REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(*Coram: Ojwang, J.*)

CIVIL CASE NO. 1139 OF 2002

MENGINYA SALIM MURGANI….……PLAINTIFF

-VERSUS-

KENYA REVENUE AUTHORITY……...…DEFENDANT

JUDGEMENT

A. EMPLOYMENT TERMINATED OUTSIDE AGREED TERMS: THE CLAIM

The plaint, dated 4th July, 2002 and filed on 5th July, 2002 was, with leave of the Court, amended and filed again on 7th December, 2005.

The plaintiff's gravamen falls within the law of employment, and, therefore, is for a substantial part, founded on contract law. The plaintiff states that he and the defendant entered into a contract of employment on or about *7th June, 1996*; he was employed as a *Senior Research Officer* on permanent and pensionable terms and was contributing 7.5% of his basic salary to the defendant's pension scheme. The plaintiff continued to work for the defendant in that capacity, and in the course of 2001, was promoted to the rank of Senior Assistant Commissioner, earning a monthly salary of Kshs.125,187/=.

It is pleaded that the plaintiff's employment was regulated by the defendant's Code of Conduct, and was not to be terminated, save in accordance with the said Code of Conduct.

It is pleaded that it was an implied term of the contract of employment, that unless the plaintiff was dismissed for misconduct or gross misconduct, or compulsorily retired under the Code of Conduct, then his employment would continue until he attained the age of 55 years.

The plaintiff states, in the alternative, that it was a further express term of the contract of employment, that the plaintiff's employment would continue until determined by a six-month notice in writing on either side, or, in lieu thereof, a payment of six months' salary. It was an implied term, alternatively, that the plaintiff's employment would be determined only on reasonable notice – which meant six months, or three months.

It is stated that, on or about 19th April, 2000 the defendant, wrongfully and in breach of the said contract of employment, suspended the plaintiff from his employment, allegedly for violating s.3:5:4 of the said Code of Conduct, in relation to the importation of goods into the country by one Schools-Equipment-

Production-Unit [SEPU]. But *two weeks* later, on or about 3rd May, 2000 the defendant *lifted the said suspension*, and the plaintiff was directed to report for duty, which he did. Then, slightly over *eight months* later, on 18th January, 2001 the defendant again, wrongfully and in breach of the said contract of employment, suspended the plaintiff from his employment, for alleged contravention of s.3:5:14 of the said Code of Conduct, in respect of the *same* importation of goods into the country by SEPU aforementioned. It is stated that, just under *two months* later, on *9th March, 2001* the defendant wrongfully, and in breach of the said contract of employment, and without giving the plaintiff six months' notice in writing, or any notice at all in lieu, to determine the said employment, and without payment in lieu of notice, *dismissed* the plaintiff from his employment with *loss of all his benefits*. In this regard the plaintiff contends that he is entitled to *general damages* for the termination of his working career, or to *reasonable remuneration* within the meaning conveyed by the authority, ***Alfred J. Githinji v. Mumias Sugar***, C.A. No. 194 of 1991.

The plaintiff pleads that the SEPU matter, as the reason for terminating his employment, was not valid and did not give a basis for the defendant's action purportedly taken on the basis of the said Code of Conduct, since his findings on SEPU were subsequently confirmed when persons charged in respect of the SEPU goods-importation, were acquitted by a Court of law. It is contended that the defendant's failure to reinstate the plaintiff in his employment, or even to tender to him an apology, following his vindication in respect of the SEPU incident, amounts to *wrong-doing in public office* which caused him injury, and he prays for *general* and *exemplary damages* for damage to his career, and for injury to his dignity.

The plaintiff claims that he lost his benefits and entitlements, and has suffered loss and damage quantifiable in figures which he has set out in the plaint. He asks for (i) general damages; (ii) exemplary damages; (iii) special damages in the sum of Kshs.1,945,453/00; (iv) costs of the suit; (v) interests on items (i), (ii), (iii) and (iv).

B. CODE OF CONDUCT PERMITTED TERMINATION OF EMPLOYMENT; NO WRONG OR BREACH OF CONTRACT WAS OCCASIONED; PLAINTIFF HAD NO ENTITLEMENT: THE LINES OF DEFENCE

The defendant's statement of defence, dated and field on 13th August, 2002, and amended and re-filed on 1st February, 2006 carries an admission that the defendant did employ the plaintiff on or about 7th June, 1996; but it is denied that there was any contract for permanent and pensionable employment *as at that date*.

The defendant denies that the plaintiff started contributing 7 ½% of his basic salary towards pension as from 7th June, 1996.

The defendant denies that there was in the employment agreement an express term of six months' notice prior to termination of the defendant's employment. The defendant also denies that there was any implied term incorporated in a letter of employment issued by the defendant to the plaintiff.

The defendant denies that by dismissing the plaintiff from employment, it had done any wrong, or been in any respect in breach of contract. The defendant states it took disciplinary action against the plaintiff, but denies that this was wrongful, or in breach of contract. The defendant asserts that the said disciplinary action was taken in accordance with the Code of Conduct aforementioned, and the terms of which Code were well within the plaintiff's knowledge.

The defendant claims justification for the said disciplinary action, which occasioned the termination of the plaintiff's employment, on the basis that "the plaintiff refused, neglected and/or failed to prevent a conspiracy to defraud the Government revenue through evasion of duty on goods imported by School Equipment Procurement Unit (SEPU)."

The defendant denies that the criminal case brought against persons involved in the SEPU goods-

importation incident, had been withdrawn; and avers that the fact the accused persons in the criminal case had to pay Government taxes, was proof that the plaintiff while in employment, had abdicated his duty of uncovering tax evasion.

The defendant asserts that there were no benefits due to the plaintiff, who was "a stranger to the matters and particulars pleaded" in respect of such entitlements and benefits.

C. MATTERS IN ISSUE – FOR RESOLUTION BY TRIAL

The pleadings on both sides cut across one another, and generate issues for resolution which the plaintiff's advocates filed on 23rd March, 2004 and served on the defendant on the following day. These issues may be set out here:

a. *Did the contract entered into between the plaintiff and the defendant provide for the plaintiff's employment on permanent and pensionable terms?*

b. *If yes, was the plaintiff's contribution to the pension scheme 7.5% of his basic monthly salary?*

c. *Was it a term of the employment contract, that the plaintiff's employment could be terminated on the basis of six months' notice by either party, or six months' salary in lieu thereof?*

d. *Was the employment contract between the plaintiff and the defendant to be regulated by the defendant's Code of Conduct?*

e. *If (c) and (d) are to be answered in the affirmative, is the defendant in breach of the contract of employment?*

f. *Has the plaintiff suffered loss and damage, as a result of the said breach?*

g. *Is the plaintiff entitled to the reliefs sought in the plaint?*

D. SUBMISSIONS ON EVIDENCE AND ON LAW

(a) The Causes of Action

Learned counsel, ***Dr. Kuria*** stated that the plaintiff's claim was based on two causes of action: (i) *wrongful termination of contract* of employment occasioning destruction of working career; and (ii) *misfeasance in public office occasioning harm*. The second claim is a *tort,* which bears the point that the defendant *abused its power* under the Kenya Revenue Authority Act (Cap.469, Laws of Kenya), or acted maliciously or recklessly when it purported to discipline him and, in a misguided cause, destroyed his career. The plaintiff asks the Court to order compensation to him, restoring him to the position in which he would have been, were it not for the misfeasance aforesaid.

The plaintiff introduces a *constitutional dimension* to his grievances, and in this regard he asks for *exemplary damages*. He contends that he was denied a *fair hearing* by an adjudicating authority, in the terms of s.77(9) of the Constitution. That subsection of the Constitution provides:

> ***"A court or other adjudicating authority prescribed by law for the determination of the existence of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicatory authority, the case shall be given a fair hearing within a reasonable time."***

It is claimed that special damages should consist in the *pension* which the plaintiff would have been entitled to, had he remained in the defendant's employ up to retirement at the age of 55; and that it should incorporate the *leave allowance* to which the plaintiff was entitled at the time of termination of his

employment.

(b) The Evidence

Learned counsel recounted the evidence, covering the testimonies of each of the two witnesses who, respectively, spoke for the plaintiff and for the defendant. He noted that the testimonies are substantially in agreement, on fact.

The evidence shows that the plaintiff is a person of specialized knowledge in the fields of money and finance. He is the holder of the following degrees: B.A. (Poona); MA. (Columbia); M.A. in Economic Development (Dalhousie); B.Sc. in Monetary and Economic Affairs (Nova Scotia); he also holds a Diploma in Banking Regulations. The plaintiff has quite considerable work-experience in the public sector, having worked in the Ministry of Economic Planning (1987); Ministry of Finance (1989 – 1993); World Bank (as Senior Economist) (1993 – 1994); Financial Consultant (1994 – 1996).

The letter appointing the plaintiff as Senior Research Officer by the defendant is dated *26th June, 1996*; he became a permanent and pensionable officer with effect from that date – communication to this effect being made in August, 1997; he was promoted to the grade of Assistant Commissioner in January 1998, and a letter dated 12th January, 1998 shows that he was placed in KRA *Grade 6*, with a monthly salary of Kshs.63,640/= rising to Kshs.83,000/=. In February 1999, the plaintiff was promoted to the post of Senior Assistant Commissioner, and as at September, 2000 his gross pay stood at Kshs.125,187/= per month. It was the plaintiff's testimony that he was a member of the defendant's pension scheme, and to this end he contributed 7.5% of his basic salary.

More light was shed on the working of the pension scheme by the defence witness, ***Mr. Michael Aringo Onyura***, who confirmed that the plaintiff belonged to the pension scheme, to which the defendant contributed, in respect of each member-employee, 13.5%. This meant that every month, as much as 21% of the salary was kept in the pension fund. Upon retirement, the employee could collect one-third of the accumulated money, receiving the balance by monthly payment; and these payments were calculated on the basis of salary as at the time of retirement.

The plaintiff's pay-slip showed that his latest salary payment of Kshs.125,187/00 carried the following heads: basic pay; transport allowance; medical allowance; and house allowance.

The defence witness, in the course of cross-examination, testified that the plaintiff had made good progress in his career, and that an employee of the defendant in that category had a chance of one day becoming the Commissioner-General of the Authority. DW1 testified that in the ranking of office-holders at the KRA, the Commissioner-General holds position No.1; four Commissioners held position No.2; Senior Deputy Commissioner is ranked at No.3; Deputy

Commissioner stands at No. 4. The plaintiff, at the time he was suspended, was ranked at No.5. The witness testified that a Commissioners each earned Kshs.600,000/= per month, but he did not know the salary of the Commissioner-General, as it was personal to him.

Witness testimony was not agreed on the *mode of terminating an employment contract* such as the one in issue herein. According to the defence witness, the contract could be terminated by giving the plaintiff three months' notice; but as no document was produced to validate this contention, learned counsel, ***Dr. Kuria*** urged that no such a formal rule existed.

It was the plaintiff's testimony that he left a World Bank job in 1996 because he looked forward to a successful career in the defendant's employ, until he reached the retirement age of 55 years. He testified that he had reason to hope for career success in his employment, as he had received *two commendations* on account of his diligent service to the defendant.

The plaintiff told the Court that he apprehended that his disagreement with a Senior Deputy Commissioner of Customs, in respect of methods of work, could have predestined him to be victimized

by the defendant.

The plaintiff testified that he had conducted dutiful and thorough investigations as from August, 1999, on the basis of intelligence information in the possession of the defendant, regarding attempts to evade customs duty; he confirmed the report, and issued a seizure notice for uncustomed goods; and he *assisted* with the prosecution of the offenders. The offenders admitted that they had evaded duty, and they paid up; and consequently, the State saw it fit to terminate the prosecution proceedings.

The plaintiff feared that it was precisely his diligence, in investigating the case of the uncustomed goods, that brought him into trouble, generated through silent acts of collusion that saw his employment terminated wrongfully. It was his view that, rather than be commended for the recovery of tax in the sum of about Kshs.20 million, he was suspended from duty and subjected to a travesty of disciplinary proceedings which, moreover, infringed his rights to a hearing attended with *natural justice.*

It emerged from DW1's testimony that the defendant had not supplied the plaintiff with documentation which had been compiled on him, but which was sent to the Staff Committee which deliberated upon matters of discipline.

It emerged from DW1's testimony that the defendant's Code of Conduct does ***not*** confer upon an employee any right to an oral hearing, either before the Staff Committee or before the Board of Directors; and the entire deliberations- procedure depended on the *discretion of the defendant*; there was an example in which a different employee had indeed been granted an oral hearing in a disciplinary matter, but the plaintiff had not been granted the same. From DW1's testimony, the plaintiff's disciplinary matter had been considered by the Staff Committee *twice* – on *16th February, 2001* and on *12th July, 2001*. The defendant's letter of 9th March, 2001 indicates the decision of the Board of Directors to *dismiss* the plaintiff; and the defendant's letter of 2nd October, 2001 states that the plaintiff's *appeal has been rejected*. The Staff Committee and the Board of Directors had deliberated (on *16th February, 2001* and *20th February, 2001*) on the plaintiff's disciplinary matter, in an *appellate capacity*; but these were *the very bodies* that, previously, had taken the decision to terminate the plaintiff's services.

It was established by evidence that the plaintiff, while serving the defendant as Senior Assistant Commissioner, had been suspended from his employment on *19th April, 2000*; and then, on *3rd May, 2000* he received a letter lifting the suspension; and he reported for duty on *4th May, 2000* when he was transferred to another department; then, on *18th January, 2001* he was suspended for the *second time.*

Learned counsel submitted that the treatment meted out to the defendant, only two months after he had, on *1st February, 2000* been *commended* by the Commissioner-General for honesty and commitment to duty, showed duplicity, malice and arbitrariness on the part of the defendant. The propriety of this contention is shown by the fact that, before the first suspension, the defendant had written to the plaintiff (*19th April, 2000*) in these terms: *"investigations done by the Criminal Investigation Department indicate that you may have been aware of the conspiracy to defraud the Government of Kenya through tax-evasion";* but so soon thereafter, (*3rd May, 2000*), the defendant "lifted the suspension with immediate effect"; and then there was the second suspension, on *18th January, 2001*, attended with a charge of *alleged omission.*

On the evidence, learned counsel submitted that the plaintiff was a victim of his own success as an officer of the defendant; his suspensions from employment arose from his discovery that importers of equipment were cheating on customs duty. Counsel urged that the logical inference from the evidence and documentation tendered in Court, was that "the suspension and purported termination came because there were corrupt people who were threatened by his zeal, efficiency and integrity."

(c) The Law: The Plaintiff's Position

Learned counsel, ***Dr. Kuria*** relied on the Court of Appeal decision in ***Alfred J. Githinji v. Mumias Sugar***

Co. Ltd., Civil appeal No.94 of 1991, for the proposition that, where employment is illegally terminated, but the employment contract does not provide a mode of termination, the Court is to determine the level of compensation on the basis of discretion, as to what is *reasonable.* The Court, in that case, thus stated the principle:

> ***"Our view is that where a contract of service…is for an indefinite period with an element of permanency and a degree of security of tenure in that it does not provide for its termination by giving of notice, or payment of any salary for its termination in lieu thereof, what the employee who is wrongfully dismissed will be entitled to, is what is reasonable in the circumstances."***

It is within such a description, counsel urged, that the plaintiff's contract of employment falls. For the defendant's contractual letter (dated 15th August, 1997) thus reads:

> "I am pleased to inform you that your terms of service have been translated to permanent and pensionable with effect from *26th June, 1996.*
>
> "Please note that you become a member of the Authority's pension scheme and contribute an amount equal to 7.5% of your pensionable emoluments."

Learned counsel urged that the contract of employment made between the plaintiff and the defendant did not provide for its termination. For the plaintiff's employee was governed by s.13 of the Kenya Revenue Authority Act (Cap.469). By that section of statute, the power to employ officers other than the Commissioner of Customs and Excise, the Commissioner of Income Tax, the Commissioner of VAT, and any other Commissioner, is vested in the Commissioner-General of the Kenya Revenue Authority (KRA). KRA (the defendant) is a *public authority* and, like other public authorities, it "assures its employees that they will work for life within it."

Counsel submitted that the defendant had created a legitimate expectation in its employees, including the plaintiff herein, that if they work diligently, then they will continue to so work "until they retire at the age of 55 years."

Learned counsel submitted that the disciplinary bodies of the defendant are to be classed as *tribunals,* and therefore they are required by law to comply with the relevant tribunal law. The Code of Conduct which governs staff discipline, at the defendant's employ, provides for a *Staff Committee*, and the *Board of Directors* is the appellate Forum. Counsel urged that both the Staff Committee and the Board of Directors are t*ribunals*, for the purposes of public law; and so they are required to adhere to *rules of natural justice* when discharging their functions: ***D'Souza v. Tanga County Council*** [1961] E.A. 377. The law requires that prescribed disciplinary procedures, in the circumstances, would have to be followed; and even if no procedure were prescribed, some form of *inquiry* would have to be conducted; and any tribunal set up must endeavour to attain *fair determination*; the person accused must know the *nature of the accusation*; a fair hearing is required, with both sides to the disputed question having an *opportunity to represent his/her/its case*; relevant information at the centre of the question must be availed to *both* sides.

Counsel urged that, by the authority of the Court of Appeal decision in ***Onyango v. Attorney-General*** [1987] KLR 711, it was to be implied, even where there was no relevant statutory provision, that a public authority to which power has been entrusted, will adhere to rules of natural justice.

Dr. Kuria submitted that the fair procedures called for, in dealing with the plaintiff's case, had not been observed; for what would have been an *appeal* came before the very same bodies which had taken the first decision – the Staff Committee and the Board of Directors.

For lack of *hearing* to the plaintiff, it was submitted, the defendant had no basis for terminating the plaintiff's employment, other than mere suspicion. The defendant's decision was based on the bald complaint, founded on a speculation, that the plaintiff *may have been* aware of the conspiracy to cheat on customs duty, on the part of those whose goods had been seized. That the basis of the termination of employment was mere speculation, counsel urged, was clear from the fact that the no criminal charge was

laid *against the plaintiff*, unlike the case of those who had been suspected of cheating on import duty. It was, indeed, the plaintiff's evidence that it was ***his*** expeditious action as head of investigations, that led to the apprehension of the suspects who were then charged, in *Criminal Case No.1018 of 2000*.

Counsel urged that the plaintiff had a *special interest*, coming close to rights linked to property-ownership, in his employment status with the defendants – and so the defendant acted illegally in terminating the same without giving a *procedural hearing;* without providing a substantive *appeal* opening; and without much of a *ceremony*. This reasoning comes from broad perceptions on the employment-interests of any employee. And a vivid depiction of this reality, which counsel urged should guide legal principle, is found in ***Mary Ann Glendon's*** learned work, ***The New Family and the New Property*** (Toronto: Butterworths), p.143:

> **"Employer and employee have always been closely bound together. As with their ancestors, master and servant, lord and vassal, or master and slave, the need of each for the other is mutual in all respects save, as *Adam Smith* said, the critical one, that the employee's need is more pressing and immediate. Developments of the past few decades, however, have significantly altered the bonding of the employment relationship, not only by reinforcing the ties that have always made it difficult for an employee to change occupations or employers, but also by *making it more difficult for an employer to terminate his relationship with any employee*. *These developments cut across legal, economic and political boundaries.* Simultaneously constraining and liberating the individual, job ties have tightened and the employment relationship has assumed an enhanced importance in his life."**

The validity of the foregoing reasoning, in the manner in which it foreshadows the existence of *rights* and *obligations* in the mutual standing of employer and employee, is a scenario which this Court takes judicial notice of; and I will return to this principle as I determine the matters in issue herein.

Learned counsel further illustrated the foregoing principles with emerging trends in local case law, and cited earlier decisions of this Court: ***Geoffrey Muguna Mburugu v. Attorney-General***, H.Ct. Civil Case No. 3472 of 1994; and ***Lt. Col. Benjamin Mwema v. Attorney-General,*** High Ct. Civil Suit No. 2230 of 2001. The facts in the two cases are pertinent to the instant matter. In the ***Mburugu*** case it was held that the mode of implementation of the plaintiff's retirement from the public service, rendered it null; and therefore, he was to be paid salary arrears. In the ***Mwema*** case, a senior officer of the military establishment was simply uprooted from his employment, without the relevant procedures of law being followed; and the respondent was hard put to justify such arbitrary disruption to the plaintiff's career. The Court awarded general damages for loss in career advancement.

In the two decisions, this Court attempted to define the essential bonds created in public employment, between employer and employee. In the ***Mburugu*** case the following passage appears:

> ***"Employment in the public service both provides a machinery of serving the public interest, and benefits the employee who is compensated by approved methods, for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment. It is in the interest of both the public, to whom services are rendered, and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office, is given fulfillment. This law, which will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices, constitutes the objective criterion of correct delivery and good service."***

Beyond contract, ***Dr. Kuria*** submitted that the defendant had committed a *tort* against the plaintiff – the tort of distortion of a public-office trust, which has been categorized as *misfeasance in public office*. This wrong arises in the mode described by ***Sir William Wade*** and ***Christopher Forsyth***, in *Administrative Law, 9th ed*. (at p. 781):

> ***"Even where there is no ministerial duty…and even where no recognized tort such as trespass, nuisance or negligence is committed, public authorities or officers may be liable in damages for***

malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury."

Learned counsel urged that the defendant had, in the instant case, acted unlawfully and intentionally to remove the plaintiff from employment; and, under the tort of misfeasance in public office, the plaintiff would be entitled to damages for "the destruction of his career."

The tort of misfeasance in public office has been judicially defined – in a persuasive authority, ***Jones v. Swansea City Council*** [1990] 1 WLR 55, at p.71 (*per* ***Slade, L.J***.):

> **"The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public, either with intent to injure another or in the knowledge that he was acting *ultra vires*."**

The defendant herein, counsel urged, is established by Act of Parliament, and wields *public power*; and so a distortion in the application of that power will, in certain circumstances, constitute misfeasance in public office.

Counsel submitted that the law on misfeasance in public office is now well developed, and has been recognized in several Commonwealth jurisdictions, as is clear from case law: ***Bourgoin S.A. and Others v. Ministry of Agriculture, Fisheries and Food*** [1986] 1 Q.B. 716; ***Three Rivers D.C. v. Bank of England*** (No.3) [2003] 2 A.C. 1 – 294.

Counsel urged that the defendant, in the instant matter, had committed the tort of misfeasance in public office, because the defendant *did know* it had to observe *rules of natural justice*, and that if it did not observe those rules, then the plaintiff's career would be ruined; yet the defendant went ahead and breached those rules, with the direct consequence that the plaintiff's career was ruined. It was always clear, counsel urged, that failure to comply with the rules of natural justice would lead to the destruction of the plaintiff's career; and therefore, the *foreseeable loss* was always perceptible. Hence the plaintiff should recover damages for the said foreseeable loss.

That the defendant departed from the lawful course, and terminated the plaintiff's employment, well knowing of the likely injury to the plaintiff – counsel urged – was attended with evidentiary *signals of recklessness;* and of these, the following examples were cited:

i. *relying on the speculation that the plaintiff may have been aware of the conspiracy to cheat on customs charges;*

ii. *suspending the plaintiff twice within a short span of time;*

iii. *refusal to provide the defendant with a report on him, which was being used to terminate his employment;*

iv. *refusal to grant the plaintiff unbiased audience, when disciplinary decisions were being taken;*

v. *suspending the plaintiff very shortly after his reinstatement in employment;*

vi. *refusal to review the said termination of employment after the State withdrew charges which had been brought against the suspected fraudsters.*

(d) The Law: The Defendant's Position

The defendant's position is that the plaintiff was dismissed from the defendant's service in accordance with the Code of Regulations which had been made by virtue of the provisions of the Kenya Revenue Authority Act. The defendant also states, in an unclear manner, that *"the plaintiff was a mere servant and not an office-holder whose conduct and regulation [?] was subject to the said Code of Regulations*." Learned counsel for the defendant stated that the impugned termination of employment was a *"decision and action…which each [?] employer is entitled to take against an employee who acts in breach of the contract of engagement and the Regulations."*

Contrary to such statements, learned counsel, in his submissions, now stated that –

> "The plaintiff was a Senior Assistant Commissioner KRA Grade 5, Investigation Branch of [of] Customs and Excise Department, before he was transferred to Tax Programmes and later dismissed from …service with effect from 20th February, 2000."

Contrary to the tone of *conjecture* in the letter terminating the plaintiff's employment, and not entirely in keeping with the defence evidence, ***Mr. Ontweka*** for the defendant, in his submissions, made the following statement (of, and about, the plaintiff):

> *"He was aware of the investigation concerning the purported imports of goods by School Equipment Program Unit (SEPU)...He was aware of the conspiracy to defraud the Government of Kenya through tax evasion but failed to take necessary measures*."

Learned counsel in his submissions, lays much emphasis on the *suspicions* which the defendant is said to have harboured against the plaintiff; but he does not say those suspicions represented reality, nor that they were framed into *charges*, and *served upon the plaintiff so he may respond in specific terms.* This omission bears out the plaintiff's evidence; but it also bears the difficulty that the content of counsel's statement, did not come through the testimony of the *defence witness*. All the testimony of the plaintiff, in respect of his repeated suspension and eventual dismissal, is confirmed in ***Mr. Ontweka's*** reading and interpretation of the evidence.

The effect is that the testimonies made before the Court, during the hearings, are not the basis of any significant contest. My concern, therefore, is essentially with counsel's treatment of the *questions of law.*

Learned counsel ***Mr. Ontweka*** made no attempt to rationalize the *procedures* followed by the defendant, in *hearing* the material laid against the plaintiff; in *taking the decision* to terminate his employment; and in dealing with *appellate issues*. Counsel made the presumption, apparently, that an act of dismissal expressed by the *highest authority* of the defendant was l*egitimate* and *final*, and had the following effect:

i. "the plaintiff lost all benefits except his pension which was to be processed and paid upon completion and submission of a clearance certificate";

ii. "the pension payable is to be guided by the Pension Scheme rules of the defendant."

Learned counsel in his analysis, denies certain points of fact which, I think, emerge with better clarity from the testimonies. He was not a *witness*, and he would have no basis for contradicting the statements of fact in the testimonies.

Counsel contends, for instance, that the plaintiff's employment was *not* on permanent and pensionable terms of employment; that the plaintiff was *not* contributing 7.5% of his salary towards his pension benefits; that the plaintiff "failed, neglected and/or refused to stop or prevent a conspiracy to defraud Government revenue." If it is on this last ground that the plaintiff could be dismissed from employment, then the natural expectation is that *testimony* would be given on *how the conspiracy to defraud was exposed*; the evidence before the Court is that it was the *plaintiff*, more than anyone else, who exposed the said fraud, and he fears it is thanks to that extraordinary initiative, that senior officers plotted to have his employment terminated. Since the defence brings no testimony on this point, the rule of *balance of probabilities* must be the basis for a resolution to the uncertainty.

From such a cursory attention to law and evidence, ***Mr. Ontweka*** made submissions on certain past judicial decisions bearing on the law of employment. From those decisions, in particular ***Alfred J. Githinji v. Mumias Sugar Company Ltd,*** Civil Appeal No. 194 of 1991; ***Rift Valley Textiles v. Edward Onyango Oganda,*** Civil Appeal No. 27 of 1992 (Nakuru); ***Shimba Tourist Services Ltd v. Wilson Mise Kigani***, Civil Appeal No. 135 of 1994; ***David Chege Mwangi v. University of Nairobi***, Civil Appeal No. 144 of 1995; ***Kenya Ports Authority v. Edward Otieno***, Civil Appeal No. 120 of 1997; D***avid K. Kituku v. Kenya Railways Corporations,*** HCCC No. 580 of 1998 (Nairobi) – learned counsel urged certain principles as the ones that should guide this Court, in determining the issues before it:

i. that, where termination of a contract of employment is shown to have been unlawful or wrongful, the remedy is to compensate the employee with *payment in lieu of notice;*

ii. that, where, in the contract of employment, the notice period is not specified, the Court is to award the equivalent of payment for a *reasonable period of time;*

iii. that, compensation or award of damages should not be such that its effect would amount to ordering *reinstatement of the employee* in his former employment, to the employer's detriment;

iv. that, once the employer loses confidence in an employee, the employee should not be forced on the employer;

v. that, there is a distinction to be drawn, in the law of employment, between an "office-holder" and a "mere servant".

Learned counsel did not, however, attempt a systematic application of such principles to the facts of this case. I expected to hear, for instance, how the plaintiff as, admittedly, a senior officer of the defendant, was a "mere servant" and not an *office-holder*; how the defendant as a *statutory* body had lost confidence in the plaintiff as an employee; how counsel's idea of *compensation that equals reinstatement*, could be related to the principles of law and the causes of action relied upon by the plaintiff; how the notion of "contract" applied in relation to employment in a *statutory body providing public service on a permanent basis;* how the employer's will ought to be expressed, in the case of a statutory, public institution which is not the property of a limited number of share-holders.

Mr. Ontweka in his submissions, has acknowledged, as submitted for the plaintiff, that the disciplinary bodies established under the defendant's Code of Conduct, *are tribunals subject to the rules of natural justice*. But counsel denies that the defendant was in breach of the rules of natural justice, because the plaintiff, at the relevant disciplinary fora, "was heard; the only thing that happened is that the outcome of the hearing was not pleasant to the…plaintiff."

(e) Contesting the Defendant's Case: The Plaintiff's Reply

Learned counsel ***Dr. Kuria*** submits that the defendant fails to address the points of law constituting the causes of action: there is a failure to engage the issue of failure to observe natural justice; and the cause of action in misfeasance in public office has not been addressed by counsel for the defendant.

E. FINAL ANALYSIS

My line of persuasion may have emerged already, from the detailed review of evidence and submissions already undertaken. This will be consolidated and finally determined, after reverting to the key issues.

There is not much contest to the facts, as carried in the evidence from both sides.

Counsel for the defendant, though not the defence witness, has given the impression that the plaintiff was only an *ordinary employee* of the defendant, whom the defendant could readily dismiss if his services were thought to be unsatisfactory.

Such an argument, for any category of employees, would be flawed, especially with regard to a *public institution* such as the defendant, and bearing in mind the special relationship which inevitably comes to exist between employer and employee. In so far as the employee spends the bulk of his or her time in the service of the employer, little other livelihood, in most cases, is earned by the employee outside the framework of the *employment relationship*. Of this fact, this Court takes judicial notice; and it must then be considered that the *status quo* of the employment relationship, inherently vests in the employee both normal rights, and legitimate expectations. In a public institution, invariably, there will be codes of management which lay down the rights and expectations of the employees, as well as procedures of discipline and termination employment. Disciplinary procedures in public bodies are *tribunal* matters, requiring *fair procedures of resolution*, these being expressed in particular in *rules of natural justice.*

In the case of the plaintiff herein, the discharge from his employment was required to be in line with a Code of Conduct, which document would serve as the basis of fairness and natural justice, in any matter of a disciplinary kind.

The Court does not, therefore, agree with ***Mr. Ontweka*** when he contends that the defendant could have terminated the plaintiff's employment *at will,* and could have fully acquitted itself just by paying to him several months' salary in lieu of notice.

It emerges as a fact, that the plaintiff had first been employed as a *Senior Research Officer*, in 1996, and, by the time his employment was terminated, he was holding the rank of *Senior Assistant Commissioner*. The evidence also shows that 7.5% of the plaintiff's earnings was being paid into the pension fund, to go with a counterpart remission by the defendant, of 13.5% of the emoluments due.

No specific evidence was brought before the Court showing a *departure* by the plaintiff from the ethics governing his work. But somebody within the defendant organization had *suspicions* regarding the plaintiff's performance of his work; and this led to repeated suspensions, and, eventually, to termination of the plaintiff's employment. Learned counsel, ***Mr. Ontweka*** did not demonstrate to the Court that termination of employment on such a ground was possible *in law*; but he drew a conclusion on a point of law, which he linked to the learned work of ***Professor Sir William Wade*** (*op.cit*., 4th ed., at p.560): "*Where the dismissal was in fact justified, failure to give a fair hearing will involve no loss and therefore no compensation."*

From the evidence, it is clear that the plaintiff's matter was heard repeatedly by the *same officers* at the Staff Committee level and the Board of Directors level; and the collective mode of hearing the matter blurred the line of *appeal*. It is also clear that those officers who heard the disciplinary matter, were also, at least partially, the *same* officers who had taken the decision to suspend the plaintiff. It is clear too that the suspicions which led to the suspensions and to termination of employment, were *not set* out in a document availed to the plaintiff, so he could respond. For the most part, the plaintiff did not *share a forum with his accusers*, so that the differing views could be resolved through an informed process.

I have considered the foregoing facts, and come to the conclusion that they were not consistent with the requirements of a *fair hearing*. The effect is that neither the Staff Committee, nor the Board of Directors, had complied with the binding rules of natural justice, which apply to tribunals exercising powers of discipline. From that conclusion, it follows that the defendant had no right, in law, to terminate the plaintiff's employment as it did.

The plaintiff claims that, the consequence of the said termination of his employment outside the framework of the law, was to destroy his career, and he seeks compensation for the said injury. The plaintiff also asserts that the defendant, in knowingly acting contrary to law while infringing his rights as an employee, was misconducting itself in office, and committing an actionable wrong which constitutes the cause of action known as *misfeasance in public office.*

It is already clear, from my analysis herein, that the defendant, in terminating the plaintiff's employment, out of either suspicion, or motives which the defendant was reluctant to ventilate in Court and to show how they could be justified as an incident of *public* duty – was not acting *according to law*, and was not

acting *in the public interest*. So well-endowed with resources, and with access to legal services, as it must be, the defendant paid no regard to the elemental requirement that public disciplinary bodies shall always be guided by the rules of natural justice: and while being so indifferent, the defendant blithely wrenched the plaintiff out of a career that, from his educational record, he had so assiduously prepared for. The defendant, obviously, caused the plaintiff damage and loss, and cast him out into an uncertain world of employment-search. In principle, therefore, the plaintiff has a proper case in law to come to Court praying for *damages.*

Given the aforementioned issues of merit in this whole case – and in my opinion, this is what must underlie the decision of the Court – I have not been persuaded of the weight of certain technicalities which the defendant has raised, as impediments to the success of the suit. I am not in agreement that the suit against the defendant herein required prior notice under the Government Proceedings Act (Cap.40, Laws of Kenya). The Kenya Revenue Authority Act (Cap.469, Laws of Kenya) sets up the defendant as (s.3(2)):

> ***"…a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its own name of –***
>
> ***(a) suing and being sued…"***

I have considered the mandate of the defendant as stated in the long title to the said Act –

> ***"……a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue…";***

and I have come to the conclusion that the body that Parliament intended was a responsible and accountable one, empowered to discharge its legal obligations without resorting to reserved privilege when obligations fall upon it. It is not surprising, in the circumstances, that the defendant has come before this Court by *its own advocates*, rather than through the office of the Attorney-General. In the event I am wrong on this point, I have taken note that there is correspondence prior to commencement of suit, which may be deemed to satisfy the requirements of any notices that may be contemplated by statute.

The defendant has also, somewhat curiously, questioned certain amendments made to the original plaint. Counsel for the defendant is aware that at an early stage in the proceedings, the plaintiff had moved the Court by Chamber Summons of 14th April, 2005 seeking leave to effect certain amendments to the plaint, and one of the items included in the sphere of amendment was the claim of damages. In this Court's ruling, the following passage appears:

> ***"Firstly the plaintiff has a valid basis for seeking substantive reparations in the form of general damages; secondly, the law allows the plaintiff at this stage to amend the plaint; thirdly, because granting such an application will cause no prejudice to the defendant; fourthly, because it is in the interests of justice that the triable issues in the suit be fully ventilated and resolved, in accordance with the law."***

After considering all the evidence, all the submissions of counsel, and after addressing my mind to the several authorities relied upon by counsel, I have come to the conclusion that the plaintiff's case has been made on a balance of probabilities, and that the defendant has done little to address the weight of the plaintiff's case.

It is clear that the plaintiff's employment was terminated with scant regard for the binding rules of natural justice. And it is clear that the defendant, as it fell into that impropriety, either knew, or ought to have known that serious employment and career damage, with consequential losses, would be occasioned to the plaintiff. The plaintiff pleads that his career has been destroyed, and he has suffered much loss.

The plaintiff also claims that the deliberate disregard of rules of natural justice by the defendant, when it was well known the same would injure him, was a tortious abuse of public office, a *misfeasance in public*

office. He contends that this is actionable in damages; and he asks for exemplary damages, given the censurable element in any abuse of public office; and given the integrity of self, as attached to employment and livelihood, which he has lost; he urges that this borders on breaches of rights akin to *constitutional rights* – and for this reason he asks for exemplary damages.

The Court's perception on such questions is recorded in ***Geoffrey Muguna Mburugu v. Attorney-General,*** Nairobi HCCC No. 3472 of 1994; I have considered that decision, and I find its principles to apply no less, in the instant matter. I had in that case stated:

> "***It is a distortion of the quality of public service, when self-interested individuals take over the process of service, jettison the law to the winds, and impose their subjective inclinations on the delivery process."***

In the instant case senior officers at the Kenya Revenue Authority did not do as the law required; they had no transparent cause which can be exposed to scrutiny, but they were intent on ridding the public establishment where they serve, of *the plaintiff*; they knew he would suffer damage and loss; they cared not; they disposed of him; he indeed suffered loss; so these officers, in effect, converted the *public institution* where they work into an instrument at their own disposal. This is the classic case of misfeasance in public office; and by it, they caused damage and loss to the plaintiff. The plaintiff, therefore, is entitled to damages.

Dr. Kuria, learned counsel for the plaintiff, relied on the persuasive authority, ***James Orengo v. Attorney-General & Another,*** Nairobi HCCC No. 207 of 2002 for the proposition that exemplary damages are awarded when the action of the defendant is oppressive, arbitrary or unconstitutional, in a case such as where the defendant is a servant of the Government. Counsel submitted that the defendant herein, by s.3(4) of the Kenya Revenue Authority Act (Cap.469, Laws of Kenya), is an *agent of the Government of Kenya*; it exercises *public power;* it is a *servant of the Government*, and "it is not allowed to oppress any person, [be that person] an employee or [a] third party."

For figures that may be awarded, under the head of exemplary damages, counsel relied on ***Chirau Ali Mwakwere v. Royal Media Services Ltd.,*** Nairobi HCCC No. 47 of 2004, in which Kshs.1,000,000/= had been awarded; he asked for the same, in the instant matter.

Counsel relied on *s.77(9) of the Constitution*, which guarantees every person the right to be afforded a *fair hearing* by an adjudicating authority, such as the Staff Committee, or the Board of Directors of the defendant which took decisions adverse to the plaintiff. Counsel urged: "From the two suspensions, reinstatement and two purported dismissals, the defendant subjected the plaintiff to an arbitrary and oppressive exercise of power. Its actions are unconstitutional and the plaintiff is entitled to exemplary damages."

The principles of law, at common law, governing compensatory awards for torts and contract, are well stated in the work by ***A.S. Burrows***, entitled ***Remedies for Torts and Breach of Contract*** (London: Butterworths, 1987). The author (p.16) quotes the relevant passage in ***Robinson v. Harman*** (1948) 1 Exch. 850 (at p.855):

> ***"The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect of damages as if the contract had been performed."***

The author then states, now with regard to claims in tort, as follows (at p.20):

> ***"In the tort realm…theoretical underpinnings of compensation have not been discussed in relation to any controversy over what the compensatory aim should be. On the contrary it is accepted without dispute that the compensatory aim is and should be to put the plaintiff into as good a position as if no tort had been committed."***

Counsel urged that, if the plaintiff's career had not been prematurely terminated, he would have worked upto the retirement age of 55 years, and could possibly have ended up as the Commissioner-General of the defendant. And if the tort of misfeasance in public office had not been committed, leading to the termination of the plaintiff's employment, he could have remained in office till retirement.

Learned counsel stated as the damages suffered by the plaintiff –

i. salary or remuneration – starting from a monthly salary of Kshs.125,187/= (as at September, 2000);

ii. exemplary damages;

iii. pension;

iv. costs of this suit;

v. interest on (i), (ii), (iii).

From the evidence, the plaintiff was ***38 years*** old when his employment was terminated. Counsel asked that, on item (i) above, he be awarded the remuneration he would have received between age 38 and age 55.

In proposing an award of general damages, the plaintiff has presented two scenarios –

i. that the plaintiff, throughout his employment, retained the position of Senior Assistant Commissioner, until he attained the retirement age of 55 years; and in the alternative,

ii. that the plaintiff remained in employment, worked as Senior Assistant Commissioner, and was periodically promoted until he would become Commissioner, earning a salary of Kshs.600,000/= per month.

After considering the two scenarios, I have come to the conclusion that it would be injudicious to found an award of damages upon sanguine assessments of prospects; and therefore, the alternative scenario is held to be inapplicable.

But even on the first scenario, the full scope of the damage alleged is inapplicable, and I hold so. The plaintiff was dismissed on *9th March, 2001*. Between that date and the date hereof, he merits salary compensation. Today he is aged 45 – 46 years; and from the Court's observation during the hearing, the plaintiff is an able-bodied, and intellectually and professionally, a well-endowed man. From his *curriculum vitae* which is part of the Court record, I recognize, on the basis of judicial notice, that the plaintiff is a well-educated and trained professional who is most likely to find occupational engagement, outside the defendant's employ. These facts are to be applied to the governing principle of law, that an aggrieved party in a civil dispute, has the obligation to *mitigate his or her own losses.*

I will, therefore, award damages on a scale differing from that proposed by the plaintiff.

The award of damages whether for breach of contract or for the commission of a tort, as already noted, seeks to restore the aggrieved, as far as possible, to the place where he or she would have been, but for the supervention of the injury. Therefore, substantially, the breach of the employment contract in the instant case coalesces into the tort, constituting *one* broad damage, in respect of which, given the public character of the wrong-doer, and the wrong-doer's failure to adhere to basic constitutional and legal principles, the propriety of exemplary damages speaks for itself.

F. GRANT OF REMEDIES

I will herein award one head of damages, but give directions for the calculation of other heads of damages

by the Deputy Registrar. The Court's award of damages is as follows:

1. From date of termination of service, namely *9th March, 2001* to date of Judgment, namely *22nd September, 2008* the pension amount falling due to the plaintiff shall be calculated, and paid with interest at Court rate.

2. From date of termination of service, namely *9th March, 2001* to date of Judgement, namely *22nd September, 2008*, leave allowance falling due to plaintiff to be calculated, and paid with interest at Court rates.

3. From date of termination of service, namely *9th March, 2001* to date of Judgement, namely *22nd September, 2008*, plaintiff's gross salary at the figure of *Kshs.125,081/=* per month be calculated, and paid with interest at Court rate.

4. I award exemplary damages in the sum of One Million (Kshs.1,000,000/=) Kenya Shillings, payable with interest at Court rate with effect from the date of this Judgement.

5. I award the costs of this suit to the plaintiff, payable with interest at Court rate as from *5th July, 2002*.

6. This matter shall be listed for mention before the Deputy Registrar in the High Court's Civil Division, on Friday 26th September, 2008. The Deputy Registrar shall give directions for the calculation of damages, in accordance with the Orders of this Court listed herein under headings (1), (2) and (3).

DATED and **DELIVERED** at Nairobi this 22nd day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Plaintiff: Dr. G. Kamau Kuria

For the Defendant: Mr. Ontweka