to the letter dated 13/12/2006. It only referred to the Plaintiff's employment contract dated 19/06/ 2006 (though there was no such contract between the parties.) On the same 12/01/2007 the Defendant issued a second termination notice which referred to the letter of appointment dated 19/11/1986. Unlike the earlier letter in which it was stated that the Plaintiff was entitled to one month's salary in lieu of notice, the second notice of termination – p Exhibit 5(b) – talked of two (2) months notice. The Defendant offered to pay 2 months salary in lieu of notice.

49. From the record, the letter of appointment dated 19/11/1986 provided for one (1) month's notice or one month's salary in lieu of such notice. It is not clear where the two month's notice came from. Whichever way it was, I am persuaded that the Defendant's termination of the Plaintiffs services was unlawful in the sense that the Plaintiff was not given a chance to be heard. Whether or not there was provision in the letter of appointment, the rules of natural justice demand that no man shall be condemned unheard. In any event, the notice of termination did not say that the Plaintiff was being summarily dismissed on grounds of a serious offence committed by the Plaintiff against the Company. For this reason, I am satisfied that the termination of the Plaintiff services with the Defendants was wrongful and unlawful.

50. What is the Plaintiff's entitlement on this claim? The Plaintiff's entitlement on this claim would be two (2) months salary in lieu of notice. That amount has already been paid and acknowledged by the Plaintiff.

51. In the premises, and for the reasons above stated, I find that the Plaintiff has not proved his case against the defendant on a balance of probabilities save for the two (2) months' salary in lieu of notice upon the finding that the termination was wrongful I would enter judgment for the same. As the amount has long been paid and acknowledged, there shall be no interest on the same.

Each party shall bear its own costs.

It is so ordered.

Dated and delivered at Nairobi this 28th day of October, 2010.

R. N. SITATI

JUDGE

In the presence of:-

M/s Owino & Owino (absent) For the Plaintiff

Mr. Charagu for Werimo (present) For the Defendant

Jane Omasaba - court clerk