



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1170 OF 2000

EDWARD KIRAGU.....1ST PLAINTIFF

PATRICK CHEGE.....2ND PLAINTIFF

VERSUS

SHELL & BP (MALINDI) KENYA LTD.....DEFENDANT

J U D G M E N T

The Pleadings

1. This suit was filed jointly by the two Plaintiffs on 14/07/2000. The original plaint was amended on 6/03/2001 and further amended on 31/07/2007. In the Further Amended Plaint, the two Plaintiffs respectively pray for judgment against the Defendant as follows:-

1ST PLAINTIFF

(a) *General damages for breach of contract and or wrongful termination of employment.*

(b) *Terminal benefits and other dues owed to the plaintiff by the defendant amounting to Kshs.9,909,231/=*

(c) *Costs of this suit and interest on (a) and (b) at the rate of 20% p.a. or at any other rate that the court may deem fit and just calculated from 31st March, 2000 until payment in full and any other order as this court may deem just and expedient to grant.*

2ND PLAINTIFF

(a) *General damages for breach of contract and/or wrongful termination of employment plus interest.*

(b) *Terminal benefits and other dues owed to the plaintiff by the defendant amounting to Kshs.6,830,840.00*

(c) *Costs of this suit and interest on (a) and (b) at the rate of 20% per annum from 31st March 2000*

until payment in full and any other order that this honourable court may deem expedient to grant.

2. The facts of this case are that the 1st Plaintiff, **Edward Kiragu** was previously employed by Agip (K) Ltd. on 24/08/1992 as Retail Manager. The company was later bought by Shell & BP Kenya Ltd, hence the name of the Defendant. The 1st Plaintiff was confirmed into his position as Retail Manager by a letter dated 3/03/1993. He signed a contract of employment in which the terms and conditions governing his employment were spelt out.

3. At the commencement of employment, the 1st Plaintiff said his basic salary was Kshs.19,440/= . He also earned a monthly allowance of Kshs.4,560/=, leave allowance of Kshs.2,400/= per year, and was also entitled to medical assistance for self, spouse and each of his five children. At the time of termination of his employment on 31/03/2000, the 1st Plaintiff said he was earning a salary of Kshs.122,965/= per month. The Plaintiff said that his contract of employment provided for retirement at age 60 after which he would earn a pension.

The 1st Plaintiff's Case

4. The 1st Plaintiff alleges wrongful and malicious dismissal by the Defendant. According to him, the following facts establish malicious prosecution that led to his dismissal from employment:-

Ø On 29th September 1999, the defendant company made some allegations against the 1st plaintiff that he had mishandled an account namely, ACCOUNT NO. 100021800 – Kigwe Service Station – Waiyaki Way.

Ø No charge was leveled against him and he was not given an opportunity to defend himself.

Ø He was subsequently given a number of letters sending him on compulsory leave from 29/9/1999 to 29/03/2000 which letters did not indicate the powers under which they were being issued. On or about the 3rd March 2000, the 1st plaintiff was maliciously charged at the behest of the defendant in Nairobi Chief Magistrate's Court in Criminal Case Number 500 of 2000 with stealing contrary to section 275 of Cap 63 of the Laws of Kenya.

Ø The Plaintiff was never convicted in the said criminal case and was subsequently released under Section 87(a) of the Criminal Procedure Code on 14/9/2001.

Ø Since then, he has never been arraigned in court on the said or other charges and no case has been decided against him.

Ø After being arraigned in court, he was called for a disciplinary process to defend himself whereupon the defendant company repeated the charges to him. He informed the disciplinary committee that he was innocent.

Ø The committee did not indicate any term of the contract that had been breached by the 1st Plaintiff.

5. On the 31/03/2000, the 1st Plaintiff was summarily dismissed from employment. He says that the letter of summary dismissal did not specify under which section of the Terms and Conditions of Service he was being dismissed. He also says that after dismissal, the Defendant did not pay him his full dues. The 1st Defendant says that as a result of the Defendant's aforesaid action, he has suffered much agony and embarrassment. The 1st Plaintiff says that instead of being thankful for faithful service rendered to it, the Defendant treated him badly and contrary to procedure.

6. Regarding the employment contract, the 1st Plaintiff says that clause 13 of the Terms and Conditions of Employment provided that before any disciplinary action is taken against an employee, such employee would have to be charged with misconduct and given an opportunity to defend himself, and that in the

instant case, the 1st Plaintiff did not commit any offence that would warrant his being disciplined under clause 13 above stated and further that the 1st Plaintiff worked diligently for the Defendant company and in accordance with the terms and conditions of his employment contract. That as a result of his diligence, the 1st Plaintiff got a promotion on 28/07/1999. It is for the reasons above given that the 1st Plaintiff seeks judgment against the Defendant as prayed in the plaint.

7. The 2nd Plaintiff herein, **Patrick Chege** was also formerly an employee of Agip (K) Ltd. which was later bought by the Defendant herein. The 2nd Plaintiff says that he was employed on 19/07/1978 as a Retail Manager and was subsequently confirmed into his job vide a letter dated 20/03/1979 after he signed an Employment Contract with the Defendant. The 2nd Plaintiff says that his initial basic salary was Kshs.1760/= in 1978, which amount increased after he was promoted on a number of occasions so that by the time of his dismissal he was earning Kshs.36,630/=. He said that on being dismissed, he was not paid any dues for the 22 years he worked for the Defendant, other than the pension contribution he made.

8. The 2nd Plaintiff was sent on compulsory leave on 7/10/1999, which leave was extended by various letters until 31/03/2000 when he was dismissed from the Defendant's employment. He said that on 29/03/2000, the 2nd Plaintiff was given a letter requiring him to attend before the Defendant's Disciplinary Committee on 31/03/2000 but he did not attend the Committee for the reason that the subject matter of the Committee deliberations was also the subject matter of a pending criminal case. The 2nd Plaintiff says further that the summary dismissal slapped on him was wrongful, and/or illegal and thus holds the Defendant liable for the consequences arising there from. The 2nd Plaintiff says further that the reasons given in the letter of dismissal dated 31/03/2000 were similar to the reasons given to him for being sent on compulsory leave. He said that though he was charged alongside the 1st Plaintiff in Criminal Case No. 500 of 2000 the Criminal Case against him ended in an acquittal due to lack of evidence.

9. The Defendant filed defence on 26/07/2001 in which it denied the existence of any contractual relationship between it and either of the Plaintiffs. The Defendant further averred that if there was any such contract, which is denied, the Defendant was not in breach of the same. The Defendant denied that it wrongfully and/or illegally terminated the Plaintiff's services with it. The Defendant pleaded that the Plaintiff's claim against it was misconceived and bad in law.

10. The 1st Plaintiff gave evidence and reiterated the averments in the plaint. He stated that from 24/08/1992 when he was employed by the Defendant as a Retail Manager, he worked diligently, got salary hikes in between until his services were terminated on 31/03/2000 on grounds of alleged gross misconduct. The 1st Plaintiff stated that according to the Terms and Conditions of Employment; misconduct on the part of an employee would be construed to mean:-

- § Ordinary criminal offences ascertained by a court of law
- § Stealing from the company
- § Being under the influence of alcohol during office hours
- § Causing grave bodily injury to management personnel
- § Participation in fracas on company premises
- § Unjustified absence from work for 4 consecutive days
- § Attempting to interfere with freedom of work
- § Refusal to carry out duties

- § Refusal to accept lawful orders
- § Insubordination
- § Insolent or rude remarks behaviour towards superiors
- § Perpetual and unjustified lateness
- § Sabotage
- § Fraudulent alteration of company systems

11. The 1st Plaintiff stated before his dismissal he was never charged with any of the above offences and that it came as a total surprise to him when gross misconduct was cited as a reason for his dismissal. 1st Plaintiff produced his Employment Agreement as PExhibit 1 which document he said did not give the Defendant the liberty to send him on compulsory leave. He also complained that he was not given an opportunity to defend himself. He produced as PExhibits 2 – 14 letters that were issued to him by the Defendant concerning and extending his compulsory leave. The 1st Plaintiff also testified that he and the 2nd Plaintiff were arraigned in court on 3/3/2000 in **Criminal Case No. 500 of 2000 – R –vs- Edward Magayu Kiragu & 3 Others** on charges of theft contrary to section 275 of the Penal Code. Court proceedings in respect of the said criminal case, in which the Plaintiff's were discharged under Section 87(a) of the CPC were tendered in evidence as PExhibit 15. The 1st Plaintiff maintains that he was innocent of the charges leveled against him. He further says that the letter of dismissal issued to him (PExhibit 16) was silent on the section of the Terms and Conditions of Service under which he was dismissed and further that the letter did not set out details of the allegations. According to PExhibit 16, the 1st Plaintiff was informed that he had failed to exonerate himself from the accusations leveled against him at the disciplinary hearing afforded the 1st Plaintiff on 31/03/2001. Part of paragraph 2 of the letter says:-

“----- As a Retail Manager, you authorized the supply of Petroleum products to a client on credit while you very well know or ought to have known that the client was not supposed to be supplied on credit. Your conduct clearly demonstrated lack of knowledge or adherence to the Company Procedure. As a result, you particularly failed to control client's outstanding position and took no steps to ensure proper credit recovery actions were in place to safeguard the interests of the company. The Company has in the process suffered substantial loss.”

The Defendant concluded the said letter by saying that the 1st Plaintiff's conduct was inexcusable and that the Defendant therefore had no alternative but to summarily dismiss the 1st Plaintiff.

12. The 1st Plaintiff also stated that his salary was Kshs.122,965/= as at 31/03/2000 (PExhibit 17). He maintains that following the malicious termination of his employment with the Defendant, his family was put to great financial difficulty and he claims damages including Expenses Accrued for the journeys he has made between Nakuru and Nairobi to attend court. The 1st Plaintiff also claims that deductions made by the Defendant in respect of travel allowances were never communicated to him. PExhibit 19, being Payroll for December 1999 shows that deductions for the car amounted to Kshs.57,619/65. The 1st Plaintiff said he was not pursuing claim (f) of his claim due to lack of receipts. He produced two payment receipts, namely PExhibit 20 dated 9/08/2000 and 11/07/2000 in respect of legal fees totaling Kshs.162,000/=.

13. In further testimony on cross examination the 1st Plaintiff maintained that if he had been served with two (2) months notice as was required under the Terms and Conditions of Service, he would have made arrangements to return the car and would therefore not have lost Kshs.585,276/= which was deducted to cover the car loan. The 1st Plaintiff also stated that at no time did the Defendant exercise the option of giving him two (2) months notice. He also said that the Defendant never availed witnesses to testify

against him in the criminal case. The 1st Plaintiff also expressed surprise that barely two (2) months after he had been promoted, he was given summary dismissal. The 1st Plaintiff urged the court to enter judgment for him as claimed in the Further Amended Plaintiff.

The 2nd Plaintiff's Evidence

14. The 2nd Plaintiff Dyrane Patrick Thiongo Chege stated that he was employed by the Defendant on 19/07/1978 as per the letter of employment produced in evidence as PExhibit 1. He said that he moved through the ranks and earned a number of promoting along the way. PW2 produced the following documents among others, in support of his case which is based on same facts as the 1st Plaintiff's case:-

§ ***P2Exhibit 2 – Letter dated 21/03/1979 confirming him as a permanent employee of the Defendant;***

§ ***P2Exhibit 3 – Letter dated 10/07/1980 promoting him from Job Group 4 to Job Group 5.***

§ ***P2Exhibit 5 – letter dated 19/01/1954 promoting him from Job Group 5 to Job Group 6, with an accompanying salary increase.***

The 2nd Plaintiff also stated that he worked in Eldoret, Nairobi, Nakuru and back to Nairobi during his 22 year stint with the Defendant. He produced a number of letters – P2Exhibits 6, 7 and 8. The 2nd Plaintiff narrated how on 7/10/1999, he was served with a letter – PsExhibit 9a – sending him on compulsory leave which culminated in his being dismissed from service on 31/03/2000. He also stated that when called to appear before the Defendant's disciplinary committee, he declined to do so for the reason that he was already facing related criminal charges in court being Criminal Case No. 500 of 2000. The dismissal letter was produced as P2Exhibit 14. The 2nd Plaintiff also stated that at the time he was sent packing, he was aged 47 years and was earning of Kshs.36,630/= on the Defendants Scale No. 6. He said that if the Defendant had not unlawfully and wrongfully terminated his services, he would have worked up to 2013 when he would be aged 60 years. In all, the 2nd Plaintiff said he lost 13 years of gainful employment and he claims salary for the said period which equals 156 months at Kshs.36,630/= totaling Kshs.5,787,540/=. The 2nd Plaintiff also wants to be paid Kshs.39,000/= in leave allowance, Kshs.78,000/= in Christmas allowances. The 2nd Plaintiff had no documents to support his claims for court appearances totaling Kshs.41,600/=, appearances at CID offices – Kshs.19,200/= - meals and board – Kshs.26,000/= and Miscellaneous expenses of Kshs.10,000/= bringing the total to Kshs.96,800/=.

15. On cross examination, the 2nd Plaintiff denied that he was negligent in the performance of his duties and averred that he deserved to be given a months' notice before termination of his services. He said that the pension moneys paid to him on dismissal were partly his own contributions and partly those of the company.

The Submissions

16. At the close of the Plaintiffs' case, the parties put in written submissions. Learned counsel for the Plaintiffs, M/s Wanjao & Wanjau Advocates contend that the Defendant's dismissal of the Plaintiffs was without justification and was contrary to procedure by a party who should have known better. They contended that all the allegations made against each of the Plaintiff's remained "unproven and on the evidence, false or exaggerated allegations. Learned counsel submitted that the 1st Plaintiff in particular was treated badly and that as a big international oil company, the Defendant should have known better. (see **Mary Wakwabubi Wafula –vs- British Airways PLC HCCC No. 157 of 2002**).

17. It was also submitted on behalf of the Plaintiffs that the Defendant's action of dismissing them in the manner that did have no basis since neither of the Plaintiffs was accused of having committed any of the offences listed under clause 13 of the Terms and Conditions of Service. Learned counsel also argued that contrary to what the Defendant would have this court believe, each of the two Plaintiffs worked diligently and in accordance with the Terms and Conditions of Service governing their employment.

18. Regarding the financial loss to the 1st Plaintiff, learned counsel for the Plaintiff is asking for the following amounts:-

Salary @ Kshs.122,965 for 65 months = Kshs.7,992,725/=

Miscellaneous unsupported allowances = Kshs. 100,800/=

Expenses accrued for travel = Kshs. 24,000/=

Legal expenses (Cr. Case 500/2000) = Kshs. 162,000/=

General damages for breach of contract = (to be determined by court)

Costs of the suit and interest = (to be determined by court)

19. As far as the 2nd Plaintiff is concerned, learned counsel submitted that he would have worked for a further 13 years or 156 months were it not for the unlawful and wrongful termination of his services by the Defendant. The financial package which the 2nd Plaintiff seeks is as follows:-

13 years (156 months) salary @ Kshs.36,630/= plus

2 months salary in lieu of notice = Kshs.5,787,540/=

Leave allowance at Kshs. 3000/= per year = Kshs.39,000/=

Christmas allowance @ Kshs. 6000/= per year = Kshs.78,000/=

Legal Fees = Kshs.27,500/=

20. It is to be noted that the 2nd Plaintiff admitted during cross examination that he was entitled to only one month's salary in lieu of notice if the Terms and Conditions of Service had been followed.

21. Learned counsel for the Plaintiffs submitted that under Section 41 of the Employment Act – Chapter 11 of 2007, an employee faced with dismissal must be given an opportunity to be heard on allegations of misconduct or poor performance. Learned counsel also submitted that under section 43(1) of the same Act, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. Section 45 of the Act provides that a termination of employment by an employer shall be unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure

Section 45(4) of the Act defines what amounts to unfair termination of employment. This is where –

“It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”

22. In deciding whether or not an employer's conduct amounts to unfair dismissal or termination of employment, the court shall consider the following matters as provided under section 45(5) of the Act:-

- (a) *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employer*
- (b) *the conduct and capability of the employee up to the date of termination;*
- (c) *the extent to which the employer has complied with any statutory requirements connected with the termination,*
- (d) *the previous practice of the employer in dealing with the type of circumstances which led to the termination and*
- (e) *the existence of any previous warning letters issued to the employee*

Case Law cited by Plaintiff

23. In **Tobias Ong’any Auma & Others –vs- Kenya Railways Corporation – HCCC No. 4434 of 1992**, the six Plaintiffs were declared redundant on or about 15/05/1990. The Plaintiffs alleged that the Defendant’s action was wrongful and a violation of the provisions of the Regulation of Wages and Conditions of Employment Act, Cap 226 Laws of Kenya. They also alleged that they were dismissed without notice. In their pleadings, the Plaintiffs asked the court to direct the Defendant to comply with the law and to pay them all redundancy dues, notice of termination severance pay and other reliefs including refund of all deductions save statutory deductions. Citing words of the Industrial Court in **Kenya Airline Pilots Association, Cause No. 94 of 1993**, the learned Judge said,

“Old principles of absolute freedom of contract and the doctrine of laissez principes of social welfare and common good. Faire have yielded place to new we are no longer living in the age of laissez faire and the contractual rights and obligations are not only subject to the principles of industrial but also subject to the principles of social justice which is not based on contractual relations and is to be enforced with the principles of contract of service. It is something outside these principles and is invoked to do justice, without a contract to back it.”

It was the learned Judge’s view based on the above principles that *“any employee should be adequately compensated for involuntary loss of service for the remainder of the period he would have worked had all things been equal”* and that *“where provisions of the law are inadequate --- the courts should be in a position to fill the void.”* I hasten to add here that this case is only of persuasive authority to this court.

24. The second authority cited by the Plaintiffs is **Kenya Airports Authority – and Silas Obengele [2008]e KLR – Msa Civil Appeal No. 38 of 2005**. The Appellant, KPA was the unsuccessful party in Msa HCCC No. 654 of 1995 in which the Respondent as Plaintiff claimed damages, special and general and a declaration relating to what he termed as wrongful retirement or termination of his employment with the Appellant on the basis that the termination failed to accord with the law. In the case, their Lordships of Appeal held that *“the need to be heard by an employee before one is dismissed is meant to prevent the employer from acting capriciously and whimsically”*. Where an employee is of capriciously and whimsically dismissed he is entitled to compensation. Their Lordships derived guidance from the case of **Southern Highlands Tobacco –vs- McQueen [1960] EA 490** in which the Court of Appeal for East Africa said thus:-

“A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the Plaintiff would have received (tf may be more or less) but that sum will generally form the basis of the calculation”.

In **East African Airways –vs- Knight [1975] EA 165**, a case also cited with approval by their lordships in the **Kenya Airports Authority** case (supra) Law Ag P expressed himself as follows on the issue of damages:-

“In assessing the damages to be awarded, the Judge used, as a basis for his calculations, the difference between Mr. Knights probable earnings from the Corporation, had he not been dismissed and his earnings from Cassman Brown Ltd. he then deducted a substantial proportion on account of accelerated receipt of damages and such contingencies as sickness, death and redundancy. In my opinion the Judge proceeded on a correct principle in this respect, and in accordance with what was said by this court in Southern Highlands Tobacco v McQueen [1960] EA 490.”

25. Another case cited by the Plaintiffs on quantum of damages for an employee who is wrongfully dismissed by an employer **Civil Appeal No. 314 of 2001 – Nairobi between Barclays Bank of Kenya Ltd and Joseph Mwaura Njau [2006]e KLR**. The Respondent who had worked for the Appellant from 1969 and risen through the ranks was on 6/03/1993 suspended from work and by a letter dated 6/3/1993, he was summarily dismissed. The Respondent sued for wrongful dismissal and asked for judgment against the Appellant for:-

- (a) One-month salary in lieu of notice - Kshs.25,015.00**
- (b) 12 days worked upto 12th March 1993 Kshs.9,999.00**
- (c) Unpaid Local leave Kshs.23,333.00**
- (d) Leave Allowance Kshs.12,000.00**
- (e) Terminal benefits for 24 years and/or early retirement benefits as per staff circular No. 18 of 3.3.92.**
- (f) Pension scheme funds as per staff circular No. 18 of 3.3.92**
- (g) General damages for wrongful termination plus costs and interests at court rates plus any other relief.**

26. Their lordships held that ***“where the contract of employment embodies a notice period, then damages to a person dismissed unlawfully is to be worked out on the basis of the notice period. Where no such period is provided for in the contract of employment --- then a reasonable period of notice is to be implied”***. In **Kyobe vs East African Airways [1972] EA 403**, the appellant’s contract of employment did not contain any period of notice. The trial Judge concluded that on the basis of the appellant’s position as a general manager of the respondent, notice period of six months would be sufficient. I will return to these authorities in my findings in this case.

The Defendants Case

27. The Defendant did not call any witnesses, but in its statement of defence filed in court on 26/07/2001, the Defendant denied all the Plaintiffs’ allegations and in particular denied that any relationship of employer/employee ever existed between either of the Plaintiffs and the Defendant. The Defendant averred that it would, at the hearing of the case contend that the suit against the Defendant was misconceived and further that it disclosed no reasonable cause of action. That line of defence seems to have been abandoned since that point was not taken up by the Defendant during the hearing and in its written submissions. The Defendant also denied being in breach of contract between itself and either of the Plaintiffs and also denied any wrongdoing in terminating the Plaintiffs’ services.

28. The Defendant also put in written submissions dated 29/04/2009 and filed in court on the same date. According to learned counsel for the Defendant, the following are the issues for determination by this Honourable Court:-

- 1. Whether the Plaintiffs were wrongfully dismissed from employment by the Defendant Company;**
- 2. if they were, what is payable to them by way of damages?**

3. *whether the Defendant Company was responsible for the alleged prosecution of the Plaintiffs;*
4. *If the Defendant Company was so responsible, whether such prosecution was malicious;*
5. *Can the relief for malicious prosecution be granted by this court bearing in mind that the same was never sought in the pleadings?*

Learned counsel for the Defendant Mr. Okeyo submitted that though the malicious prosecution was pleaded in the plaint, no relief was sought in the further amended plaint.

28. The Defendant conceded that the Plaintiffs were employed by the Defendant through respective contracts of employment which provided under Clause 13(d) in both contracts that an employee may be summarily dismissed in the event of grave misconduct. I have already set out the acts which the said clause envisaged as amounting to gross misconduct. The Defendant contends that the listing therein was merely to be seen as a guide to what the Defendant could consider as gross misconduct and that the list should not be seen as being conclusive, exhaustive, or limiting in effect and that negligence in performance of work was factored in the listing.

29. Learned counsel also submitted that Section 44(4)(c) of the Employment Act 2007, gives an employer the power to summarily dismiss an employee who willfully neglects to perform any work which it was his duty to perform, or if carelessly and improperly performs any such work. That an employee could be dismissed summarily if he is suspected of having committed a criminal offence against or to the substantial loss of his employer or his employer's property. The Defendant further conceded that the provision to Clause 13(d) of the Contract of Employment provided that where the company contemplated instant dismissal, it was first to formally charge the Plaintiffs' with the misconduct in order to give them an opportunity of defending themselves.

30. As to whether or not the Defendant Company acted in compliance with the said procedure, learned counsel submitted that the Defendant acted accordingly when through letters dated 29/03/2000, each of the Plaintiffs was invited to appear before the disciplinary committee to show cause why each of them should not be dismissed; that the 1st Plaintiff failed to exonerate himself while the 2nd Plaintiff refused to attend the hearing altogether. Learned counsel also submitted that each of the Plaintiffs was dismissed for negligence in the performance of their duties, and in particular that the 1st Plaintiff "**authorized the supply of petroleum products to a client on credit**" while such a client was not entitled to any credit supplies, and that as a result of such negligence, the company "has in the process suffered substantial loss."

31. As for the 2nd Plaintiff, the Defendant says that he was dismissed for failing "**---- to take necessary measures to ensure that the company was not subjected to loss of millions of shillings.**" It was contended by learned counsel for the Defendant that the charges which led to the Plaintiffs summary dismissal were based on negligence while the criminal case of which the Plaintiffs were acquitted concerned theft under Section 275 of the Penal Code. In this regard, learned counsel submitted that the 2nd Plaintiffs refusal to appear before the Disciplinary Committee on grounds that the matter before the Committee was subjudice was ill-founded and that he voluntarily denied himself an opportunity to exonerate himself of the allegations leveled against him. Referring to **Kenya Airways Corporation –vs- Tobias Oganya Auma & 5 Others** (supra), learned counsel submitted that there was no place for rules of natural justice in this case since it is a case based on contract of employment. (Also see **Rift Valley Textiles –vs- Edward Onyango Oganda – Civil Appeal No. 27 of 1992**).

32. The Defendant's counsel also cited the case of **Kibe –vs- Attorney General – Civil Appeal No. 164 of 2000**). The Appellant who was acquitted of criminal charges preferred against him arising from a theft in the office was subsequently dismissed from employment on the ground that he had been negligent in his work. He sued for damages for wrongful dismissal alleging that the acquittal in the criminal case had exonerated him from liability. His claim was dismissed. The Appellant appealed to the Court of Appeal. On appeal, the court held, *inter alia*, that the evidence in the criminal case only exonerated the Appellant from criminal as opposed to civil liability, which his dismissal was all about. The court also held that the

Appellant had been negligent in failing to alert the cashier or assistant cashier to lock the door to the cash office where he worked.

33. On the basis of the above, learned counsel for the Defendant contended that the termination procedure required by the Defendant was adhered to; that the termination was for a just cause and therefore that neither of the Plaintiffs is entitled to any damages as claimed in the plaint or at all.

34. Regarding the second issue on quantum of damages assuming that the Plaintiffs' termination was wrongful, learned counsel relied on **Kenya Airways Corporation –vs- Tobias Oganya Auma & 5 Others (supra)** and submitted that rules of natural justice are not to be considered in cases of this nature and further that any damages to be awarded is the amount that would have been earned if the contract of employment had been properly terminated. Learned counsel also submitted that such damages must be pleaded and proved as special damages. The learned Judges of Appeal in the **Tobias Oganya Auma** case (above) held while citing **Kenya Ports Authority –vs- Edward Otieno** and also drawing support from the case of **Addis –vs- Gramophone Company (1909) ACC 488**, that

“--- there can be no general damages in respect of suits based on a termination of employment contracts.”

The court also observed that

“--- it was unreasonable for the Respondents to believe that it was their entitlement and right to be employed by the Appellant during their whole working life. The expectation has no basis in law as employment relationship is contractual and thus terminable under the terms of the same contract.”

34. It is to be noted that the **Edward Otieno** case (above) is one of the authorities relied upon by the Plaintiffs. Learned counsel for the Defendant contended that since the Superior Court's decision awarding the Appellant damages for breach of contract was overturned, this court should turn its back to it and only consider what was said by the Court of Appeal in the appeal case. Learned counsel urged this court to dismiss the Plaintiffs' claim for general damages for the reasons stated above.

35. The third issue on which learned counsel for the Defendant's submitted concerns the Plaintiffs' claim for allowances. Learned counsel submitted that the Plaintiffs are not entitled to such allowance. He cited the case of **Kenya Ports Authority –vs- Silas Obengele (supra)**. At page 5 of the court's judgment the court considered whether in a case where a person has been wrongly retired or dismissed, the measure of damages should include loss of house allowance, telephone facility, traveling allowance and other related benefits normally enjoyed by staff who are still in employment. The court held that:-

“These benefits are paid to employees not as payment to services rendered or to be rendered but to enable the officer concerned perform his work more conveniently and therefore more efficiently. It is a facilitation payment. That being the case, there is or there would be no basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remunerative. For instance for what reason will you say a payment for transport to and from work be made, if the officer is not going to work? Or why would an officer demand telephone facilities if he is not going to use the same for the benefit of the employer.”

In light of the above, learned counsel for the Defendant submitted that the Plaintiffs are not entitled to any of the allowances they claim from the Defendant. He urged this Honourable Court to dismiss the Plaintiff's claims under items (a) and (b) of their respective pleadings.

36. The next issue discussed by the Defendant's learned counsel is whether the Defendant was responsible for the prosecution of the Plaintiffs. It was contended that the answer was in the negative for the reason that the Plaintiffs were arrested and charged at the instance of the police since the Defendant Company made no complaint whatsoever to the police. Learned counsel also contended that since the Plaintiffs were only discharged under Section 87(a) of the Criminal Procedure Code (CPC) they cannot be said to have been acquitted. He also submitted that the Defendant Company was never consulted by

police when arresting or discharging the Plaintiffs. Learned counsel submitted further that an accused person can only be acquitted under Sections 202 and 204 of the Criminal Procedure Code. That in any event, if the Plaintiffs were to pursue their claim in malicious prosecution, the Honourable the Attorney General ought to have been made a party to the suit. In summary learned counsel for the Defendant, citing **Gitau –vs- East African Power & Lighting Company Limited [1986] KLR 365**, said that the Plaintiffs’ claim for malicious prosecution cannot succeed because the Plaintiffs have failed not only to demonstrate, that the Defendant company instigated the Plaintiffs’ arrest and prosecution, but that they have also failed to prove that there was malice on the part of the Defendant Company.

37. In his further submission on whether, if at all the Plaintiffs’ prosecution had been instigated by the Defendant and if the said prosecution was malicious, learned counsel submitted that the answer to the question is in the negative. He submitted that no evidence was adduced at the trial in the criminal case to show that the Defendant was uncooperative during investigations or in availing witnesses. Learned counsel also submitted that the charges preferred against the Plaintiffs were for ordinary theft under Section 275 of the Penal Code and not theft by servant under Section 281 of the Penal Code as would have been the case. For the above reasons, learned counsel for the Defendant submitted that the Plaintiffs are not entitled to any relief for malicious prosecution since the same was neither pleaded nor proved. He contended that the Plaintiffs are bound by their pleadings, and therefore the sum of Kshs.162,000/= in special damages for legal costs related to the criminal case is not payable to the Plaintiffs.

38. By way of summary, learned counsel wants this court to make findings that the two Plaintiffs were properly dismissed from their employment in accordance with the prevailing Terms and Conditions of Service; that the two Plaintiffs are not entitled to general damages as sought in their pleadings; that they are also not entitled to payment of any allowances and further that the Plaintiffs are not entitled to any other reliefs as claimed in the pleadings.

The Issues and Findings

39. The court having considered the pleadings, the submissions and the law, I now consider the issues that have arisen for determination and my findings on those issues. For purposes of simplicity and clarity, I will adopt the issues as framed by the Defendant in its written submissions. The issues as framed cover the whole spectrum of this case, and although not listed in the same order in their submissions, they are the same issues addressed by the Plaintiffs both during their evidence in chief and the subsequent cross-examination and re-examination and also in their written submissions.

40. The first issue is whether the Plaintiffs were wrongfully dismissed from their employment by the Defendant Company. It is not denied that each of the two Plaintiffs were in the employ of the Defendant Company just prior to their being dismissed. Until about 29/09/1999, the 1st Plaintiff, Edward Kiragu had worked well in his capacity as a Retail Manager earning Kshs.122,965/= per month plus certain allowances of which he testified in his evidence in chief. On the 29/09/1999, the Defendant Company made some allegations that the 1st Plaintiff had mishandled an account, namely Account No.100021800-Kigwe Service Station – Waiyaki Way. The 1st Plaintiff alleges that no charge was leveled against him and that he was not given an opportunity to be heard. Thereafter the two Plaintiffs were sent on compulsory leave from 29/09/1999 until 29/03/2000. On 31/03/2000, the services of the two Plaintiffs were terminated. The Plaintiffs allege that the letters written to them did not give any hint as to why they were being sent on leave. The letter dated 29/09/1999 which was sent the 1st Plaintiff on compulsory leave reads thus:-

“Mr. E.K. Kiragu,

Thro’

Marketing Manager,

Agip (Kenya) Ltd.,

NAIROBI.

Dear Sir,

RE: ACCOUNT NO. 100021800 –

KIGWE SERVICE STATION – WAIYAKI WAY

Reference is made to the meeting between yourself, the Marketing Manager and the Managing Director on irregularities involving account number 100021800 (Kigwe Service Station – Waiyaki Way).

The Management communicated its displeasure in your involvement in mishandling the above account.

In view of the above, the Management has decided to send you on compulsory leave effective 30th September 1999 to 7th October 1999. You will report back to the office on Friday 8th October 1999 at 8.15 a.m. and immediately call on the Marketing Manager for further instructions.

Yours faithfully,

AGIP (KENYA) LTD.,

G. ROMEO

MANAGING DIRECTOR”

41. In the first paragraph of the letter, reference is made to a meeting held between the 1st Plaintiff, the Marketing Manager and the Managing Director regarding irregularities on the account noted in the letter. The letter also said that the 1st Plaintiff had mishandled the account to the displeasure of the Defendant Company and that as a result thereof, the 1st Plaintiff was to proceed on compulsory leave. The letter of dismissal dated 31/03/2000 (Pexhibit 16) referred to the earlier letter dated 29/03/2009 and to the subsequent disciplinary hearing afforded to the 1st Plaintiff on 31/03/2000. The position stated by the Defendant Company was that the 1st Plaintiff had failed to exonerate himself from the accusations leveled against him; that the 1st Plaintiff had authorized the supply of petroleum products to a client on credit who was not supposed to be given credit facilities. The Defendant Company stated in the letter, that what the 1st Plaintiff did and his failure to control the client's outstanding position resulted in substantial loss to the Defendant Company. The company's position was that the 1st Plaintiff's conduct was inexcusable, taking the 1st Plaintiff's position in the Company as Retail Manager. The issue here is whether it is true as alleged by the 1st Plaintiff that no charge was leveled against him by the Defendant Company and that he was not given an opportunity to be heard.

42. From an analysis of the evidence given both oral and documentary, the Defendant leveled a charge against the 1st Plaintiff in the two letters dated 29/09/1999 and 31/03/2000. There is also evidence and 31/03/2000. There is also evidence by the 1st Plaintiff during his testimony in court that on 31/03/2000, he appeared before the Disciplinary Committee, but failed to convince the Disciplinary Committee members of his innocence in the allegations made against him. I am therefore satisfied that the 1st Plaintiff had serious complaints made against him and that he was afforded an opportunity to defend himself against these charges. He failed to give an adequate explanation to the charges.

43. The 1st Plaintiff has also contented that because he was acquitted of the criminal charges in CMCR Case No. 500 of 2000, he should not be held liable in this case. The case law that I have so painstakingly reviewed above is to the effect that an acquittal in a criminal case only relieves the accused of criminal

liability and not civil liability between himself and his employer. Further, it is clear that since the Plaintiffs were discharged under Section 87(a) of the Civil Procedure Code, those same charges of which they were discharged are still hanging over the Plaintiffs' heads. In the circumstances I find and hold that though the Plaintiffs were not eventually convicted of the charges of theft, they were still liable to exonerate themselves from the civil liability under their respective contracts with the Defendant Company. The 1st Plaintiff was unable to exonerate himself from the civil liability when asked to do so.

44. As for the 2nd Plaintiff, he told the court that though he was invited to appear before the Disciplinary Committee, he refused to do so on the ground that the matter for which he was required to appear before the Committee was sub-judice. It is my view that the 2nd Plaintiff misapprehended the law and thereby denied himself the opportunity to be heard on the allegations that were made against him. In the letter dated 29/03/2000 (P2 Exhibit 12) notifying the 2nd Plaintiff of the Disciplinary Committee hearing, the Defendant informed the 2nd Plaintiff of the requirement upon him under the terms and conditions of service to defend himself by showing cause why disciplinary action should not be taken against him. The Defendant Company leveled three accusations against the 2nd Plaintiff:-

- 1. That as Customer Service Assistant on diverse days during the month of September 1999, he failed to carry out his duties in a manner expected of him in that he authorized the supply of petroleum products to Kigwe Service Station Ltd on credit against established company procedures.**
- 2. That he failed to observe company procedures in the performance of his duties.**
- 3. That he admitted signing order books intimating that the customers orders conformed with the company's operating procedure while he knew or ought to have known that they were not.**
- 4. That he failed to take necessary measures within his ability to ensure that the Company was not subjected to a loss of millions of shillings.**

45. The above allegations were in my view, very serious allegations, so that with or without the existence of a pending criminal case the 2nd Plaintiff would have taken the earliest opportunity to give his side of the story. As it were, he chose not to do so. The Defendant Company therefore had no choice but to proceed to take the best available option – to dismiss the 2nd Plaintiff along with the 1st Plaintiff for gross misconduct. The reasons the 2nd Plaintiff gave for his inability to attend the Disciplinary Committee Meeting are that:-

- not enough notice had been given to him to prepare himself for the questioning**
- he did not appear to have been given any job description after being promoted to the post of Customer Service Assistant**

46. I think that it was imprudent and unwise for the 2nd Plaintiff to decline the invitation to defend himself. It would appear that the 2nd Plaintiff did not take the Defendant Company seriously and attempted to hold it at ransom. The 2nd Plaintiff thus dug his own grave by his conduct which bordered on insolence and insubordination. In its dismissal letter to the 2nd Plaintiff, the Defendant Company pointed out that the charges which had been leveled against the 2nd Plaintiff were well within his knowledge since September 1999 when the 2nd Plaintiff was sent on compulsory leave and that he did not require any more time than two days to prepare to answer them; that in fact the 2nd Plaintiff had recorded a statement over those same allegations. The Defendant also said clearly that the 2nd Plaintiff's apprehension about the pending criminal case was misplaced since in the Defendant Company's view, no prejudice would accrue to the 2nd Plaintiff as regards his contractual relationship with the Defendant Company. As further stated, the Defendant Company proceeded to consider the 2nd Plaintiff's fate on the basis of the information in their possession.

47. On the basis of the above finding, I would agree with learned counsel for the Defendant that the Plaintiffs' claim that their dismissal from employment with the Defendant Company was both wrongful and unlawful cannot stand; and I so hold.

48. The second issue for determination is the quantum of damages that would be paid to the Plaintiffs if the court had found that the dismissal was wrongful. It is now trite law that in a case of wrongful dismissal, the quantum of damages paid to such an employee is the amount of salary for the notice period. In the instant case, both Plaintiffs testified that if they wanted to leave the employ of the Defendant Company, they would be required to give one month's notice or pay one month's salary in lieu of notice. The same case would apply if the Defendant Company wanted to sack them. The Plaintiffs in this case are claiming to be paid damages equivalent to the balance of the years that they would have worked until they each attained age 60. The cases that have been referred to herein clearly point to the fact that the damages payable should be in accordance with the terms of the contract. The terms of the Plaintiffs' contract are that each of the Plaintiffs' be paid one month's salary in lieu of notice.

49. As far as other claims are concerned, the 1st Plaintiff was unable to produce evidence of expenses incurred of Kshs.235,500/=; the alleged unauthorized deductions from the payroll of Kshs.585,276/=. Nor is the 1st Plaintiff entitled to the Security Bond Valuation and search. Equally the 1st Plaintiff is not entitled to the legal costs in Criminal case No. 500/2000 amounting to Kshs.162,000/=. The reason for reaching this conclusion is that the charges leveled against the Plaintiffs in the criminal case were unrelated to any complaints of ordinary theft raised by the Defendant Company against any of the Plaintiffs. The same reasoning applies to the claims made by the 2nd Plaintiff. Consequently, I would make no award under any of the heads claimed by either Plaintiff under terminal benefits and other dues allegedly owed to the Plaintiffs.

50. The third and fourth and fifth issues concern the alleged malicious prosecution of the Plaintiffs by the Defendant Company. My finding on this issue is that neither of the Plaintiffs placed before the court any evidence that it was the Defendant Company which made a report of the allegations of ordinary theft charges against the Plaintiffs. In any event, neither of the Plaintiffs seeks a relief for malicious prosecution. I think that it is not necessary to consider these two issues any further, and would make no award under this head even if I had found and held that the Plaintiffs were wrongfully dismissed from employment by the Defendant Company.

51. The final issue for determination is on costs. It is trite law that costs follow the event. In the instant case, I think that the Plaintiffs ought to meet the costs of this suit.

52. In the result, I have reached the conclusion that the Plaintiffs have failed to prove their allegations against the Defendant on a balance of probability. Accordingly, I hereby dismiss the Plaintiffs' suit with costs to the Defendant.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of July 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:

Miss Sang (present) for the Plaintiffs

Mr. Okeyo (present) For the Defendant

Kinyua - court clerk