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

Civil Suit 1505 of 2001

CYNTHIA KUVOCHI LUYEGU & 6 OTHERS…….....…..…..…..…
PLAINTIFFS

VERSUS

TOURSIM PROMOTION SERVICES LIMITED ….....…... 1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL ….....…... 2ND DEFENDANT

JUDGMENT

The seven Plaintiffs in this case were all employees of the 1st Defendant, Tourism Promotion Services Limited working at its Serena Hotel, Nairobi, at the times material to this suit. They were employed on diverse dates under individual contracts of employment but were all dismissed summarily on the 7th of March, 1999 under similar circumstances and for the same reasons. It has been submitted and mutually agreed that the Plaintiffs were unionisable employees and that their contracts of employment as well as the terms and conditions thereof were governed by the existing Collective Bargaining Agreement between their employer (as a member of the Kenya Association of Hotelkeepers and Caterers (KAHKC) and the Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)

The Plaintiffs have sought to prove to this court that their dismissal on 7th April 1999 communicated to them vide the respective letters of summary dismissal dated April, 6th March, 1999 and issued on 7th April, 1999 was wrongful and malicious, which, according to them, renders the 1st Defendant liable to compensate them in damages. In their Collective Plaint dated 27th August, 2001 and filed on 3rd September, 2001, the Plaintiffs have also sued the Attorney General (2nd Defendant) "**as the prosecutor in Criminal Case No.899 of 1999**" instituted pursuant to the 1st Defendant's complaint against the Plaintiffs. The said complaint also forms the basis for the summary dismissal. The record submitted before me shows that the criminal case was No.898 not 899. The Plaintiffs in their plaint have stipulated that they ***jointly and severally*** pray for judgment against the Defendants ***jointly and severally*** for:

(a) General damages for wrongful confinement and/or imprisonment;

(b) General damages for malicious falsehood and malicious prosecution.

(c) Aggravated and exemplary damages

(d) General damages for breach of contract and wrongful dismissal

(e) Special damages as particularized in paragraph 9 and 11 of the plaint

(f) Costs of the suit

(g) Interest on (a) and (b) (c) (d) (e) and (f) at court rates

(h) Such other or further order as this Honourable Court may deem apt.

Obviously alerted by the question posed to his witnesses during cross examination by counsel for the 2nd Defendant as to whether there was any contract of Employment between the 2nd Defendant and the Plaintiffs to warrant the relief sought under prayers (d) and (c), Counsel for the Plaintiffs attempted to apportion the prayers sought against either Defendants by splitting the same in part A of his written submissions. I find this to be an inappropriate attempt to amend the plaint without leave of the court and do disregard the same, being of the considered view that parties to a suit are bound by their pleadings as they stand at the close of the hearing. My judgment is therefore delivered on the basis of the prayers as they appear in the plaint and earlier set out in this judgment. In his submissions counsel also introduced a prayer 9 (e) for Shs.320,000/= which does not appear in the court copy of the Plaint referred to. The only special damages appearing in the Plaint are at paragraph 9 (a) where Shs.200,000/= is said to have been incurred by the 2nd, 3rd , 4th, 5th, 6th and 7th Plaintiffs as legal fees in defending the criminal suit, and Shs.120,000/= said to have been incurred by the "***First Defendant***"! It is plainly obvious from the plaint that the prayer for damages for breach of contract and wrongful dismissal is misplaced in as far as the same is directed at the 2nd Defendant whose only role in the events leading to the filing of the suit against it is the arrest and prosecution of the seven Plaintiffs in Criminal Case No.898 of 1999.

The 1st Defendant has in its defence and counterclaim dated 26th October, 2001 and filed on the same date denied all the allegations made against it by the Plaintiffs and has additionally counterclaimed against all of them, jointly and severally, a sum of Kshs.4,366,765 which sum was amended at the hearing to read Shs.4,003,844.60. The counterclaim is denied by the Plaintiffs. The Attorney General (2nd Defendant) has also denied all the allegations made against him by the Plaintiffs.

The hearing of this suit took 2 years. This is largely due to the manner in which hearing dates are allocated and listings done, an area which requires serious rethinking in our courts. Save for the 2nd Defendant, who did not call any witnesses, saying instead, that he would rely on the 1st Defendants' case, the 1st Defendant and the 7 Plaintiffs tendered oral evidence and produced various documents in support of their cases. The 1st Defendant called 2 witnesses and also produced documents to back up its defence and counterclaim. Despite the fact that the Plaint is a joint and several one, containing a uniform claim for relief, the Plaintiffs, through their counsel and without seeking to amend the Plaint attempted to adduce evidence intended to prove that each was entitled to separate and individual relief as per their respective terms and conditions of employment. In furtherance of this they have, in the written submissions filed on their behalf, adopted the tabulations for terminal dues reproduced in the 1st Defendant's bundle of documents, which they claim to be partial admission on the part of the 1st Defendant, of the Plaintiffs' entitlements. As earlier stated the court has relied on the Plaint and not the submissions as regards the particulars of the reliefs claimed herein.

The oral testimonies of all the seven Plaintiffs were chorus of the same thing. They testified that they were employed by the 1st Defendant in their respective capacities under separate letters of employment which they produced as exhibits. Apart from P.W.2 who was a night auditor at the time of dismissal all the other Plaintiffs were front office cashiers at the time of dismissal. Save for P.W.4 they all testified how on the 31st March, 1999 they were summoned to a meeting with the hotel's Personnel Manager, Rooms Division Manager, chief Security Manager and Accountant who questioned them about certain discoveries made in the computer system depicting various adjustments to telephone sales and/or telephone revenue collections at the front office. In all the cases the Plaintiffs confirmed that their computer passwords had been used in connection with the said adjustments which were shown to have been made between November, 1998 and January 1999 during which period all except the 2nd Plaintiff

had worked as cashiers at the front office. The 2nd Plaintiff had, on his part, worked as the night auditor during that period. The plaintiffs told the Court how at the said meeting of 31st March, 1999 they were each shown a computer screen wherein the said adjustments appeared, with negative figures having been recorded against telephone revenue collections. The Plaintiffs told the court that they were asked to own up as being the ones responsible for the losses attaching to those negative recordings but they declined to do so. Under cross-examination each of the Plaintiffs confirmed that their passwords had been used in the making of the adjustments. They also admitted having written the various statements produced in evidence by the 1st Defendant as document Nos. A8, B7, C9, D8, F8 and G9 in which they confirmed the said adjustments to revenue earned from telephone sales.

P.W. 4 and P.W.5 admitted under cross examination that it was possible for losses to accrue from the negative adjustments while the other Plaintiffs either denied that possibility or pleaded lack of knowledge of whether or not loss would accrue as claimed. The Plaintiffs testified that after the questioning on 31st March, 1999 they were all suspended from work for one week only to return on 7th March, 1999, to be asked yet again to admit their involvement in the adjustments and losses said to have been incurred as a result thereof. They told the court that immediately upon their refusal to make the admission they were issued with dismissal letters and handed over to police who were already waiting for them in the hotel premises. It is after that arrest that the Plaintiffs say they were remanded in custody for three days during which their homes were searched and they themselves charged with the offence of conspiracy to Defraud the 1st Defendant, which was later substituted with one of Theft by Servant for which they were tried for 21 months before being acquitted under section 210 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya. Before attending court for plea on 16th April, 1999 there was published a story and picture of the Defendants in the Sunday Standard of 11th April, 1999 which they claim to have exposed them to public odium whereby they were scandalized by being branded as thieves. The article was produced in evidence by P.W.1 and relied upon by the others. The Plaint does not refer to the same at all and it is not clear what portion of their claim as stated in the Plaint and in the submissions the said article in intended to support. Although the Plaintiffs blame the 1st Defendant for the publication, none of them explained to the court how the 1st Defendant is connected to the publication. For this reason I find it appropriate to deal with the substance of the said publication at this instance before delving into other issues. The picture appearing at the back page of the Sunday Standard (Ex.p.9) and the accompanying story at page 2 were published at a time when the 7 Plaintiffs were no longer employees of the 1st Defendant and no longer in the custody of the police. The location at which the seven congregated for the picture and story is not stated. To any reasonable mind it is doubtful that the 1st Defendant would have summoned the Plaintiffs in order to run a caption of them titled "***Arrested Serena Hotel Staff Freed***" and a story Titled "***Serena Accountant threatens to resign over Shs.6 Million theft***" and to force them to make the statements quoted in the story and attributed to the 7 Plaintiffs. Clearly the picture and accompanying article are the Plaintiff's own as can be seen from the following excerpt.

"… **Telling their side of the story yesterday, the seven cashiers – Anthony Njoroge, Nickson Andaye, Evans Mudogo, Edwin Kimuma, Cynthia Kuvochi, Hammad Loris and Anthony Njihia maintained they are innocent."**

The seven were then quoted in the article as saying the following:

"**The hotel management sacked us before handing us over the police on grounds that we really do not know. But the police have interrogated us and released us for lack of evidence, although we shall report to the Central Police Station on Monday**."

The story goes on to say

"…**The seven accused the management of intimidation, unjustified allegations and unprocedural sacking and warned that if the hotel does not rescind its decision they will take it to court**."

The article concludes by stating that

"Serena Management were unavailable for comment and were all said to be away."

I find that the said exhibit is of no evidential value in the Plaintiffs' case against the Defendants being a mere attempt by the Plaintiff to vindicate themselves.

Coming to the issues, it appears from my perusal of the court file that no issues appear to have been framed agreed or filed prior to the commencement of the hearing. The Plaintiffs have not attempted to set down any issues in their submissions either but the 1st Defendant has framed three issues as follows:

1. Whether the 1st Defendant had reasonable and probable cause in pressing for the prosecution of the Plaintiffs and whether in so doing it acted with malice.

2. Are the Plaintiffs liable for the 1st Defendants claim under the counterclaim?

3. Were the Plaintiffs unlawfully and wrongful dismissed, and are they entitled to damages as prayed?

As would be expected the above issues are deduced from the 1st Defendant's Defence and Counterclaim and are argued in its submissions to support its pleadings and arguments at the trial. The same have been considered fully as have been the submissions filed for the seven Plaintiffs.

Adopting a broader view of the issues before the Court and looking at the case as a whole, I have considered and framed the issues for determination as follows:

1. Were the Seven Plaintiffs herein unlawfully or wrongfully dismissed from employment and is the 1st Defendant liable to compensate them in damages for such dismissal? Did the 2nd Defendant play any role in the said dismissal as to be held jointly and severally liable therefore as prayed in the plaint?

2. Was the Plaintiffs' prosecution in Criminal Case No.898 of 1999 malicious and were the Plaintiffs falsely imprisoned in relation thereto as claimed?

3. Did the 1st Defendant suffer loss to the tune of Kshs.1,003,884.06/= as a result of deliberate or negligent acts of the Plaintiffs in the performance of their duties and if so are the Plaintiffs liable to compensate the 1st Defendant for the said loss as claimed in the 1st Defendants counterclaim?

4. If the answers to issue No.1 and 2 are yes, what is the quantum of damages payable to the Plaintiffs?

The plaintiffs claim that their dismissal on 6th April, 1999 was wrongful and unlawful because no notice was given to terminate their contracts of Employment. They base their claim on the provisions of the Collective Bargaining Agreement applicable at the time "Exhibit p.1" provides in clause 9 for termination of Employment as follows:

"1 **After the completion of the probationary period the Employment shall be terminated by either party giving written notice or making payment in lieu of the notice in the following terms:**

(a) An employee with less than five years continuous service with the same employer two months notice or two months pay in lieu.

(b) **An employee with ten or more but less than ten years continuous service with the same employers, three months notice or three months pay in lieu."**

Counsel for the Plaintiffs states in the written submissions that the Plaintiffs ought to have been terminated on either of the two options regard being taken to their years of service. The Plaintiffs also rely on clause 10 of the Agreement which provides for suspension or interdiction claiming that their dismissal before the result of the Criminal trial was known contravened the provisions of clause 10 of the Agreement. The said clause provides that:

"**The Employer *reserves* the right to suspend with full pay an employee from employment upto a maximum of 14 days pending investigations into alleged gross misconduct or other offences. Should the employee be found to have committed gross misconduct or other offences then he/she shall be summarily dismissed or terminated with effect from the date of the employer's decision upon completion of the investigations. Should the Employee be found innocent of gross misconduct of other offences, then he/she shall be reinstated forthwith.**

Where the employee's case is under investigation by the police or is pending before a court of law the employees suspension shall be extended without pay until the result of the police investigations or the court action is known." (underlining my own)

In their oral testimony as well as in the written submissions made by their counsel, the Plaintiffs have conveniently avoided clause 9 (e) which provided that

"**Nothing in this clause (9) shall prejudice the right of either party to terminate a contact of Employment *summarily* for lawful cause." (underlining my own)**

The Plaintiffs have also avoided any mention of the provisions touching on the employer's right to dismiss an employee summarily or to terminate the employee's contract with effect from the date of the Employer's decision arrived at, at the completion of investigations into the employee's conduct carried out by the Employers as contained in cause 10. Evidence tendered by both the Plaintiff on one side and the 1st Defendants' witness clearly shows that the Employer herein exercised its right to dismiss the Plaintiffs summarily upon completion of its own investigations on the 6th April, 1999, when the actions of the Plaintiffs were neither the subject of police investigations or pending before a court of law. I find this to have been in order being in conformity with the provisions of Collection Bargaining Agreement. The Plaintiffs' employment having been terminated prior to the police investigations and the prosecution, the argument that they ought to have been suspended until the result of the court action was known does not hold. Additionally and more importantly the Plaintiffs have submitted that their acquittal in the Criminal case renders the dismissal unlawful and wrongful. The circumstances under which the Plaintiffs were dismissed have already been set out earlier in this judgment. The 1st Defendant has justified the dismissal action on the strength of the evidence adduced by D.W.1 who explained that the Defendants' passwords having been used to make computer adjustments to telephone sales to the detriment of the 1st Defendant, the 1st Defendant's position was that the Plaintiffs were either directly involved in the making of the said adjustments or by negligently allowing other parties to use their passwords to effect the same. The Plaintiffs all admitted that indeed their passwords were used to make the adjustments. Without denying the fact that they were on duty at the affected area on the dates the adjustments were made, all, the Plaintiffs claimed that other people may have effected the adjustments using their passwords, submitting further that the Duty Manager, Front office Manager, Computer Manager and assisting cashier could access their passwords.

According to DW.1, the losses discovered by the audit conducted by her depicted losses incurred due to adjustments to revenue made when each of the Plaintiffs were on duty. She told the court that each cashier would run a computer generated shift report at the end of the day which would be sent for countersigning by the general cashier, and income auditor but that the affected shift reports had not been counter signed by the general cashier which meant that the buck fell on the front office cashiers themselves on the dates the relevant adjustments were made. Explaining the alleged possible use of his password by others, P.W.5 told the court that

"**I confirm my password could be used by others to check out guests and make any necessary**

adjustments or corrections with my authority, consent and knowledge."

He submitted further that he believed that if any negligence was to be found on his part then the same should be shared with the managers, a position various other Plaintiffs took while others thought the managers were wholly and solely to blame.

The 1st Defendant has referred to the provisions of the Collective Bargaining Agreement (already cited), the respective contracts of Employment for each Plaintiff and the Employees Handbook "Ex.p.3" to show that the Employer was legally entitled to terminate the Employment of each of the Plaintiffs. The Plaintiffs again conveniently avoided the provisions for Summary Dismissal which clearly appears in each of their letters of Appointment and reads as follows:

"**The Company reserves the right to terminate your services without notice if *in its opinion*, you willfully disobey the lawful orders and instructions of the company, or its official delegated with authority over you, or be a party to any fraud or dishonorable act or be guilty of any other gross misconduct." (underlining my own)**

The Employee's Handbook tendered in evidence as "***exhibit p.3*** " defines gross misconduct as

"**an offence which warrants dismissal e.g. theft, drunkenness and failure to comply with rules and regulations."**

Clearly from the above wording the listed offences are only examples and are not exhaustive in defining the offences for which the 1st Defendant had the right to summarily dismiss its employees. Having ascertained that indeed, the Contracts of Employment, the Collective Bargaining Agreement and the Employers' Handbook do provide for summary dismissal it cannot be said that the same was unlawful.

The next question the court must consider is whether the circumstances of this case, the dismissals were justified. In all the termination letters, the 1st Defendant stated the following in explaining the dismissal:

"**On various dates during the months of November & December, 1998 and January,1999 your personal password has been used by yourself or through your negligence to violate Contract Procedures resulting to loss of Colossal amounts of Company revenue for which you are held responsible, and this letter advises you of your immediate dismissal."**

D.W.1 testified on the findings of the audit carried our by herself and wherein the losses attributable to each of the seven Plaintiffs as identified by their cahier numbers were as follows:

P.W.1 Shs. 5,339.17

P.W.2 Shs. 2,783,746.18

P.W.3 Shs. 517,934.81

P.W.4 Shs. 5,170.29

P.W.5 Shs. 227,458.14

P.W.6 Shs. 97,199.97

P.W.7 Shs. 367,035.50

Considering the above, I am persuaded that the 1st Defendant was justified in finding that the Plaintiffs, either having carried out the various adjustments leading to the stated losses or causing the same to be effected using their passwords, whether deliberately or through negligence, were guilty of gross misconduct which has been legally defined in Halsbury's Laws of England Vol.16 (IB) 4th Edition at paragraph 567 as:

"**conduct so undermining the trust and confidence inherent in the particular contract of Employment that the Employer should no longer be required to retain the employees."**

According to note 12 to paragraph 567 of Halsburys' Laws of England Vol.16 (IB) 4th Edition,

"**Examples of gross misconduct include theft or fraud, physical violence or bullying deliberate and serious damage to property, serious misuse of organization's property or name, deliberately accessing internet sites containing pornographic, offensive or obsence material, serious insubordination unlawful discrimination or harassment, bringing the organization to serious disrepute, serious incapacity at work brought on by alcohol or illegal drugs, causing loss damage or injury through serious negligence, a serious breach of health and safety rules and serious breach of confidence."**

Tampering with Company equipment or causing the same to be used as alleged in this case squarely falls under the above definition. It follows therefore that the summary dismissal of all the Plaintiffs was in my considered opinion not only lawful but also justified in the circumstances, given the reasons stated in the letters of dismissal.

The dismissal did not involve the 2nd Defendant at all as was confirmed by the Plaintiffs during cross-examination by counsel for the 2nd Defendant.

In deciding whether the Plaintiffs' prosecution was malicious I have considered whether the essentials for the tort of malicious prosecution have been met in this case. The said essentials are that:

1. There must be a prosecution in which the Defendant is the prosecutor by being so actively involved that he is seen as the one putting the law into force. In **DANBY** –vs - **BEARDSLEY** (1880) 43 L.T 603 the Court found that if the Defendant merely tells his story of his loss leaving the court to determine whether the facts amount to an offence or not, even on that ground alone he cannot be called a prosecutor.

2. The prosecution must end in favour of the Plaintiff. It matters not whether it was ended by an acquittal, discontinuance of the prosecution or by quashing of the charge for reasons of a defect.

3. The Plaintiff must prove lack of reasonable and probable cause and the Defendant must prove he had.

The Plaintiffs say the prosecution was malicious only on the ground that they were arrested within the 1st Defendants' premises immediately after being issued with dismissal letters. Their counsel, has, in the filed submissions, stated that

"**The way the Plaintiffs were handed dismissal letters simultaneously, with arrest by senior officers is a demonstration of malice by the managers of the first Defendant and the police."**

I am unable to see how the above submission demonstrates any of the three essentials for the tort of malicious prosecution. Whereas it is common ground that there was a prosecution of the Plaintiffs resulting from the 1st Defendant's complaint to the police, and which prosecution ended with the acquittal of the seven Plaintiffs, they have not submitted any evidence to prove lack of reasonable or probable cause in their prosecution. Reasonable and probable cause has been defined in the leading case of **HICKS** – vs - **FAULKNER** [1962] A.C 766 (which I note has been appropriately cited by counsel for the 1st

Defendant) as follows:

"**An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the accused was <u>probably</u> guilty of the crime imputed." (underlining my own).**

The above test applies at the time of the accusation, not at the conclusion of the trial. The 1st Defendants belief in the guilt of the Plaintiffs has been demonstrated by their action in carrying out a thorough internal investigation and audit of the Plaintiffs dealings, their reporting the matter to the police and their filing of a counter claim for recovery of the sums lost through activities linked to the Plaintiffs' performance of their duties. The Plaintiffs have not proven as they ought, that the 1st Defendant in instigating the prosecution had some other motive than a desire to bring them to justice. All the Plaintiffs testified that their relationship with the 1st Defendant had been good all along. One fails to see therefore, how, in the absence of proof by the Plaintiffs, malice can be imputed as against the 1st Defendant.

The 2nd Defendant submitted before the Court that he relied on the evidence adduced by the 1st Defendant to refute the allegations of false imprisonment and malicious prosecution. Evidence tendered shows that the Plaintiffs were confined in police cells for three days during which the police searched their homes and as soon as that was done the Plaintiffs were each granted free bond which they enjoyed while the Criminal Case was underway. It seems reasonable in the circumstances of this case that the police would have detained the Plaintiff while investigations were on course. Indeed it is the normal thing to do where people are suspected to have committed the offence of theft of colossal sums of money as was the case here. I find that, given the circumstances of the case the police had just cause and excuse to confine the Plaintiffs as they did. I do not accept the Plaintiffs contention that they were confined and their movement curtailed while undergoing trial, having been granted free bond. Being of the view that the 1st Defendant's complaint against the Plaintiffs was founded on reasonable grounds for suspicion and given the evidence tendered in support, which directly links the Plaintiffs to the loss of over Shs.4 million, it follows that the 2nd Defendant was equally justified in preferring the charges against them and prosecuting them for the offence. As held in **DAWSON** –vs- **VASANDAAU**, (1863) II W.R 516,

"**The prosecutor need not believe in the probability of a conviction but only that the charge was warranted."**

Again I find that the Plaintiffs have not proven any malice on the part of the 2nd Defendant.

Regarding the counterclaim, the 1st Defendant relies on the evidence of D.W.1 as supported by the Computer print outs showing the various adjustments to telephone revenue attributable to each of the Plaintiffs and the loss occasioned thereby.

Guided by the attendant passwords, the 1st Defendant was able to link each of the Plaintiffs to the said adjustments to the apportion losses to each of them. Counsel has submitted in writing that:

"**The 1st Defendant's position (is) that the Plaintiffs either used their passwords to make the adjustments that led to the loss or the Plaintiffs negligently allowed their passwords to be used to make the adjustments. The Plaintiffs having admitted that their passwords were used cannot escape liability."**

In her testimony D.W.I told the court that the adjustments were in the domain of the front office cashiers head cashier and night auditor. She also testified that the loss of **Shs.4,003,884/=** was found to have arisen due to misuse of the computer system. In her own words she told this court that

"**We concluded that it was the front office cashiers who misused the computer system."**

D.W.1 further told the court that

"the front office cashier and the night auditor as well as front office managers or hotel managers had the right under the system to make any legitimate adjustments after receiving the requisite authority. We established in this case that the authority was abused and the adjustments which led the loss were neither legitimate nor authorized."

Requisite authority would be given by the Front Office Manager, Rooms division Manager or the General Manager upon being satisfied by the cashier why the adjustment was necessary. As already stated elsewhere in this Judgment the pinning down of the seven Plaintiffs in regard to the alleged loss is based mainly on the ground that their passwords were used. It has been submitted on the 1st Defendant's behalf that

"**The Plaintiffs admitted that their passwords were used without their knowledge. The 1st Defendant's position was that the Plaintiffs were each responsible for the safety of their passwords, and must be held accountable as to the usage. The fact that the Plaintiffs could not explain how their passwords were used bespeak of negligence.**"

In the same vein, counsel submitted on behalf of the 1st Defendant that the 1st Defendant's position is that the Plaintiffs

"**Were directly responsible for the adjustments that led to the loss of revenue by the 1st Defendant either through direct involvement in making the adjustments or by negligently allowing other parties to use their passwords to effect the adjustments."**

Clearly from the above it follows that the 1st Defendant does agree, as suggested by the Plaintiffs that it was possible that other persons could have used their passwords to effect the adjustments which led to the loss. The letters of dismissal said just as much. The Plaintiffs in their testimonies told the court that managers, in particular the Duty Manager, Front Office Manager, Computer Manager and assisting cashier, Room Division Manager as well as relievers could have access to their passwords. This evidence was not rebutted by the 1st Defendant. Neither did the 1st Defendant adduce evidence to show that under the terms of their contracts, the Plaintiffs would be held accountable for losses incurred as a result of their negligence in performance of their duties to the extent that the same would be recoverable from them. Much as their negligent handling of their passwords may justify the disciplinary action taken against them, I am not persuaded that in the absence of any direct evidence linking them, independently of others, to the making of the adjustments complained of, the 1st Defendant can be said to have discharged its duty to prove their liability for the same on the balance of probabilities. I am of the considered view that although the 1st Defendant has demonstrated that it did incur the loss of revenue claimed in its counterclaim and apportioned the same to each of the Plaintiffs, there is still a probability that others and not the Plaintiffs could have been responsible for the said loss.

Taking all my above findings into consideration, I now conclude and hold that:

1. The Plaintiffs dismissal by the 1st Defendant was neither unlawful nor wrongful and the 2nd Defendant played no role in it at all. The Defendants are not liable to compensate them for the same.

2. The Plaintiffs prosecution in Criminal Case No.898 of 1999 was not malicious and no false imprisonment has been proved in relation thereto.

3. Although the 1st Defendant did suffer a loss of revenue to the tune of Shs.4,003,884.06/= the same has not been proven to be solely attributable to the Plaintiff's conduct. The Plaintiffs are not liable to

compensate the 1st Defendant for the same.

4. The allegation of false imprisonment and malicious prosecution having not been proven and in that case the answers to issue Nos. 1 and 2 being in the negative, no damages are payable to the Plaintiff by either of the Defendants. There is no need, in the circumstances, to consider issue No.4 as regards the quantum of damages which would have been payable.

It follows from the above that neither the Plaintiffs' suit, nor the 1st Defendants' counterclaim succeeds and both are hereby dismissed. Parties will bear their own costs of the suit and counterclaim.

Dated and delivered at Nairobi this 27th day of September, 2006

M. MUGO

JUDGE

Judgment delivered in the presence of:

Mr. Mutubwa for Plaintiffs

Mr. Namachanja for 1st Defendant

No appearance for 2nd Defendant

M. MUGO

JUDGE

27.9.2006