



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1212 of 2001

JOSEPH IRUNGU MUCHIRI.....APPLICANT

VERSUS

CONSERVATION CORPORATIN KENYA LTDRESPONDENT

JUDGMENT

The Plaintiff came to this Court vide a plaint dated 19th July, 2001 and filed on 23rd July 2001. The key averments in the plaint are that him Plaintiff was employed by the defendant on 4th August 1994. There after he worked to the satisfaction of his employer and rose from the rank of a credit controller to the credit manager. That on 24.2.1998 the defendant without any reasonable cause, warning and or proper notice unlawfully and wrongfully dismissed the Plaintiff from his employment without paying him his lawful dues as particularized un paragraph 6 of the plaint and for which he seeks the same from the defendant together with costs and any other relief that the court may deem fit to grant.

The defendant defended the suit vide a defence dated 15th August, 2001 and filed the same date. The salient features of the same are that the defence contend that the dismissal of the plaintiff was not unlawful and wrongful, that the same was justified as it was on account of insubordination and for acting in an insolent manner by publishing a disparaging document against those put in authority above him. The defendant went further to deny the particulars in paragraph 6 of the plaint and invited strict proof for the same.

In reply to the defence, the plaintiff reiterated the content of the plaint, denied particulars of breach of contract, attributed to him and put the defendant to strict proof thereof.

The Plaintiff was the sole witness on his side. Whereas the defence fielded 2 witnesses. The facts are fairly straight forward and not in serious contest. The brief facts of the same are to the effect that indeed the Plaintiff was employed by the defendant. The letter of appointment is dated 8.4.1994 and produced as exhibit 1. His job description upon the said appointment was a credit controller as shown by exhibit 2. The employment earned the plaintiff a monthly salary as shown by some copies of the pay slips produced in a bundle as exhibit 4. At the point of departure, he was drawing a salary of Kshs.95,000.00 inclusive of house allowance. There were also bonuses paid on a yearly basis either through the payroll or separately.

It was the Plaintiffs stand that he worked diligently, which diligence, earned him praise from equals and seniors as shown by exhibit 7,8 among others. The Plaintiff's diligence earned him a confirmation in

his employed as per exhibit 3, supervisory role, salary review as shown by exhibit 5 and 6 in a bundle dated 9.1.1996, 3.4.96, 14.6.96, 17.6.96, 4.7.96, 11.11.96 and 28th January 1998.

The Plaintiff worked smoothly till the events leading to his sacking were set in motion. The building stones started with discontentment amongst local staff allegedly due to the presence of too many expatriate employees:-

- (ii) Preferential treatment of the said expatriate workers who were better remunerated.
- (iii) Frequent retrenchment of local staff on the pretext that the organization is undergoing restructuring only to be replaced by expatriates. This led to exchange of correspondences via emails and the holding of meetings as shown by exhibit 9, 10 and 11. The said meetings culminated in the passing of a resolution to resist retrenchment as shown by exhibit 12.

On 24.7.98, one Stogdale, who was the managing Director, of the defendant called an open staff meeting and started making inquiries concerning a document which had been authored and faxed to all the share holders, UK, USA and South Africa using the office fax machine. The document turned out to be defence exhibit 3. It had been faxed from their office between 4.00 – 5.00 p.m. on 16th. At first nobody claimed responsibility. Then later on DW1 and a colleague went and reported to DW2 a personal assistant, to the MD that they recall on 16th July, 1998 the Plaintiff had requested to use the said fax machine, in their office and he took one hour using it but hi m DW1 did not know what document was being faxed.

Following that revelation DW2 Triza Pereira took DW1 and another to a Mr. Stogdale and passed the information on to him, where upon the said Mr. Stogdale allegedly called in the plaintiff and inquired from him concerning the said document. The plaintiff denied authoring or any knowledge of the said document whose first and last page was shown to him. Despite his protestation the said David W. Stogdale wrote a letter of summary dismissal exhibit 13 dated the same 24th July 1998. It reads:-

“24th July, 1998

Mr. Joseph Irungu Muchiri Nairobi,

Dear Mr. Muchiri

Summary Dismissal

You will recall the meeting I had with the staff on Friday 24th July 1998. During the meeting three members of staff testified that you operated the central stores facsimile machine between 1600 hrs and 1700 hrs on Thursday 16th July 1998.

During this period a document which has been shown to you was faxed to the conservation corporation Africa share holders. The document which I can concussively say was faxed by yourself is written in abusive and insulting language to persons placed in authority.

This matter constitutes Miss Conduct under Section 17(d) of the employment Act Chapter 226 of the Laws of Kenya. Further your action brings the company into dis repute which destabilizes other employees and breaches the confidence that the company has placed on you.

The management has therefore reached a decision for your summary dismissal. Please contact Mr. Sekhon

the Financial Controller for your final dues.

Yours sincerely

David W. Stogdale

Managing Director”

The plaintiffs, dues were worked out as per exhibit 15 as shown here under:-

“Conservation Corporation African

Joseph Irungu M. Muchiri

Payroll No.95

Computation of Final dues

Basic pay Kshs 77,900.00

House allowance 18,000.00

95,900.00

(i) pay in lieu of leave

55 x 95,900/26 = 202,865.35

(ii) Salary for the month of July

1.7.98 to 24.7.98 = 74,245.05

Less total deductions - 84,271.50

Net pay = 191,838.90

(iii) Withdrawal from retirement benefit

and interest earned 265,318.35

= 457,157.25

(iv) Less: Net due to Kentours Sacco

After shares - 602,908.65

Balance owing from J.I. Muchiri

- 145,751.40

Prepared by Robert Karanja 29.7.98 -

Name Date Signature

Outstanding leave as of 24.7.98 55 days

Date employed 1st April, 1996

Date dismissed 24th July, 1998”

Exhibit 13 thus ended the plaintiff's employment with the defendant. Exhibit 15 purported to be the Plaintiffs worked out terminal dues but the same was not signed by him because him plaintiff did not agree with the tabulations.

On 18th August, 1998 Counsel for the defendants issued a demand letter to the plaintiff on behalf of S.P. FTZGERALD AND NICKY Fitzgerald on account of the content of defence exhibit D3.

On 26th August, 1998 the Plaintiff wrote two letters produced as exhibit 14. One was responding to the defence Counsel's, demand letter and the other moving to challenge the summary dismissal and giving a notice of intention to sue.

On 31st August 1998 Counsel for the defence responded to the Plaintiffs response to their demand and gave notice that they were going to file a suit against the plaintiff.

Against the background, laid by the plaintiff, the defendant has advanced the evidence of DW1 and 2 in opposition to the Plaintiffs claims. DW1 Steven Mucharos' evidence is that at the material time, he was an employee of the defendant. On 16.7.98 the Plaintiff communicated to him through inter com inquiring if their fax machine was free so that he plaintiff, could use the same. He responded in the affirmative and at 4.00 p.m. or there about the plaintiff came and him D.W.1 gave him the chair. The Plaintiff allegedly used the machine from that time up to 5.00 pm. But D.W.1 could not tell what kind of document it was, that was being faxed.

On 24.7.98 when the issue of exhibit D3 arose, him D.W.1, and 2 others, informed DW2 that it is the plaintiff who had used the fax machine at that time and on the material date. The information was then passed onto the M.D., Mr. Stogdale and the same date the Plaintiff was summarily dismissed.

When cross-examined him D.W.1 confirmed the general discontentment among the staff over retrenchment. He confirmed he participated in the meeting which led to the signing of exhibit 12. he was however firm that he does not know what document was faxed by the plaintiff on the 16th.

DW.2 s' sum total of her evidence, is that on 24.7.1998 the M.D. Stogdale called her and informed her to wait for a fax document being faxed from South Africa which she did. It is her evidence that the document faxed to their office was exhibit D3. She took it before reading the content and handed it to the M.D. who read it. He called an open meeting with the staff and inquired about who had knowledge of the Authoring and faxing of the said document from their office. At first there was no response. But later on D.W.1 and another came to her and informed her that they had knowledge that the Plaintiff had faxed a document thro ugh the fax machine in their office although they did not know the content.

Following that information DW.2, took DW1 and the colleague to the MD to whom they relayed the same message. After due inquires, she was instructed to write out exhibit 13 and the plaintiff was summarily dismissed on that same date.

When cross examined D.W.2 was firm that she was aware the plaintiff was instrumental in the writing and signing of exhibit 12. She had no first hand information that it is the plaintiff who authored and faxed exhibit D3 save from the information gathered form DW1 and his colleague.

According to her the fax had been sent to UK where it was received by a Mr. Sporporg who then faxed it to South Africa and it is South Africa which faxed exhibit D3 to them.

Commenting on the dues, claimed, she stated that none of them was payable as the Plaintiff suffered summary dismissal. She agreed bonus is usually paid at the end of the year when the company posts profits. That the Plaintiff is not entitled to the same because he did not work till the end of the year and secondly, in that year there was a Bomb blast which affected their business and they did not post any profits. She maintained that the plaintiff was not entitled to lost income or gratuity because of the summary dismissal. But she was sure that they had fully paid the Plaintiffs pension contributions and the

defendant does not owe the plaintiff any money.

Further added that she was not aware of any warning to plaintiff regarding his performance. She was aware of exhibit 12. She conceded the place where the document was allegedly faxed was not out of bounds to staff. But the plaintiff had no business using the machine in the central stores, office, as he had his two fax machines in his two offices. She said from the content of exhibit 2, the statement, a fax was sent to South Africa on 17th and she assumed it is the Plaintiff who sent it. That it was the same exhibit D3.

Both counsels filed written submissions. The Plaintiff's Counsel referred to no case law but stressed the following points basing the same on the facts as revealed by evidence adduced by both sides. These are:-

- (1) The Plaintiff was an employee of the defendant as per the letter of appointment exhibited.
- (2) There is no dispute that the plaintiff was unlawfully, summarily dismissed from his employment because he allegedly authored and faxed the abusive document exhibit D3 to the share holders. It is the Plaintiffs stand that none of the witnesses presented by the defence saw the plaintiff author the or fax the said document.
- (3) The bill from the post office indicate that the document faxed to South Africa was faxed on 17th July, 1998 using the same fax machine. No evidence has been adduced by the defence to show as to who faxed that document on 17th July 1998 as the evidence of D.W.1 IS confined to the events of 16th July 1998.
- (4) The document exhibit D3 and in addition to the evidence of DW2 the fax was received on the 24th July 1998 at 11.24 a.m, the same date that the Plaintiff was summarily dismissed. It is their stand that the time was insufficient to enable the defence conduct thorough investigations in order to conclude that the plaintiff was in the wrong. Extensive and thorough conclusive investigations were necessary in view of the evidence revealed both orally and documentary that there was a general discontentment among the staff due to the retrenchment threats.
- (5) It was the opinion of the defence that the document was highly defamatory, but the plaintiff wonders why no action was taken against him. If indeed, there was conclusive proof that it is the plaintiff who had authored and faxed the said document.
- (6) Failure to call David Stogdale to testify, when he was within reach of the jurisdiction of the Court, is fatal to the Plaintiffs case, as he is the one to whom the existence of the said fax was revealed by the addressee, and he is the one who allegedly carried out the investigations and arrived at the conclusion that the Plaintiff was responsible, held him liable and then summarily dismissed him.
- (7) None of the addressees was called to give evidence and this is fatal to the defence case.
- (8) Turning to the Plaintiffs claims, they contend all of them have been proved as presented and they should be allowed. The Court is urged not to give consideration to the evidence of DW2 as she was not the Resource Manager and her evidence as regards the actual tabulation of the plaintiff's claims was not based on any documentary proof.

The defence on the other hand has urged the Court not to allow the Plaintiffs claim to stand for the following reasons.

- (1) The evidence on the record shows that the plaintiff was rightfully and lawfully dismissed because of authorizing an abusive letter exhibit D3 which has been conclusively linked to him.
- (2) The plaintiff's claim is defective as the plaintiff has not pleaded any known principles of law that was

allegedly breached in his favour.

(3) They contend that the plaintiff was summarily dismissed on account of gross misconduct which negated any previously assumed satisfaction service previous to that.

(4) Allegations that the plaintiff was not given a chance to defend himself does not hold as the plaintiff himself says that when questioned about the content of the alleged document he denied any knowledge of the same and that is a sufficient chance to defend oneself.

(5) That on the basis of the facts presented, the defendant was justified in dismissing the Plaintiff on the basis of the allegation that he had authored exhibit 3.

(6) Turning to the tabulated claim of the plaintiff, Counsel, submitted that the plaintiff is not entitled to the claim of:-

- (i) 3 months salary in lieu of notice because he was dismissed in accordance with the terms of the contract which entitled the defendant to summarily dismiss him for misconduct without notice.
- (ii) He is not entitled to yearly bonus and that was payable only when the company made a profit and second to an employee who worked up to the end of the year.
- (iii) Compensation for lost income is not payable in line with the contract as well as case law on the subject.
- (iv) Gratuity is not payable as the same is not based on the contract of employment.
- (v) Pension is not also payable as the Plaintiff has not shown how the figure was arrived at.

On case law counsel referred the court to the case of **HAHN VERSUS SINGH [1985] KLR 716** where it was held inter alia that special damages must not only be specifically claimed but also strictly proved. The decree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.

The case of **KENYA PORTS AUTHORITY VERSUS EDWARD OTIENO MSA CA NO. 120 OF 1997** where at page 4 of the judgment, the Court of Appeal quoted with approval the holding in the English case of **ADDIS VERSUS GRAMOPHONE [1900] A.C. 488** that where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal or his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. At page 5 of the judgment at line 17 from the bottom quoting **LORD LOREBURN** in the said case observed “*if there is a dismissal without notice, the employer must pay an indemnity, but that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment*”.

Following that approval at page 5 line 8 from the bottom, the CA held “*we think the same position must apply in Kenya, as we can find nothing in our employment Act Cap.226, which would abrogate or modify these general principles in respect of the law relating to contracts of employment*”.

At page 6 line 6 from the top, the Court, observed “*In our judgment where, as in the instant case, a contract of service includes a period of termination of employment, the damages suffered are the wages for the period during which his normal notice would have been correct*”.

In addition to the above cited cases the court has on its own referred to the case of **OKONG’O VERSUS THE ATTORNEY GENERAL AND ANTOHER [1988] KLR 742** also a Court of Appeal decision. It held inter alia that “*at common law by which this court was guided on contract, specific performance of a contract of service has never been ordered because the court has felt it impossible to force the service of*

an employee to an employer when the latter has lost confidence and trust in the employee. It follows that once an employee has been dismissed, whether rightly or wrongly the dismissal stands and if the contract has been broken by the employer, damages for breach of contract is the remedy to which an employee is entitled”.

Also the case of **BII VERSUS KENYA COMMERCIAL BANK LTD [2001] KLR 458, RINGERA J.** as he then was held inter alia that *“a termination of employment in accordance with the terms of a contract could not possibly be unlawful, although it may be unfair and the Laws of Kenya do not know of the doctrine of unfair dismissal.”*

The case of **CONSOLATA KIHARA AND 241 OTHERS VERSUS DIRECTOR KENYA TRIPANOSOMIASIS RESEARCH INSTITUTE [2003] KLR 232,** at page 236 paragraph 8-13 Kuloba J. as he then was, quoting from **VINE VERSUS NATIONAL DOCK LABOUR BOARD [1957] A.C.488** stated thus *“But in the ordinary case of Master and Servant the repudiation or the wrongful dismissal puts an end to the contract, and the contract having been wrongfully put to an end, a claim for damages arises”* On the same page at paragraph 25-34 quoting the privy council in the case of **VIDYO DAYA UNIVERSITY OF CEYLON VERSUS SILVA[1965]1 WLR 77** stated thus *“The law is well settled that if where there is an ordinary contractual relationship of master and servant, the master terminates the contract, the servant cannot obtain an order of certiorari, if the master rightfully ends the contract, there can be no complaint. If the master wrongfully ends the contract then the servant can pursue a claim for damages”.*

On the basis of the foregoing reasoning Kuloba J. as he then was held thus:

“It is an elementary principle of Kenyan law that in the ordinary situation of employer and employee cases which are sometime referred to as cases of Master and Servant if an employer or maser wrongfully dismisses an employee or servant the employment is effectively terminated albeit in breach of contract.

- (2) In normal situation of ordinary occurrence, there cannot be specific performance of a contract of service and an employer can terminate the contract with his employee at any time and for any reason or for none.
- (3) If the employer terminates the employee’s contract in a manner not warranted by the contract, he must pay damages for breach of contract.
- (4) The law, is well settled, that if, where there is an ordinary contractual relationship of master and servant the mater terminates the contract, the servant cannot obtain an order of certiorari.
- (5) In an ordinary case of master and servant it does not at all depend on whether the employer has heard the employee in his defence. It depends on whether the facts emerging at trial prove breach of contract”.

In *Chitty on contracts* page 780 paragraph 37-108, it is stated thus *“a provision for a pension able permanent employment does not normally mean for life or even until normal age of retirement”.*

Though the court has traced on record, a document dated 19th November 2001, and signed by Counsels of both parties, containing 4 issues for determination, similar to those of the defence, the same was not filed in court, as it does not bear a court stamp. The net effect of this is that the court has to go by the statement of issues filed by the Plaintiff, dated 11.7.03 and filed the same date and those of the defence dated 1.8.03 and filed on 6.8.03. This Court has perused the same and finds that the defence issues are similar in material particulars with the plaintiff’s issues numbers 1-4. The remainder of the Plaintiffs issues namely 5, 6, 7 and 8 have a bearing on the rest and can be married and considered together with the exception of issues number 5. Issue number 6 and 7 dealing with summary dismissal and breach of contract can be intertwined with issue number 3 dealing with summary dismissal. While issue number 8 dealing with payment of dues can be twined up with issue number 4 dealing with entitlement to the claimed terminal benefits. 5 stands out alone so it qualities to be considered separately.

The foregoing being the case, it means that the issues that this court has identified for determination are:-

- (1) Whether the plaint is defective for non disclosure of cause of action.
- (2) Whether the plaintiff served the defendant, to the defendant's satisfaction and obtained salary increments.
- (3) Whether the termination of the plaintiff was wrongful as alleged in the plaint or it was as a result of the plaintiff's gross misconduct as alleged in the defence.
- (4) Whether the plaintiff is entitled to the terminal benefits and the prayers pleaded at paragraph 6 and 9. respectively of the plaint or any sum of money or at all.
- (5) Whether there were existing circumstances as of July 1998 which the defendant used to its advantage to get rid of the plaintiff by way of summary dismissal as contended or at all and if so what the said circumstances were.

The court has considered these issues in the light of the pleadings on record, the evidence adduced by either side submissions of both sides both on the facts and the law and principles of law both from the legal provisions and case law relied upon by either side and proceeds to make a determination as here under.

On the first issue of fielding a defective plaint, the defence raised objection because as per their submissions, the plaintiff did not plead the law on which he was basing his claim. Indeed a perusal of the plaint does not reveal a pleading of the law governing the claim. But the central theme in the plaint is that him plaintiff was an employee of the defendant at the material time and that the defendant unlawfully and wrongfully brought that employment through summary dismissal which summary dismissal was being contested and for which contest the Plaintiff prayed the reliefs sought. Order 6 rule 7 Civil Procedure Rules gives a party a discretion to raise points of law. It reads "*A party may by his pleading raised any point of law*". Order VII rule 1(1) (2) gives the general layout of the plaint. It reads "*1(1) The Plaint shall contain the following particulars.*

- (a) *The name of the Court in which the suit is brought.*
- (b) *The name description and place of residence of the plaintiff and an address for service.*
- (c) *The name description and place of residence of the defendant, so far as can be ascertained.*
- (d) *Where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect.*
- (e) *An averment that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter.*

1(2) The Plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.

1(3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule.

(2) Where the plaint seeks the recovery of money, the plaint shall state the precise amount claimed, except the plaintiff sues for mesne profits or for an amount which will be found due to him on taking unsettled accounts between him and the defendant".

Applying these provisions to the plaintiff's plaint, herein, this court finds that order 6 rule 7 Civil Procedure Rules gives a party a discretion to raise points of law. Being discretionary the Plaintiff cannot be faulted for not pleading the law governing his claim. Secondly there is no requirement that the said

points be raised expressly. They can be raised impliedly. Pleading of existence of an alleged breached employer/employee relationship is an implied pleading of the law on employment. The other particulars of the plaint are in compliance with the requirements of order 7 rules 1 and 2 of the Civil Procedure Rules and this court has no doubt that is why the defendant made no move to have the same struck out. The court finds the plaint proper.

As regards satisfactory service, to the defendant, by the plaintiff, this is not in dispute. Exhibits 2,3,4 and 6,7,8 all show that the Plaintiff worked diligently well, he earned salary raises or reviews, he was confirmed in his employment and was even promoted from the rank of a credit controller to a credit manager. All this is proof of evidence of a good worker. Further confirmation on this, is from the evidence of DW2 who said the defendant had no problem with the plaintiff save the events leading to these proceedings. Also the content of the summary dismissal letter exhibit 13, does not mention unsatisfactory work performance as a contributing factor to the dismissal. The court therefore makes findings that the plaintiff worked diligently and the performance of his work did not contribute to the summary dismissal.

As regards the termination of the employment, the competing interest of the parties is borne out both by the pleadings and the evidence. The Plaintiff says it was not lawful where as the defence says it was lawful. The court is guided by principles of law relied upon and case law cited. All go to state that the courts first stop should be the contract document. In this case it is exhibit 1. The salient features of the same are already on the record. There is provision for either party bringing it to an end in compliance with the notice requirements. Neither party applied the notice requirement.

The defendant invoked the summary procedure provisions circumstances under which this can be resorted to are set out in the clause on termination, on page 3 of exhibit 1. The employer can also avail himself of the grounds in Section 17 (d) of the employment Act Cap.226 laws of Kenya set out hereunder.

The reasons for the termination is set out exhibit 13. They are 2 namely matters set out in section 17(d) of the employment Act Cap.226 Laws of Kenya and matters named in clause (b) of the termination clause in exhibit 1. These are:-

Section 17(d) of the Employment Act Cap 226 reads *“If an employee uses abusive or insulting language or behaves in a manner injurious to his employer, or to a person placed in authority over him by his employer”*

Exhibit 13 accused the plaintiff of the following:-

- (a) That he operated the central stores facsimile machine between 1600 hrs and 1700 hrs on Thursday 16th July 1998.
- (b) That a document shown to the plaintiff was faxed to the defendant shareholders.
- (c) That the writer conclusively says that the document was faxed by the Plaintiff to the said shareholders.
- (d) That the document is written in an insulting and abusive language to persons placed in authority.
- (e) That the matter constitutes this conduct under Section 17 (d) of the employment Act Cap.226 Laws of Kenya.
- (f) That the management had made a decision to summarily dismiss the plaintiff from the employment.

In order for exhibit 13 to hold all the above ingredients have to be satisfied by the evidence on the record. D.W.1 and 2 are the witnesses who have tendered the evidence for the defence. D.W.1 is the sole witness that the plaintiff communicated with them through intercom requesting if the fax machine was free so that

he could use the same. It is D.W.1's evidence that indeed the Plaintiff came and used he said fax machine. This court found nothing in the said evidence put to the witness through cross-examination that could suggest that D.W.1 was framing the plaintiff. Further it is on record both from D.W.1 and D.W.2 that the said fax machine was not out of bounds for use by the Plaintiff although he had other fax machines in his office which he could access. D.W.2 tended to suggest that the only reasonable inference that can be drawn from that, is that, the move was for an improper motive. But this is a mere suspicion.

From the foregoing the court finds that use of the machines perse was not prohibited and did not count towards the summary dismissal. What counted towards the summary dismissal is the content of the document.

What counted towards the dismissal, was that the document identified to be exhibit D3, was the one faxed to the shareholders. As noted earlier on DW1 did not identify the document that the plaintiff allegedly faxed. DW2 was not present. DW2 has relied on the information gathered from Mr. Stogdale that exhibit D 3 is the one which was faxed to share holders among them those residing in the UK, a Mr. Sprborg. That it is the recipient of this document in the UK who informed their office in South Africa and faxed it to them. Then the office in South Africa got in touch with Mr. Stogdale, informed him about the document, and informed him that the said document was being faxed to them, and him Stogdale, assigned DW2 to wait for the said document to come through the fax receive, it and hand to him and this is what DW2 did.

From the sequence of events given by DW2, it would mean that if it is just one document that left Nairobi to London, then London to South Africa, and then South Africa, to Nairobi, it would mean that such document would have marks or details proving that indeed such a document left and or reached such destination. Such a document would indicate when it left and reached its destination. Exhibit D3 has been paraded as the document. Following the sequence given above, it will mean that it should contain the following details.

- (i) The time and fax number when it was faxed out of Nairobi.
- (ii) The time of receipt and fax number through which it was received in London.
- (iii) The time when faxed from London, to South Africa ,and the fax number in London through which it was faxed.
- (iv) The time when received in South Africa, and the fax number through which it was received.
- (v) The time when faxed from South Africa, and the fax number through which it was faxed.
- (vi) The time and fax number through which it was received here in Nairobi.

A perusal of exhibit D3 reveals that it does not have all the above mentioned information. It simply has an information that it was sent out on 16th July 1998 at 16.54 hrs thorough fax number 741631. It has two other entries one made on 22 July 1998 at 11.24 against CHSporborg, through fax number 01718651529. This number is not among the numbers appearing on exhibit D2. The numbers indicated to have been called in the UK as per the information on exhibit D2 are 2, namely 1813337911 and 1712676540.

Exhibit D1 is also relied upon as proving sending of the fax. The numbers indicated to have been called in the UK on the 16th are 1712676540 and 18133377811 which do not feature on exhibit D3. This discrepancy in the details on exhibits D1,2 and3 makes exhibit D3 to be doubted as the document whose sequence was given above. Once doubted it cannot be used by the defence as the offensive document that led to the summary dismissal of the plaintiff.

As noted earlier, the writer of exhibit 13 is the one who said that he was saying conclusively that, it is the plaintiff who faxed the offensive document. Mr. Stogdale, did not come to give the evidence to confirm to the court what facts led him to conclusively say that it is the plaintiff who faxed the said document. In

the absence of such evidence, the assertion is unsupported and it does not go to oust DW1's evidence that he does not know the nature and the content of the document the plaintiff faxed on the material day.

As regards the assertion that the document is written in an insulting and abusive language to persons in authority, the court has no doubt that the language is indeed insulting. The issue is who are the aggrieved parties. The aggrieved parties are those placed in authority over the plaintiff. Apart from the correspondence written on their behalf by Counsel, there is nothing to show that they complained. DW2 did not receive their complaint. It is Mr. Stogdale and Counsel who received that complaint. Both of whom did not give evidence. Failure to give evidence as submitted by the plaintiffs Counsel makes the move to vindicate the wrong unjustified.

As for the matter constituting misconduct the court has no doubt it does, however it alone in the absence of a link to the plaintiff cannot surmise to support or justify the dismissal.

As for the management taking a decision to summarily dismiss the plaintiff, there has to be evidence to that effect. D.W.2 was not in the management, then, and she said so in her evidence. It means that the proper person to give evidence to that effect was Mr. Stogdale. No proof of such a meeting has been exhibited that the management took that decision as there is no indication as to where the meeting took place, who were in that meeting, what was discussed and the decision taken. There is nothing to oust the plaintiffs assertion that Mr. Stogdale acted on his own to summarily dismiss him. No document has been exhibited to show that Mr. Stogdale could single handedly dismiss a senior employee. Having ousted all that the defendant relied on to justify the summary dismissal there is nothing to stand in the way of the plaintiffs assertion that the dismissal was unjustified.

As regards whether other factors influenced the dismissal, this court, is alive to the documentation produced by the plaintiff namely exhibit 9, 10, 11 and 12, that there was discontent amongst local staff due to frequent retrenchment. However although the management was aware of this, Mr. Stogdale did not cite this as one of the reasons for the summary dismissal.

Having held that the dismissal was unlawful or wrongful the court comes to assess the damages. Case law already cited directs the court to the contract of employment. The items prayed for in paragraph 6 of the plaint are:-

(1) 3 months salary in lieu of notice. This is provided for in exhibit 1. Once the summary dismissal is faulted, then the only other lawful way of bringing the contract to an end would be through payment of the notice value which comes to Kshs.287,700.00, which is allowed.

One year's bonus is not in the contract but the plaintiff said they used to be paid yearly. DW2, confirmed, it is paid, but its payment depends on whether the company has posted profits. It is her evidence that in 1998 no profits were made and so none was paid even to other employees. However as submitted by the plaintiffs counsel, no records were produced to show that none was paid.

Indeed this is paid on a yearly basis at the end of the year. The Plaintiff had not completed a year. It is however clear from the past record that had it not been for exhibit 13, nothing could have prevented him from working up to the end of the year. The fault lay with the defendant, so they should shoulder that penal consequences. The court finds this awardable.

As for lost income for the period he remained without employment. Case law cited states clearly that this claim is not awardable. The same is disallowed. Gratuity claimed is not provided for in the contract. No evidence was adduced as to under what circumstances it is paid. There is therefore insufficient evidence to warrant the court allow the same.

As for pension, being the employer's contribution, this is provided for in the contract exhibit 1. The defendant recognized that the same is payable and that is why it was included in the tabulation in exhibit 15. It was not paid because of the minus due to an alleged amount due to Kantours Sacco. The amount totals kshs 265,318.35. This amount, nor that allegedly due to Kentours has been counter claimed by the

defence. No evidence was adduced to show that it was so owed. The court finds the same awardable and it is allowed as prayed.

In conclusion the final orders of this court are:-

(1) The Plaintiff's employments' summary dismissal, is ruled to be unlawful, and wrongful, and the same is set aside and substituted with a normal termination in accordance with the contract exhibit 1.

(2) In view of number 1 above, the plaintiff is awarded the following terminal benefits:-

(i) 3 months salary in lieu of notice Kshs 287,700,00.

(ii) One years bonus Kshs 95,900.00

(iii) Pensions (employer's contribution) Kshs 265,318.35.

Total Kshs 648,918.35.

(3) The amount in number 2 above will carry interest at Court rates from the date of filing till payment in full.

(4) The Plaintiff will have costs of the proceedings together with interest at court rates.

DATED, READ AND DELIVERED AT NAIROBI THIS 22nd DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE