



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

**Civil Suit 3611 of 1995**

**ROBERT OKERI OMBEKA.....PLAINTIFF**

**VERSUS**

**CENTRAL BANK OF KENYA.....DEFENDANT**

**J U D G E M E N T**

The Plaintiff filed this present case seeking judgment in the following terms:-

- (a) **The sum of Kshs.4,100,000/00 together with interest at the mean rate of 20% per annum with effect from January, 1994 until payment thereof in full.**
- (b) **Damages for wrongful arrest and consequent malicious criminal prosecution, together with interest thereon, at court rates.**
- (c) **Damages for wrongful dismissal of the plaintiff from the defendant's employment with loss of benefits, together with interest, at court rates.**
- (d) **Costs of this suit, together with interest thereon at court rates.**
- (e) **Such other or further reliefs.**

The Plaintiff Robert Okeri Ombeka (PW1) gave evidence in chief in the following terms. He said that he was previously employed by Central Bank of Kenya the Defendant from 1980 on a permanent and pensionable basis. That in 1993 December he presented Convertible Foreign Exchange Bearer Certificates (CFEBC) herein after called Forex-C. He said that the Forex-C are bearer which means that the person in possession is entitled to payment and he likened them to money. The Forex-C that he presented for payment he said were worth USD 410,000 which is equivalent to Kshs.4.1 million. He said that the time the exchange rate from USD to Kshs. Was Kshs.10 per USD. The Forex-C were issued in Kenya marked in 1991. They were issued by authorized Commercial banks and were traded in the open market. They were issued by the authority of the manager of the foreign department in Central Bank of Kenya. He said that they were traded by all persons in Kenya without any restrictions. He said that the Delphis Bank presented the aforesaid Forex-C to Central Bank of Kenya for payment. The Forex -C were lodged for payment but before payment was received by him Central Bank stopped the payment. That the payment was stopped because of the complaint made to the police by Central Bank. He said he was arrested and charged on 14<sup>th</sup> January, 1994 whereby he was charged for stealing by servant contrary to section 80 of the Penal Code. He stood trial and at his trial 8 prosecution witnesses gave evidence and after the prosecution closed its case he was acquitted under section 210 of the Criminal Procedure Code. He produced a copy of the ruling in evidence. He said that there was no exclusion against him as an employee of Central Bank from purchasing the Forex-C and accordingly after his acquittal he made demand for payment to be made to him by Central Bank for the value of those Forex-C. He said that he made written demand for Kshs.4.1 million plus 20% interest per annum with the effect from 19<sup>th</sup> January, 1994. In his said demand he also claimed for damages for wrongful arrest for wrongful dismissal and loss of pension benefit.

On being cross-examined by the defence counsel the Plaintiff said he was a senior clerk with Central Bank of Kenya and that he was attached to the foreign department dealing with Forex-C. He however said that he never handled nor did he see the Forex-C at Central Bank. On being further questioned he did accept that he saw the Forex-C which were in the department that he worked. He said the Forex C were received by two supervisors in his department namely Mr. Ngugi and Mr. Kibugu. Those supervisors normally issued acknowledgment note to the bank which had forwarded the Forex-C. Thereafter those Forex-C were sent to the Central bank of Kenya Auditors for audit and authorization of payment. Thereafter payment would be effected by the foreign department to the various banks. Once those Forex-C were paid PW1 said they were filed in a room within the Central Bank of Kenya for safety and custody. He stated that his duties were many but were clerical. At the time of his arrest he was at the PTA desk maintaining a register. He said that although at that time he was at the Central Bank of Kenya he could not gain access to the room where the Forex-C were kept. On being further questioned he accepted that he had the

keys to the room where the repaid Forex-C were kept and he could if he so wished have entered the room but he added that he had never handled Forex-C when working at Central Bank of Kenya. The Forex-C that he presented for payment he said he had acquired them from the market. He again reiterated that the Forex-C were bearer and would be paid for to the person who had them. On being further questioned he said that he is the one who presented the Forex-C for payment and not a person called Mr. Angwenyi. On further being questioned PW1 said that it was Mr. Angwenyi who presented the Forex-C for payment. And again on being pressed on this point by defence counsel he said as follows:-

***“I want to correct myself Forex-C were presented by me having been introduced by Angwenyi at Delphis Bank”.***

He further said that he had gone to his bank that is Habib Bank but found that there operations had come to an end and consequently they introduced him to Delphis Bank. He said to Delphis Bank with Mr. Angwenyi who introduced him to Mr. Kihiga. Mr. Kihiga was an officer dealing with foreign exchange at Delphis Bank. On PW1 giving the Forex-C to Mr. Kihiga he said that he recorded his name and stamped the Forex-C and also wrote his name thereon. On being further questioned he said that he did not get from Mr. Kihiga something in return on surrendering the Forex-C to him. Then again he stated that there was a forwarding letter which he wrote and gave to Mr. Kihiga together with the Forex-C. However he said that he did not have that letter but that he would look for it. On being questioned again PW1 said as follows:-

***“I think I wrote the letter through Angwenyi I do not know if I drafted the letter or Angwenyi did”***

On yet the same issue PW1 said that Angwenyi wrote the letter on his behalf. In writing that letter he stated the value of the Forex-C. He said Mr. Angwenyi was his agent and he acted on his instructions. Again he said it was he who presented the Forex-C in the company of Mr. Angwenyi. Defence counsel asked PW1 the following questions:

***“Why did Angwenyi write a letter on your behalf when you were there?”***

PW1 responded as follows:

***“He drafted the letter. The letter is somewhere I may be having a copy somewhere Angwenyi presented the Forex-C on my behalf.”***

Again PW1 said as follows:

***“I do not know how to put it I presented them the Forex-C”.***

In yet another twist to the same issue PW1 stated it was Angwenyi who presented the Forex-C on his behalf. He said that Angwenyi was an employee of Habib Bank. He was not aware whether Angwenyi is still working for Habib Bank as of now. After presenting the Forex-C PW1 said he left the bank with a copy of the forwarding letter which had been stamped by Delphis Bank. He however said that he did not have a copy of that letter in court. The payment for the Forex-C was made to the bank which presented the Forex-C. PW1 said he called Mr. Kihiga and asked him if the Forex-C had been paid. It was confirmed that the Forex-C had been paid but he said that he had never received payment of the same because Central Bank had recalled that payment. He further said that someone from his bank which is the Standard Chartered Bank at Gateway House gave evidence at the criminal trial that the money the proceeds of the Forex-C should have been paid to him. He however said that no cheque was written in his favour by Delphis Bank. He later said that he wrote a letter to Delphis requesting them to pay the money through inter-bank transfer to his account at the Standard Chartered Bank. The Standard Chartered Bank called him and instructed him that payment of that money had been stopped by Central Bank. At this point the court noted in the court proceedings that the witness was unsure of what answers to give when being cross-examined. However he proceeded to state that he did not receive payment because the Central Bank had stopped the payment. He did concede that he had no evidence that such payment had been stopped by Central Bank. But he stated that Central Bank had on ordered its department that is banking fraud department to arrest him.

On being re-examined by his counsel PW1 said that Mr. Angwenyi was a manager in Habib Bank in the foreign operations.

Defence did not call any evidence and the parties chose to present submissions before court. The court has had an opportunity to read and consider those submissions. In the court’s assessment of the case before it, it is clear that the evidence presented by the Plaintiff is not at tandem with the claim which was filed in this court. For example in paragraph 5 and 6 of the plaint which state that the Defendant failed to make payment for the Forex-C. The court would refer to page 19 of the proceedings in the criminal trial particularly the evidence of Kihiga. Mr. Kihiga stated that the Delphis Bank received the payment by Central Bank of Kenya through a bankers credit note for an amount which included the value of the Forex-C. On receipt of that payment he stated that he was instructed by PW1 to pay Angwenyi. Mr. Kihiga said that he was not told by PW1 why he was making payment to Angwenyi who he said was an associate of the Plaintiff. He however said that he made payment as instructed issuing a cash payment of Kshs.1 million and a banker’s cheque for Kshs.3.1 million. Having that evidence in mind when one considers the provisions of the Central Bank circular on Forex-C and in particular the paragraph relating to repurchase one cannot say that the Defendant did not make payment. Indeed elsewhere in evidence of the criminal trial Angwenyi confirmed that payment was received and that he indeed paid the Plaintiff Kshs.1 million and the balance he issued a cheque in his favour. One could go through the pleading and each time one would conclude that the Plaintiff’s evidence failed to support the plaint. It is however not necessary to do so suffice that it is on record. Having in mind the Plaintiff’s claim to begin with his claim for Kshs. 4.1 million the court is of the view that he failed to prove his entitled to the same. There was no sufficient evidence presented before this court which proved that the Plaintiff was the owner of the aforesaid Forex-C. Indeed from his evidence it is not clear whether the bearer was himself or Angwenyi. The court found his evidence in that regard to be unreliable and untruthful. Indeed the court did note that when being questioned in regard to those Forex-C he was at sometime unsure which answer to give. Accordingly the court rejects his evidence regard to this claim. In respect to his claim for damages for wrongful arrest and malicious criminal prosecution the court is not satisfied that he has proved his case in that regard. The court is guided by the case of Nyaga vs. Mucheke Civil Appeal No. 59 of 1987 (Unreported) and in particular the following portion.

***“There is no dispute that the appellant made a report to the police complaining about damage to his crop. The respondent was arrested, detained and charged. No evidence was adduced to show the exact nature of the report except that the appellant admitted having made the report to the police to the effect that the respondent had damaged his crops and trees. The police investigated the matter and arrested the respondent.”***

Indeed the Plaintiff did not prove malice on behalf of the Defendant in reporting their complaint over the Forex-C to the police. The court finds that in the ruling delivered by the criminal court the magistrate seemed to have accepted that at least three of the Forex-C which were the subjects of the trial were ‘bad’. If that be so that would have been sufficient reason for the Defendant to lodge a complaint and if they so did and the police decided to arrest and charge the Plaintiff that act was out of control of the Plaintiff. The Plaintiff therefore on this claim has failed to prove the same. The Plaintiff also made a claim for damages for wrongful dismissal from the Defendant’s employment. A part from the oral evidence in chief where the Plaintiff stated that he worked for the Plaintiff in 1980 there was no documentary evidence presented before court to prove that he was either an employee or that he was dismissed from employment of the Defendant. The Defendant failed to shift the burden upon him in this regard. See section 107 of the Evidence Act. However even if the Plaintiff had attempted to prove that he was an employee to entertain the figures stated in his counsels submissions would be to say the least ambitious. The court chooses to be guided by the case of **Ombanya vs Gailey & Roberts Limited (1974) E.A. 522** and particularly the following portion:-

***“I think it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current. In the instant case, the Plaintiff would have been legally dismissed by one month’s notice and the Defendant could have dispensed with his services on that period of notice. In this respect the Plaintiff would have no cause of action.”***

It ought to be noted that this head of the Plaintiff’s claim was in the nature of a special damage and there was need for the Plaintiff to specifically claim in the plaint the amount being prayed for. The Plaintiff did not and therefore that claim will fail. The court is assisted by the case of **Coast Bus Service Limited vs Ndanyi** and states as follows:

***“We would restate the position. Special damages must be pleaded with as much particularity as the circumstances permit, and in this connection, it is not enough to simply aver in the plaint, as was done in this case, that the particulars of special damages were “to be supplied at the time of trial”.***

The Plaintiff did not plead the claim for pension even though in his counsels submissions mention was made of this. The court will therefore not consider disclaim.

The court in summarizing the evidence presented by the Plaintiff, the court would say that, that evidence was full of falsehood and untruth which were intertwined. The object of cross-examination as I understand it to test a witness’s veracity. The defence counsel in cross-examining the Plaintiff in deed tested his evidence and the Plaintiff’s evidence was found to be wanting on truth. The court could not trust the evidence presented by the plaintiff for as it is seen herein-before the Plaintiff kept changing his evidence and at the end of it all the court was unable to decide what was the true evidence of the Plaintiff. Not only has the Plaintiff failed to shift the evidential burden placed upon him but on the whole he has failed to prove his case on a balance of probability. The end result therefore, is that this case fails and the judgment of this court is that the Plaintiff’s case is hereby dismissed with costs to the Defendant.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 16<sup>th</sup> day of October 2006.

**MARY KASANGO**

**JUDGE**