



REPUBLIC OF KENYA



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Samuel Rukenya Mbura & 19 others (Suing for Themselves and on Behalf of Other Former Employees of Castle Brewing Kenya Limited) v Castle Brewing Kenya Limited & another (Civil Case 1119 of 2003) [2006] KEHC 2316 (KLR) (Civ) (8 June 2006) (Judgment)

SAMUEL RUKENYA MBURA & others v CASTLE BREWING KENYA LIMITED & another [2006] eKLR

Neutral citation: [2006] KEHC 2316 (KLR)

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

CIVIL

CIVIL CASE 1119 OF 2003

ARM VISRAM, J

JUNE 8, 2006

BETWEEN

SAMUEL RUKENYA MBURA	1ST PLAINTIFF
DAVID WANYAMA	2ND PLAINTIFF
PATRICK MUSYIMI	3RD PLAINTIFF
STEPHEN MBONDO WAMBUA	4TH PLAINTIFF
TIMOTHY KIMATHI	5TH PLAINTIFF
GERALD GITHINJI	6TH PLAINTIFF
ERASTUS KAMULU	7TH PLAINTIFF
SAMUEL GITAU	8TH PLAINTIFF
ALICE GAITHUMA	9TH PLAINTIFF
CHRISPER MUREI	10TH PLAINTIFF
ROBERT KAROKI	11TH PLAINTIFF
ORESTE GUCHU	12TH PLAINTIFF
JOHNSTONE WAWERU	13TH PLAINTIFF
CHARLES KIRUTHI	14TH PLAINTIFF
HEZEKIEL MUTURI	15TH PLAINTIFF
GEOFFREY KARANJA	16TH PLAINTIFF



CHRISTOPHER KARIUKI 17TH PLAINTIFF
ROBERT RUTO 18TH PLAINTIFF
DAVID WAWERU GICHINI 19TH PLAINTIFF
THOMAS OPIYO OWIDI 20TH PLAINTIFF
SUING FOR THEMSELVES AND ON BEHALF OF OTHER FORMER
EMPLOYEES OF CASTLE BREWING KENYA LIMITED

AND

CASTLE BREWING KENYA LIMITED 1ST DEFENDANT
EAST AFRICAN BREWERIES LIMITED 2ND DEFENDANT

Claim for damages for breach of constitutional rights ought not to be presented in a representative manner

The decision discussed the termination of employment of the plaintiffs who alleged that it was done arbitrarily and their fundamental rights and freedoms such as freedom from torture, cruel, inhuman or degrading treatment or punishment and the right to belong to a union and freedom of assembly and association were contravened. It also addressed the filing of representative suits while seeking damages for alleged contravention of fundamental rights and freedoms.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - freedom from torture, cruel, inhuman or degrading treatment or punishment - where there was a unilateral decision to close down the brewing plant and to transfer its business to another company without consulting its employees - whether the failure to inform employees of the 1st defendant of the impending closure of its brewery amounted to cruel, inhuman and degrading treatment.

Constitutional Law - fundamental rights and freedoms - enforcement of - where the plaintiffs filed a representative suit alleging contravention of fundamental rights and freedoms and seeking damages - whether complaints of contravention of fundamental rights and freedoms could be filed as representative actions or public interest litigation.

Labour Law – employment - employment disputes – remedies in employment disputes – damages - whether a claimant was entitled to any equitable or general damages in a claim for breach of employment contract.

Brief facts

The plaintiffs averred that on or about May 13, 2002, the 1st defendant, through its managing director wrote to them terminating their employment following closure of the 1st defendant’s brewing plant at Thika. The plaintiffs contended that as a result of the closure, they were debarred from entering the 1st defendant’s premises and from picking their personal belongings. It was their case that the closure of the brewing plant was done without consulting them, and or their representatives, and that it was arbitrarily and suddenly executed in a manner that amounted to cruel, inhuman and degrading treatment.

The plaintiffs further contended that their loss of employment was caused by the 1st defendant through unlawful conspiracy with the 2nd defendant and that such termination was a breach of their right to life which incorporated their right to livelihood and which was contrary to section 71 of the Constitution of Kenya. It was also their contention that the unilateral decision to close down the brewing plant and to transfer its business to the 2nd defendant without hearing them and or according their union the benefit of making representation, was a denial of their right to belong to a union, and a breach of section 80 of the Constitution of Kenya. The plaintiffs thus prayed for a judgment against the defendants for damages and or compensation.



Issues

- i. Whether complaints of contravention of fundamental rights and freedoms could be filed as representative actions or public interest litigation.
- ii. Whether the failure to inform employees of the 1st defendant of the impending closure of its brewery amounted to cruel, inhuman and degrading treatment.
- iii. Whether a claimant was entitled to any equitable or general damages in a claim for breach of employment contract.

Held

1. Statement No.3 of the agreed facts confirmed that all the plaintiffs with the exception of the 3rd, 9th and 10th plaintiffs were on diverse dates employed by the 1st defendant and as no evidence was tendered to controvert the three exceptions, the three plaintiffs did not exist and their claims must accordingly fail. That was because the Evidence Act provided that whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserted, must prove that those facts existed. That left 17 plaintiffs suing on behalf of themselves and on behalf of other former employees of the 1st defendant.
2. Every other complaint of an alleged contravention of the fundamental rights must relate the contravention to himself as a person. There was no room for representative actions or public interest litigation in matters subsumed by sections 70-78 of the Constitution. The reasoning behind such an assertion was that fundamental rights related to people in their individual capacities and the same were best articulated at an individual level. The plaintiffs' claim for damages for breach of their constitutional rights ought not to have been presented in a representative manner.
3. The evidence tendered before the court running from the provisions of the letters of appointment to oral testimony of the plaintiffs indicated that the payments made to the plaintiffs were in full satisfaction of the claims against the 1st defendant and even more.
4. The measure of damages for unlawful dismissal was the amount which the employee would have earned during the period of notice if the employment was terminable by notice or from the period of dismissal up to the time the contract would have ended if the employment was on a fixed term basis and that general damages for unlawful dismissal were not available in a claim for unlawful dismissal.
5. The plaintiffs' claim arose out of contractual obligation between them and the 1st defendant as well as alleged violation and breach of constitutional provisions as stated in the pleadings. The matter before the court was by no means trivial, frivolous or vexatious. It raised very pertinent issues relating to employer /employee relationship.
6. The plaintiffs were never notified of impending closure of the 1st defendant's premises but only informed of the same upon its execution. The closure of the brewery may have been shocking news to the employees that was nothing close to cruelty, inhuman or degrading treatment in the way that the unfortunate news was communicated.
7. The evidence before the court was that upon abrupt closure of the 1st defendant's premises, the plaintiffs were escorted out of the compound by security men. PW1 stated on cross-examination that no one hit him and neither was he confined in any manner. All the other plaintiffs' witnesses also testified that they were not assaulted in any way. There was nothing brutal in the manner in which the plaintiffs were treated and therefore find no contravention of section 74 of the Constitution.
8. No evidence was led by the plaintiffs regarding the issue of the plaintiffs being denied their right to belong to a union or their freedom of assembly and association. The closest the plaintiffs got to evidentiary requirement was to allege non-consultation of their trade union to which the defendants replied by stating that they had informed the union officials of the extent and nature of their action. The plaintiffs were not denied their right to belong to a union or denied their right to freedom of assembly and association.



9. The plaintiffs suffered damages upon termination of their contracts but the same was recovered when they received payments in satisfaction of their claims against the 1st defendant. They were not entitled to any further damages in law. A claimant was not entitled to any equitable or general damages in a claim for breach of employment contract and that the only damages recoverable were limited to the pay for the notice period.
10. The Constitution was not a toothless bulldog nor was it a collection of pious platitudes. It had teeth and in particular those to be found in section 84. The teeth included an order for damages where necessary and that it would be within the original jurisdiction of the High Court to issue such orders, writs or directions as it may deem necessary to secure the enforcement of sections 70-83 of the Constitution. But having found that there was no breach of the constitutional rights of the plaintiffs, no damages shall be awarded under that head too.
11. The defendants' contention on contravention of Order 7 rule 1(2) of the Civil Procedure Rules was founded on the fact that the person listed as number 37 in the list attached to the plaintiffs' bundle of documents and the 3rd plaintiff had instituted separate suits in Thika Residents Magistrate Court claiming *inter alia* damages for unlawful termination of employment against the 1st defendant. The same was confirmed by statement numbers 4 and 5 of the Agreed Facts. The suit stood fatally defective as against the the person listed as number 37 in the list attached to the plaintiffs' bundle of documents and the 3rd plaintiff only.

Suit dismissed; each party bears its own costs.

Citations

Statutes

1. Civil Procedure Act
2. Companies Act
3. Constitution of Kenya, 2010
4. Employment Act
5. Evidence Act

Advocates

None mentioned

JUDGMENT

1. In a plaint dated 24th October, 2003 and filed in the High court of Kenya on 3rd November, 2003, the plaintiffs by way of a representative suit averred that on or about 13th May, 2002, the 1st defendant, through its Managing Director, one Mr. Chris Freer, wrote to them terminating their employment following closure of the 1st defendant's brewing plant at Thika. The plaintiffs contended that as a result of the closure of the said plant, they were debarred from entering the 1st defendant's premises and from picking their personal belongings. It was their case that the closure of the brewing plant was done without consulting them, and or their representatives, and that it was arbitrarily and suddenly executed in a manner that amounted to cruel, inhuman and degrading treatment. The plaintiffs further contended that their loss of employment was caused by the 1st defendant through unlawful conspiracy with the 2nd defendant and that such termination is a breach of their right to life which incorporates their right to livelihood and which is contrary to section 71 of the Constitution of Kenya. It was also their contention that the unilateral decision to close down the brewing plant and to transfer its business to the 2nd defendant without hearing them and or according their union the benefit of making representation, was a denial of their right to belong to a union, and a breach of section 80 of the Constitution of Kenya.



2. By reason of the aforesaid, the plaintiffs prayed for a judgment against the defendants for damages and or compensation.
3. The 1st defendant thus filed a defence on 11th December, 2003 and admitted having entered into employment contracts with each of the plaintiffs.
4. The 1st defendant averred that the suit is incompetent, as the plaintiffs had not been authorized by the court to bring an action on behalf of all its former employees.
5. The 1st defendant confirmed termination of the plaintiffs' contracts of employment but denied doing so unlawfully. The 1st defendant then enumerated the payments made to the Plaintiffs in satisfaction of all the claims they had against it as follows:
 1. Salary and allowances upto 31st May, 2002
 2. Payment in lieu of leave accrued upto 31st May, 2002
 3. Three months salary and benefits in lieu of notice
 4. A gratuity equivalent to 2 months pay for every completed year of service
 5. A refund of both the individual and 1st defendant's contribution to the 1st defendant's pension scheme with interest thereon, and stated that each of the plaintiffs had indeed received the payments as set out above.
6. The 1st defendant further pleaded the background facts that led to its closure. It denied barring the plaintiffs from accessing the premises and stated that the plaintiffs were allowed to collect their personal effects and denied allegations of cruel, degrading and inhuman treatment against the plaintiffs.
7. The 1st defendant also contended that the employment contracts with the plaintiffs were terminated in accordance with the law, and in particular the *Employment Act*, and denied contravention of any provisions of *the Constitution* as alleged by the plaintiffs. The 1st defendant thus prayed for the dismissal of the suit.
8. The 2nd defendant filed a separate defence on 11th December, 2003 stating that all the plaintiffs were employees of the 1st defendant, not the 2nd defendant. It contested the competence of the suit on the grounds that leave of court to institute the same had not been obtained. It denied any knowledge of the circumstances surrounding termination of the contracts of employment between the 1st defendant and the plaintiffs, as well as any allegations of cruel, inhuman and degrading treatment met on the plaintiffs. It further denied that it was under any duty to consult the plaintiffs and or their representatives and denied breaching any provisions of *the Constitution*. Accordingly, it prayed that the claim against it be dismissed with costs to the plaintiff.
9. The Plaintiffs then filed a Notice of Motion dated on 5th March, 2004 under section 84 of *the Constitution* of Kenya and in accordance with rule 10(a) and (b) of *the Constitution* of Kenya (Protection and Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001. Therein the plaintiff sought:
 - 1) A declaration that a contract of employment taking away right to form and belong to a trade union and association for the purposes of affording them protection of their interest is a breach of section 80 of *the constitution* of Kenya.



- 2) A declaration that the provisions of the *employment act* in relation to the termination of the plaintiff contract did not take away the plaintiff right under section 74 of *the Constitution* of Kenya.
 - 3) A declaration that the defendants conduct amounted to breach of section 70 and 75 of *the Constitution* of Kenya.
 - 4) A declaration that termination of plaintiff contract was a breach of section 71 of *the Constitution* of Kenya.
 - 5) A declaration that commercial decisions are not immune to application of the law relating to applicants rights guaranteed under section 80 of *the Constitution* of Kenya.
 - 6) An order that the plaintiffs are entitled to damages for breach of their constitutional rights and such further orders and or directions deemed appropriate for the purposes of enforcing or securing the protection of *the Constitution* of Kenya.
10. As expected the defendants filed grounds of opposition stating interalia, that the plaintiffs' application is premised on the incorrect construction of *the Constitution* and consequently denied any breach of *the Constitution*.
 11. Prior to the filling of the above mentioned Notice of Motion, the defendants had on 19th December, 2003 filed a chamber summons application seeking to strike out the plaint on the grounds that:
 - The plaint was fatally defective for failing to comply with Order 7 rule 1 (2)
 - It was not sufficient for 1st plaintiff alone to swear the verifying affidavit,
 - It was doubtful whether plaintiffs had authority from other plaintiffs to institute proceedings and
 - The action is an abuse of the court process in so far as the plaintiffs have not been authorized under Order 1 Rule 8 of the Civil Procedure Rules.
 12. The Chamber Summons application was supported by the affidavit of Madren Nderu, the company secretary of the 2nd Defendant.
 13. The plaintiff consequently filed grounds of opposition on 17th February, 2004 stating interalia that the application was misconceived.
 14. Of course, the Chamber Summons could not be heard because the proceedings were stayed in accordance with Rule 10 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, and the file was referred to the Chief Justice, for directions.
 15. By his order dated the 17th May, 2004, the Honourable the Chief Justice appointed me to preside over the hearing of this matter.
 16. The parties appeared before me severally, and at the instance of this court, agreed to abandon all preliminary applications, and to proceed to a full hearing of the suit based on agreed issues, including those raised in the Chamber Summons application dated 19th December, 2003, and Notice of Motion application dated 5th March, 2004.
 17. Accordingly, I began hearing this suit on 26th July, 2005.



Applicants/Plaintiffs Case

18. The applicants were represented by Ms. Kabage and Ms. Karugu of the firm of Gitobu Imanyara and Co. Advocates. The 1st applicant, Samuel Rukenya Mbura, took the stand on 26th July, 2005. He stated that he knew all the other plaintiffs and that they had worked together for the 1st respondent at Thika. He started working on 17th August, 1998 and his letter of appointment was dated 12th August, 1998. His terms of employment were later revised vide revised terms and conditions of employment under the Collective Bargaining Agreement (Page 8 of the Plaintiffs bundle of documents).
19. It was his testimony that on 13th May, 2002 he went to work as usual and left at 2.00 p.m for the day. He, however, heard on the 7.00 p.m news that Castle Breweries had been closed down which news he says shocked him. He reported to work on 14th May 2002 only to find different askaris on guard and who told him that as he was not present in the previous day's meeting, he should pick up his letter of termination from the designated place. He stated that nobody had told him of the closure before leaving work the previous day. He was never called for an interview nor helped to find a job as promised in the letter of termination. He stated that the termination affected him adversely because he and his school going children entirely depended on the job. He also testified that he and his co-workers were allowed to enter the premises but in the company of Askaris and only to collect their personal belongings. He found that his safety boots worth Ksh. 4000 were missing.
20. He urged the court to make a determination that his rights were infringed upon.
21. The 2nd plaintiff to take the stand was Charles Maina Chege who stated that the documents relating to him were on pages 145-149 of the Plaintiffs bundle of documents. His employment was terminated on 13th May, 2002. He testified that as he was leaving work at 5.00 p.m he met the Human Resource Director who informed him of a meeting of all the staff at the canteen and asked that he attend. He proceeded to the canteen where he found other workers already waiting and soon thereafter the Managing Director, Mr. Freer, and other directors walked in and Mr. Freer shouted "shut up, listen to me....." and proceeded to announce the closure of the premises and termination of their services. (I will later on revert to the underlined words as they form one of the basis upon which the Plaintiffs allege breach of the Constitutional provisions).
22. He could not understand how the services of an employee of three years standing could be terminated in that manner. He said he had to stop his asthma treatment and could no longer pay for his mother's medical bill. He could no longer take care of his sister and his children who were under his care. He found the presence of Askaris armed with rungun on that occasion intimidating and unfair.
23. He talked of a fellow employee and neighbour who committed suicide in the circumstances. He had expected to work with the 1st defendant until retirement. He urged the court to enforce his constitutional rights.
24. On cross-examination, he admitted not being one of the named plaintiffs.
25. Evans Mugambi was the 3rd witness to take the stand. He stated that he was one of the plaintiffs and worked for the 1st defendant as a cooling attendant. On 13th May, 2002 he was on a night shift and went to work by taxi as he had missed the staff bus. He arrived at the premises at 10.00p.m and found askaris with dogs. They refused him entry and told him that Castle Breweries was no more.
26. He says that he was shocked and because it was dangerous to go home at that time, he sat around with the askaris until 5.00 a.m the next day. He admitted that he had been paid all his dues. He urged the



- court to find that he had been treated badly by his employer. He had expected a good future at Castle Breweries and to work until his retirement.
27. Upon cross-examination, he admitted that his name was not among those in the plaint. He also admitted that the askaris did not beat him nor insult him.
 28. The 4th witness to take the stand was Johnstone Waweru. He is the 13th plaintiff in the plaint. He was at work on 13th May, 2002 and was leaving at around 5.00 p.m when the Human Resource Director told him to go to the canteen for a meeting. There he found other employees waiting. Soon after, the MD, Mr. Freer, in company of other directors arrived. According to his testimony, Mr. Freer shouted “shut up” before informing them of the closure of the company. He stated that they were required to pick their termination letters and leave the premises without taking anything. Further that the askaris while armed with rungas and dogs escorted them to the gate, which action he claims was inhuman and cruel. His duties were to guard company assets and property. He says that he can no longer support his family and himself and urged the court to find that his Constitutional rights had been infringed.
 29. He also urged the court to find that he is entitled to a sum of money totaling Ksh.14, 840, 410/= which amount of money he would have earned had he worked until his retirement.
 30. On cross examination, he admitted that he had been paid all his dues as earlier enumerated, and that he had not been physically abused. He also testified that the people in the canteen were chatting immediately before Mr. Freer addressed them.
 31. The plaintiffs closed their case at this juncture.

Respondents/Defendants Case

32. The defence called one witness, Constance Ruhui, who was at the material time the Human Resource Director of the 1st defendant company. She stated that she is a graduate of the University of Nairobi, an advocate of the High Court of Kenya, a consultant in performance management and a member of the Chartered Institute of Arbitrators. It was her testimony that South Africa Brewery International (hereinafter referred to as “SABI”) through its subsidiary Castle Brewing Kenya Limited, the 1st defendant herein, operated a brewery at Thika in Kenya. East Africa Breweries Limited (hereinafter referred to as “EABL”) the 2nd defendant herein, on the other hand, through its subsidiary Kibo Breweries Limited, owned and operated a brewery at Moshi in Tanzania.
33. By an agreement dated 14th May, 2002 SABI sold to EABL 100% of the entire share capital of Castle Breweries Kenya while EABL on the other hand transferred to SABI ordinary shares in the capital of Kibo Breweries Limited representing 20% of the entire issued capital and accordingly SABI closed its brewery at Thika on 13th May, 2002 and EABL closed its brewery at Moshi, Tanzania.
34. She admitted that the 20 plaintiffs are the 1st defendant’s ex-employees, whose contracts were terminated on 13th May, 2002. She added that EABL was not involved in the termination of the contracts. She testified that she gave advice to the 1st defendant on the terminal benefits payable to the plaintiffs and all other ex-employees upon the closure of the 1st defendant. This advice was based on the letter of employment of each employee and the law of Kenya. She stated that the employees were informed of the 13th May, 2002 meeting through notice boards and their departmental heads. She also testified that the employees were chatting while waiting for the Managing Director, Mr. Freer. Upon the latter’s arrival with other directors, he raised his voice in an attempt to speak to the waiting workers. Thereafter the employees were asked to pick their letters of termination of their services. The guards then closed the offices and she left at 6.00p.m. It was her evidence that the askaris did not attack anyone and that no one was stopped from collecting their personal belongings.



35. On cross-examination, she stated that she was not consulted on how the employees were to be informed of the closure of the 1st defendant's business premises and the termination of their employment and further admitted that those on night shift found new security guards upon their arrival at the premises. Such employees were to be informed of the closure by their departmental heads, and that every effort was indeed made to inform all the employees.
36. The respondents closed their case at that point.
37. Having summarized the Plaintiffs' and Defendants' case as presented before me, it would now be of importance to include in this judgment, statement of the agreed facts which I shall be referring to from time to time. The agreed facts, filed on 21st October, 2005, are as follows:

1

- a. The Defendants are limited liability companies duly registered and incorporated under the *companies Act*, Cap 486 of the laws of Kenya.
 - b. The 1st defendant was formerly carrying out brewing business in Kenya and currently its properties and operations/business have been transferred to East African Breweries Limited.
- 2 The first defendant entered into employment contracts with each of its employees which contracts were independent of any other contract.
 - 3 The plaintiffs with the exception of Patrick Musyimi, Alice Gaithuma and Christopher Murei were on diverse dates employed by the 1st defendant.
 - 4 David Chombo Magambo listed as number thirty seven in the list attached to the plaintiffs list of documents filed in court on 14th February 2005 is the plaintiff in Thika Resident Magistrates court Civil Case number 692 of 2002. The first defendant is the defendant in that suit. David Chombo Magambo claims inter alia damages for unlawful termination in Thika Resident Magistrate's Court Civil Case Number 692 of 2002.
 5. The third plaintiff, Patrick Musyimi is the plaintiff in the Thika Residents Magistrates Court Civil Case Number 693 of 2002 where the first defendant is the defendant. The third plaintiff claims inter alia damages for unlawful termination of his contract of employment in Thika Resident Magistrates court Civil Case Number 693 of 2002.
 6. No order has been made by the court under Order 1 Rule 8 of the Civil Procedure Rules authorizing the plaintiffs to bring the action on behalf of the former employees of the first defendant.
 7. Before May 2002, Tanzania Breweries Limited, a subsidiary of South Africa Breweries International (Africa) BV, a limited liability company registered in Netherlands was the market leader in the United Republic of Tanzania in the production, marketing and sale of beer.
 8. In the corresponding period Kenya Breweries Limited, a subsidiary of East Africa Breweries Limited, the second defendant herein, was the market leader in the Republic of Kenya.
 9. At all material times South Africa Breweries International (Africa) BV through its subsidiary Castle Brewing Kenya Limited the first defendant herein operated a brewery at Thika in Kenya with minority share of the beer market in Kenya.



10. East African Breweries Limited through its subsidiary Kibo Breweries Limited owned and operated a brewery at Moshi, Tanzania with minority share beer market in Tanzania.
 11. Owing to the economic and financial challenges in the brewing industry in Kenya and Tanzania, South Africa Breweries International (Africa) BV and East Africa Breweries Limited agreed independently to concentrate their production, Marketing and sales resource in the market where each was a market leader.
 12. By an agreement dated 14th May 2002 South Africa Breweries International (Africa) BV sold to the second defendant 100% of the entire issued share capital of Castle Brewing Kenya Limited and East African Breweries Limited the second defendant herein transferred to South Africa Breweries International (Africa) BV 8000 002 ordinary shares in the capital of Kenya Breweries Limited representing 20% of the entire issued capital of Kenya Breweries Limited as consideration for the arrangements referred above.
 13. Accordingly South Africa Breweries International (Africa) BV closed its brewery at Thika on 13th May 2002 and East African Breweries Limited the second defendant decided to close its brewery at Moshi, Tanzania.
 14. The first defendant's contracts of employment were terminated on terms that each employee was to receive the following payments in satisfaction of all claims against the first defendant.
 - a. salary and allowances upto 31st May 2002
 - b. payment in lieu of leave accrued upto 31st May 2002
 - c. Three months salary and benefits in lieu of notice
 - d. A gratuity equivalent to two months pay for every completed year of service
 - e. A refund of both individual and first defendant's contributions to the first defendant pension scheme with interest thereon.
 15. Each of the employees of the first defendant including such of the plaintiffs as were employed by it received payment as set out above.
 16. The first defendant deployed security personnel at its premises on the material day for security reasons
 17. The severance package of each employee were set out in the letters of termination.
 18. Each employee was paid by cheque (sic) the package set out in the letters of termination on the material day being 13th May 2002.
 19. On subsequent dates, pension and other terminal benefits were paid after tax computations had been made.
 20. The first defendant did not promise the employees any payments over and above what was stipulated in the letters of termination.
 21. Those former employees who qualified in subsequent interviews conducted by Kenya Breweries Limited the subsidiary of the second defendant were offered employment by Kenya Breweries Limited.
38. I will now consider the summary of the submissions by both counsels.



Submissions by Counsel for the Applicants

39. Ms. Kabage opened her submissions by stating firstly, that although the plaintiffs' suit herein arose from contracts of employment, this cannot bar the said plaintiffs from seeking remedies and damages under *the Constitution*. She placed reliance on the case of Rashid Odhiambo and 245 Others –v- Haco Industries Limited (civil Appeal No. 110 of 2001) where the learned judges in the Court of Appeal overruled the High Court Ruling that availability of other lawful causes of action bars a party from seeking any remedy under section 84 of *the Constitution* for contravention of fundamental rights and freedoms under *the Constitution*.
40. Her second limb of submission was that the suit as presented before the court is properly a representative suit in that there is:
- Sufficient numerosity of parties
 - Commonality of issues, claims or defences of interest
 - Nexus between the representatives and the class
 - Ascertainability of the group and
 - Good faith of the representative parties
- as was stated to be the prerequisite requirements of a representative suit in the case of Kenya Bankers Association and Others –v- Minister for Finance and others (2002) 1 KLR 61. She distinguished the Njoya and Others –v- Attorney General and Others (2004) 1 E.A 194 case by submitting that it should not be taken out of context.
41. Thirdly, she submitted that this was a representative suit and that there was no need for all the plaintiffs to give evidence. To support this, she referred to paragraph 3 of the statement of agreed facts where the defendants had conceded that all plaintiffs, except three, were former employees of the 1st defendant.
42. On damages, she submitted that the only requirement is violation of the Constitutional rights whereupon the court ought to give such remedies as appropriate. She relied on the case of Marete –v- Attorney General (1987) KLR where it was stated that *the Constitution* is not a toothless bulldog nor a collection of pious platitudes but one that has teeth and particularly those found in section 84 of *the Constitution*. She also relied on the case of Dominic Amollo Arony –v- Attorney General (HCCC Misc. Appl. 494 of 2003) to urge the court that the damages awardable ought to be that which will deter repetition, punish breach, and secure effective policing of *the Constitution*.
43. Ms. Kabage finally submitted on instances of violation of the plaintiffs rights as follows:
- That plaintiff No.1 having had to sleep out in the bush was inhuman and degrading.
 - That the Managing Director's act of shouting "shut up" was inhuman, cruel and degrading.
 - That the plaintiffs had to collect their belongings in the presence of supervisors.
 - That the information relating to termination of employment was given through the media and not to the Plaintiffs' personally.
 - That the collection of termination letters from the carton boxes was humiliating.



Submissions by Counsel for the Defendants

44. The defendants were represented by Mr. Kimani of the firm of Hamilton, Harrison and Mathews who opened his submissions by arguing that for the plaintiffs to successfully invoke the provisions of *the Constitution*, the following issues must also be addressed:
- 1) Whether the plaintiffs have followed all the rules of procedure and are properly parties to the suit.
 - 2) Whether the plaintiffs have followed the rules of evidence.
 - 3) Whether each plaintiff as per the rules of evidence has established a claim for compensation.
45. He cited the Haco industries case (supra) in which the Court of Appeal stated that the burden of proof in a civil case, whether Constitutional or not, is on the plaintiff.
46. It was his submission that even if a violation was established, damages are not automatically established and that the object of inquiry is to put the plaintiff in the position he would have been but for the injury. The plaintiff must establish the damages.
47. He proceeded to distinguish the Dominic case (supra) in that the facts therein were totally different from the present case because it involved loss of employment with a long prison sentence and the damages awarded therein were for solitary confinement. The brief facts of that case were that, Dominic Akony Amolo, a former service man in the Kenya Air Force, together with others, was arrested and confined at Kamiti Maximum Security Prison on charges relating to failed coup attempt against the Government of the Republic of Kenya. He was thereafter convicted but successfully appealed against the conviction and sentence on the 27th September, 1984. He continued to be held in custody until 5th October, 1984 before release.
48. He sued the Government for breach of his constitutional rights such as unlawful and solitary confinement for nine days. The court held that his continued imprisonment between 27th September, 1984 and 5th October 1984 was in breach of his right to liberty contrary to section 70 of *the Constitution* and was awarded Ksh. 2,500,000 in damages. The court further directed that proof of his entitlements to certain benefits and services rendered be tendered before a single Judge of the High Court for determination.
49. Regarding the Marete case (supra) Mr Kimani argued that it involved Government employees whose employment had been terminated without pay for two and a half years, whereas in the present case, all dues had been paid to the plaintiffs as per the contract of employment and that this fact had been conceded.
50. He urged the court that an award of damages was not necessary because the issue here involved redundancy based on a commercial decision to close down the business.
51. He submitted that *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, did not outline the procedure relating to representative suits and therefore the civil procedure rules should apply. That being so, he stated that the court ought to come to a finding that the plaintiffs have not complied with Order 1 Rule 8. He conceded that the plaintiffs did not need leave of court but that they needed to take directions pursuant to Order 1 Rule 8 (3) which is mandatory.
52. He referred to the case of Alfred Njau and 5 Others -v- City Council of Nairobi KAR (1982-1988) Vol.1,229 which made reference to the procedure set out in Order 1 Rule 8 (2) of



giving due notice to the institution of a suit either individually or through public advertisement. He contended that the only people who are before the court are the twenty plaintiffs as were the six appellants in the Alfred Njau case (*supra*).

53. He cited the case of Suniv Vinayak -v- Diners club international(HCCC 1885 of 2003) where the court held that a claim for damages is a personal relief and a representative suit is absolutely inapplicable and urged the court to rely on the same to find that this suit was incorrectly instituted as a representative suit. The case of Paul Ng'ang'a Ndeti and 3 Others –v- Housing Finance Company of Kenya (Civil Case No. 151 of 20030 was cited to demonstrate to the court that the plaintiffs therein sought directions to sue the defendant on their own and as representatives of the borrowers of the defendant interested in the suit and submitted that only the named twenty Plaintiffs herein had the right to make claims.
54. He closed his submissions by stating that any involuntary termination of employment is bound to be painful but the same should not be graduated to such a level as to amount to breach of fundamental rights in *the Constitution*.

Issues

55. Having set out the facts of this case and submissions of the parties, it now follows that I should consider and make determination on the issues of law and facts arising therein.
56. The parties filed a list of Agreed issues on 25th January, 2005, and I shall be guided by the same to reach the end of this matter.
57. I will now consider each issue as hereunder:

1. Were all the Plaintiffs employees of the 1st defendant?

58. Statement No.3 of the agreed facts confirms that all the plaintiffs with the exception of Patrick Musyimi, Alice Gaithuma, and Christopher Murei were on diverse dates employed by the 1st defendant and as no evidence was tendered to controvert the three exceptions, the court believes that the said three plaintiffs do not exist and their claims must accordingly fail. This is because the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
59. That leaves 17 plaintiffs suing on behalf of themselves and on behalf of other former employees of the 1st defendant.
60. Clearly then the suit is presented in a representative manner and the question that follows is whether or not the suit as presented stands the test of law on representative suits.
61. The Plaintiffs responded to the question by relying on the case of Kenya Bankers association and Others –v- Minister for Finance and Another (*supra*) as hereinbefore stated and which they associated with their claim herein in that the plaintiffs are an identifiable group, their cause of action arose from the same incident and that they are seeking similar orders and reliefs.



62. I agree with the plaintiffs' assertion but only to the extent of their claim as pleaded in the plaint but disagree that their Constitutional claim as stated in the Notice of Motion stands the test. To this extent, I associate myself with my brothers finding in the Njoya Case (supra) wherein it was clearly stated:
- “..every other complaint of an alleged contravention of the Fundamental Rights must relate the contravention to himself as a personthere is no room for representative actions or public interest litigation in matters subsumed by sections 70-78 of *the constitution*.”
63. The reasoning behind such an assertion is that fundamental rights relate to people in their individual capacities and the same are best articulated at an individual level.
64. The oral testimony of PW1, PW2, PW3 and PW4 all contain different modes of alleged constitutional breaches e.g.
- PW1 stated having heard of the closure of the 1st defendant's premises over the radio
 - PW2 testified that he was told of the closure at a meeting in the canteen.
 - PW3 stated having been told of the same by the askaris upon his arrival at the premises for the night shift and
 - PW4 was told of the news at the canteen meeting.
65. It is equally probable that the other former employees of the 1st defendant represented in this suit also had had different encounters in the manner in which their Constitutional rights were allegedly breached, and the details of which encounters are unknown to this Court.
66. I thus come to the conclusion that the plaintiffs claim for damages for breach of their Constitutional rights ought not to have been presented in a representative manner.
67. I shall however make a finding on whether or not the alleged violations constitute a breach of fundamental rights and freedoms as against the twenty named plaintiffs herein.
68. Having agreed that the plaintiffs rightly presented their claim as pleaded in the plaint by way of a representative suit, it would have followed naturally that I should consider the defendants' earlier contention that the plaintiffs ought to have sought leave of the court as per Order 1 rule 8 of the Civil Procedure Rules before presenting their case in a representative capacity. The defendants, however, in the course of proceedings before me, conceded that the plaintiffs needed not to get leave of court.
69. I shall nevertheless address this issue because it has been raised before me severally by other litigants while relying on the case of Johnson –v- Moss (1969) E.A 654 which is notably a Ugandan case. The case firmly stated that leave must be sought to sue or be sued in a representative capacity.
70. The provisions of Order 1 Rule 8 (1) of the *Civil Procedure Act* and Rules, Cap 21 of the Laws of Kenya, are couched in the following terms:
- “Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit on behalf or for the benefit of all persons so interested.”(Emphasis mine)
71. Order 1 Rule 8 of the Ugandan Civil Procedure rules read as follows:
- “Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the court sue or be sued or may defend in such suit, on



behalf or for the benefit of all persons so interested. But the court shall in such case give such persons either by personal service or where from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement as the court may in each case direct.” (Emphasis mine)

72. Thus, it is evidently clear that the Ugandan Rules require persons intending to sue or be sued to seek the court’s permission. This is not so in the Kenyan Rules which require that only where a party is defending on behalf of other defendants that leave is required.

2. Did the 1st defendant enter into contracts of employment with the plaintiffs which were independent of any other contracts?

73. The 2nd statement of the agreed facts answers this question in the affirmative.

74. The evidence tendered before me fosters this position as each and every plaintiff had a letter of appointment specifically addressed to them. One such letter is Mr. Samuel Rukenya’s (the 1st plaintiff) letter on page 4 of the Plaintiffs bundle of documents.

3.(a) What payments did the plaintiffs receive upon termination of their contracts?

75. Statement number 14 of the Agreed Facts answers this question by stating that the Plaintiffs contracts of employment were terminated by the 1st defendant on terms that each plaintiff was to receive the following payments:

- a. salary and allowances upto 31st May, 2002
- b. payment in lieu of leave accrued upto 31st May, 2002
- c. Three months salary and benefits in lieu of notice.
- d. A gratuity equivalent to two months pay for every completed year of service.
- e. A refund of both individual and first defendant’s contributions to the first defendant pension scheme with interest thereon.

And which the plaintiffs who testified in court confirmed having received.

(b) Were these payments in satisfaction of all claims against the 1st defendant for termination of their contracts?

76. The evidence tendered before this court running from the provisions of the letters of appointment to oral testimony of the plaintiffs no doubt indicates that the payments made to the plaintiffs were in full satisfaction of the claims against the 1st defendant and even more.

77. It is now settled law that the measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment is terminable by notice or from the period of dismissal upto the time the contract would have ended if the employment was on a fixed term basis and that general damages for unlawful dismissal are not available in a claim for unlawful dismissal.

78. The above sentiments constituted the running theme in the following cases amongst many others, Ombanya –v- Gailey Roberts Limited (1974) E.A Kenya Ports Authority –v- Edward Otieno Okello (C.A No. 120 of 1992) and Rift Valley Textiles Limited –v- Edward Onyango Oganda (C.A No. 27 of 1992).



79. In the latter case the court of appeal stated the following:

“We have no doubt whatsoever that the law did not entitle the judge to do any of these things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it also provides for what was to be done if either party was unable to comply with the said notice period namely to pay the other party for the notice period. In our view, even though the respondent’s dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant.”

80. In that case, the contract of service provided that it could be terminated by a three months notice by either party but the high court awarded the respondent twelve months gross salary as general damages in addition to the three months salary in lieu of notice already paid.

4.(a) Do the Plaintiffs establish a reasonable cause of action known in law?

81. Ordinarily this issue would have had to be considered as a preliminary issue and if the court’s finding was not in the affirmative, this court would have had to strike out the pleadings. But having had the benefit of hearing this matter, I find that the plaintiffs established a case with a reasonable cause of action.

b) Is the claim frivolous or vexatious?

82. The plaintiffs claim arises out of contractual obligation between them and the 1st defendant as well as alleged violation and breach of constitutional provisions as stated in the pleadings.

83. Frivolous is defined in the Black’s Law Dictionary as lacking a legal basis or legal merit, not serious; not reasonably purposeful.

84. Vexatious has been defined in the same dictionary as without reasonable or probable cause or excuse; harassing, annoying.

85. The matter before me is by no means trivial, frivolous or vexatious. It raises very pertinent issues relating to employer /employee relationship. I find that issue in the negative.

5. Did the 1st defendant bar the plaintiffs from entering its premises or collect their personal effects?

86. I shall consider the testimony before me in part to ably address this issue.

87. PW1 testified that the employees were allowed to re-enter the premises to clear their lockers while in the company of askaris.

88. PW2 did not make any mention of the issue.

89. PW3 testified that on arriving at the premises at about 10.00 p.m, the askaris did not allow him to enter the compound but testified he was later allowed to do so.

90. PW4 testified that he had nothing left at the 1st defendant premises except personal effects which he did not collect.

91. DW1 testified that all the plaintiffs were escorted to collect their personal belongings and their letters.

92. On a balance of probability, I find that the plaintiffs were accorded an opportunity to collect their personal effects.



6. Was the 1st defendant’s brewery closed in a manner that was cruel, inhuman and degrading?

93. I note that the plaintiffs were never notified of impending closure of the 1st defendant’s premises but only informed of the same upon its execution.

94. It is however my humble opinion that the closure of the brewery may have been shocking news to the employees but I find nothing close to cruelty, inhuman or degrading treatment in the way that this unfortunate news was communicated.

7. Was the 1st defendant obliged under contract or other legal duty to consult the plaintiff or their representatives regarding the closure of the brewery?

95. Section 16 A (1) of the *employment Act* provides that:

A contract of service shall not be terminated on account of redundancy unless the following have been complied with

- a) the union of which the employee is a member and the labour officer in charge of the area where the employee is employed shall be notified of the reasons for and the extent of the intended redundancy.

96. The law thus places a duty of notification on the employer. But is notification equivalent to consultation? I think not. To me notification is just that – to notify or to inform, not to “consult”.

97. It however remains for consideration whether the 1st defendant lived upto its duty of notification. This court finds itself handicapped to make a determination on this issue in view of the fact that despite the plaintiff’s contention that the 1st defendant failed to notify them and/or their union, they did not call in any evidence to prove the same.

98. The only evidence before this court is that of DW1 that the 1st defendant notified the plaintiff’s union.

99. The *Evidence Act*, Section 3 (4) provides that a fact is not proved when it’s neither proved nor disproved.

100. I therefore find that indeed the 1st defendant had a duty of notification but nothing much turns on this point as the plaintiffs have not discharged the burden placed on them.

8. (a) Did the 1st defendant fail to give notice, bundle out or treat the plaintiffs in a cruel, inhuman and degrading manner?

(b) If so, is such treatment contrary to Section 74 of *the Constitution*.

101. Section 74 of *the Constitution* provides that:

“No person shall be subject to torture or to inhuman or degrading treatment punishment or other treatment.”

102. The starting point is to define what inhuman or degrading treatment constitutes. The new Shorter Oxford English Dictionary on Historical Principles defines Inhuman treatment as “an action that is barbarous, brutal and cruel” while degrading punishment is “that which brings a person in dishonour or contempt”.

103. The evidence before this court is that upon abrupt closure of the 1st defendant’s premises, the plaintiffs were escorted out of the compound by security men.



104. PW1 stated on cross-examination that no one hit him and neither was he confined in any manner. All the other plaintiffs' witnesses also testified that they were not assaulted in any way.
105. In my considered opinion, based on the weight of the evidence before me, I see nothing brutal in the manner in which the plaintiffs were treated and therefore find no contravention of section 74 of the Constitution.

9. Was battery, terror or intimidation meted upon the plaintiffs and in violation of their right to protection from inhuman treatment.

106. I find this issue well addressed in issue number 8 and partly in other issues but will add the following regarding the question of intimidation.
107. Indeed it is human to feel intimidated when suddenly accosted with unusual security without notice. Dogs are ordinarily intimidating especially if their presence is not notified.
108. I am however hesitant to hold that the same constitute breach of the Constitution or a violation of the plaintiffs right to protection from inhuman treatment.
109. Of relevance here is the complaint that the MD, Mr. Freer, treated the plaintiffs in a cruel and inhuman manner by shouting "shut up" at the meeting. Indeed all the witnesses including the defendant's witness are in tenor in their testimony that Mr. Freer shouted in the manner stated hereinabove.
110. However further testimony in relation to the context in which the same was said makes the statement not so out of the ordinary. Witness after witness testified that the plaintiffs were chatting while waiting for Mr. Freer and other directors and therefore one would expect the canteen to have been noisy and that Mr. Freer's statement was meant to get the attention of everyone in the meeting hall.
112. I therefore find no breach of the Constitutional provision to this end.
113. I want to however categorically state here that I believe that we should continuously subject our Constitution to a progressive mode of interpretation to enable our Constitution guide the destiny of the people of this country. But the same must be done while having regard to other laws of the country, public interest, economic realities of the world we live in today and socio-political realities that face us as a people.

10. Were the employment contracts between the 1st defendant and the plaintiffs terminated in accordance with the Employment Act?

114. The plaintiffs admitted receiving certain payments that I had alluded to earlier on.
115. In view of the above, I find that that 1st defendant terminated the Plaintiffs contracts in accordance with the relevant provisions of the Employment Act.

11. Did the 1st defendant promise the plaintiffs generous severance packages or offer assistance in finding new jobs?

12. If such promise or offer was made is it capable of enforcement without consideration?

116. I will consider issues number 11 and 12 jointly.



117. The letters of termination of the Plaintiffs' contracts read in relevant part as follows:

“.....but those affected will receive generous severance packages. The company will also assist employees as far as possible with finding new positions.”

118. Indeed the 1st defendant represented that they would offer generous severance packages and assist employees as far as possible in finding new positions. But is the same capable of enforcement in law? I think not. I agree with the defendant's counsel that the same lacks consideration and is incapable of being enforced in law.

119. But assuming for a moment that the same is enforceable, this court notes that the plaintiffs did not even attempt to plead what they considered generous packages and which they would have wanted the court to enforce.

120. If anything it may well be argued that whatever payments that were made to the plaintiffs were indeed generous. Regarding finding new employment, no evidence was tendered to show what was expected and how the 1st defendant failed in its duty.

13. Did the 1st defendant breach the memorandum of agreement entered into by the Plaintiffs' union?

121. No evidence was tendered by the plaintiffs to state what provisions of the alleged memorandum of agreement were breached let alone evidence to show its existence.

122. I am therefore not able to make a finding on this issue.

14. Was the loss of employment occasioned by the unlawful conspiracy between the defendants and in breach of the Plaintiffs right to life?

123. Conspiracy is defined in the Black's Law Dictionary as an agreement by two or more people to commit an unlawful act coupled with an intent to achieve the agreement's objective.

124. Statement numbers seven to thirteen of the Agreed Facts elaborate the circumstances and the ultimate agreement between the 1st and 2nd defendants which led to the closure of the 1st Defendant's premises and ultimate loss of employment to the plaintiffs.

125. I find nothing conspiratory or unlawful in the negotiations and the agreement in the circumstances and consequently return a negative finding on this issue.

15. Can termination of employment be equated to punishment?

126. Termination of employment is a matter provided for in our laws in that there are clear stipulations on how it ought to be done and remedies in the event of the breach. Legally speaking therefore I find this issue as framed is neither here nor there.

16. Were the plaintiffs denied their right to belong to a union or their freedom of assembly and association?

127. I agree with the defendants' Counsel that no evidence was led by the plaintiffs regarding this issue. The closest the plaintiffs got to evidentiary requirement was to allege non-consultation of their trade union to which the defendants replied by stating that they had informed the union officials of the extent and nature of their action.

128. I note too that I had partly dealt with this issue earlier on.



129. I find that the plaintiffs were not denied their right to belong to a union or denied their right to freedom of assembly and association.

17. Have the plaintiffs suffered any loss or damages?

18. Do the plaintiffs have a right to any declaration or entitled to any compensation or form of damages from the defendants?

130. These two issues are inter-related, and I shall address them together.

131. Yes the plaintiffs suffered damages upon termination of their contracts but the same was recovered when they received payments in satisfaction of their claims against the 1st defendant.

132. I find that they are not entitled to any further damages in law as I had indicated before. A claimant is not entitled to any equitable or general damages in a claim for breach of employment contract and that the only damages recoverable are limited to the pay for the notice period.

133. As regards damages arising out of breach of *the Constitution*, I agree with the decisions in the very many cases that the plaintiffs have cited and in particular the Marete –v- Republic case (supra) where Shields J said,

“*The constitution* of this republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular those to be found in section 84.....”

134. The teeth include an order for damages where necessary and that it would be within the original jurisdiction of the High Court to issue such orders, writs or directions as it may deem necessary to secure the enforcement of sections 70-83 of *the Constitution*.

135. But having found as I did that there is no breach of the Constitutional rights of the Plaintiffs, I shall not award damages under this head too.

19. Is the suit fatally defective for failure to comply with Order 7 Rule 1 (2) of the Civil Procedure Rules?

136. Order 7 Rule 1 (2) reads,

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

137. The plaint herein was accompanied by a verifying affidavit which sought to verify the correctness of the averments contained therein and which were both filed on 3rd November, 2003.

138. I find no fault in the verifying affidavit and therefore return a negative finding on this issue.

139. I however note that the defendants’ contention on contravention of Order 7 Rule 1 (2) is founded on the fact that David Chombo Magambo (listed as number 37 in the list attached to the plaintiffs bundle of documents) and Patrick Musyimi (the 3rd plaintiff) have instituted separate suits in Thika Residents Magistrate Court claiming inter alia damages for unlawful termination of employment against the 1st defendant.

140. Indeed the same is confirmed by statement numbers 4 and 5 of the Agreed Facts.

141. That being so, I hold that the suit stands fatally defective as against the said David Chomba Magambo and Patrick Musyimi only.



142. Accordingly, and for all the reasons outlined above, I dismiss the Plaintiffs suit.

143. Before I close, let me express my gratitude to all the Counsels for their hard work and well researched presentations. And I simply want to say that I feel a deep sense of sorrow for all the Plaintiffs before me, and other former employees of the 1st defendant, for the loss of their jobs. I know how painful and traumatic this is to everyone, especially in a market where there are limited employment opportunities. Some of these people had left fairly good and stable jobs to venture into what they believed were greener pastures. It was unfortunate that their new employer's business had to close down, leaving them stranded and without any source of income. It is for these reasons that I would not wish to inflict any further pain and burden, and accordingly I will order that each party bears its own costs. And with that I will end by saying to the Plaintiffs pole sana, and God bless.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE, 2006.

ALNASHIR VISRAM

JUDGE

