



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1022 OF 1999

AMIR MUGHAL..... PLAINTIFF

VERSUS

LAKMER TECHS LTD..... DEFENDANT

JUDGEMENT

In a plaint filed in court on 23.11.98, Amin Mughal, the plaintiff, claims from the defendant company three months salary in lieu of notice on account of the termination of his employment with the defendant company. He also claims a refund of Khs.13,212/= per month from June 1995 to September 1998 which he alleges was deducted from his salary on the pretext that he would be made a shareholder in the defendant company which he never was. The plaintiff also claims general damages for unlawful termination of employment and for defamation on account of a letter written by the defendant company to its suppliers in August 1998 when the plaintiff was still a director of the company. He also claims accrued benefits as a company director to be assessed by the court.

In its statement of defence filed on 21.12.98, the defendant denies having unlawfully terminated the services of the plaintiff in or around September, 1998 as alleged in the plaint and avers that the termination of the plaintiff's services was justified on grounds of gross misconduct. The defendant also denies that there was an agreement with the plaintiff whereby the defendant would retain Khs.13, 212/= per month from the plaintiff's salary as consideration for making him a Director of the company as alleged. The defendant further denies that the words published by itself of and concerning the plaintiff were actuated by malice or that they were capable of the defamatory meaning attributed to them by the plaintiff. In any event, the defendant avers, the words complained of were true. The defendant also counterclaims from the plaintiff a sum of Khs.770, 000/= full particulars whereof are given.

The parties agreed on 11 issues for trial. They were (1) was the plaintiff an employee of the defendant and if so, what were the terms of employment? (2) Was the plaintiff summarily dismissed pursuant to his gross misconduct? (3) was there an agreement that the defendant would deduct Khs.13,212/= of the plaintiff's salary from June 1995 in order to make him a Director of the defendant and or was the plaintiff appointed a director of the defendant company? (4) was the plaintiff defamed by the words set out in paragraph 5 of the plaint? (5) was there a publication of the said words and, if so, by whom? (6) was the publication actuated by malice? (7) are the words complained of capable of the defamatory meaning ascribed to them by the plaintiff? (8) has the plaintiff been injured in his credit and reputation? (9) is the defence of justification available? (10) is the plaintiff entitled to damages, and (11) is the defendant entitled to the prayers in the counterclaim. These issues were filed before the trial.

At the trial, the defendant amended the defence by abandoning the plea that the plaintiff's dismissal was

of a summary nature due to gross misconduct and substituting therefor the claim that the plaintiff's termination of employment was on grounds of redundancy. The defendant also abandoned the counterclaim. At that stage, the plaintiff asked for costs of the amendment and of the counterclaim. The late Hewett, J. Who was then trying the case directed that the issue of costs be addressed in the final submissions. As I see it now, the issues for trial may be reduced to the following - (1) whether or not the termination of the plaintiff's employment with the defendant company was unlawful and if it was, what is the measure of damages; (2) whether or not the plaintiff is entitled to a refund of Khs.13,212/= per month from June 1995 to September 1998 which was allegedly deducted from his salary for the purpose of his being made a shareholder of the defendant company; (3) whether the plaintiff is entitled to any accrued benefits as a director of the defendant company and, if so, how much?; (4) whether the defendant has defamed the plaintiff as alleged; and (5) what order should be made on costs?.

The answers to the first four issues depend on the court's findings as to the terms of the plaintiff's employment with the defendant company. In that regard it was the plaintiff's evidence that he was employed on terms spelt out in an appointment letter signed by Jitesh Lakhani, a director of the defendant company and which he accepted. He produced that letter as exhibit 1. According to that letter the plaintiff would be engaged in the position of a Company Director from 1st June 1995. Clause 4 thereof provided that his remuneration would be Khs.30,000/= per month and that he would be offered to buy shares in the company after two years of working. It was the plaintiff's evidence that the salary of Khs.30,000/= was net of all deductions which the company undertook to pay. Clause 8 provided that the employment could be terminated by either party by the giving of two months notice or payment in lieu of notice. And clause 11 provided that he would be eligible for all the benefits of a director of the company. The plaintiff who is a graduate of Middlesex University and an Engineer by trade specializing in computers and I.T. testified he was taken as a Company Director because of the qualifications and experience he was bringing to the company. He was entitled to a company credit card, a company vehicle and travel allowance for his trips. He produced company form No. 203A: Notification of change of Directors and Secretaries of a Company as exhibit 2. The document showed that the plaintiff had been appointed a director of the Company as from 10th April 1996. He testified further that he was required to put aside part of his salary to the extent of about Khs.13,000/= per month to enable him purchase shares in the company. In that regard he referred to clause 4 in the letter of appointment. It was his evidence that he suffered such deductions for 38 months from June 1995 to September 1998. He produced two of his salary slips as exhibits 3A and 3B for 1.4.98 and 31.7.98 which showed his net salary as Khs.16,788/= to support his claim that a sum of Khs.13,212/= was set aside for his acquisition of shares in the company. He further testified that in July 1998 he made business trips to Dubai and U.K. to meet suppliers with whom the defendant company wished to have a business relationship. On returning from abroad, he went to his office on 31.8.98 and he was given a cold shoulder by Jitesh Lakhani - his partner in the defendant company. He was told his services were no longer required and no reasons were given. He found his office had been taken over by Lakhani's wife. He was given a box containing his documents and personal belongings. Discussions with Mr. Lakhani got nowhere but he was promised a fair calculation of his dues. He was given a letter indicating that the termination of his employment was due to the economic crisis. He produced the letter as exhibit 4. He did not believe it as he knew the Company has just won a tender with Crown Agents worth Khs.10 million. He was not given any money at all on termination of his employment. He received no communication from the company regarding his position as a Director. And he had left the company car at the Company's house before he had gone on the business trip. As a result of those things he wanted a refund of Khs.13,212/= from June 1995 to September 1998, terminal dues for 3 months and any further benefits.

In cross examination, he maintained that he had discussed the terms of his employment verbally before he joined the company and the verbal contract was the same as what was contained in exhibit 1. He insisted that his take home pay was agreed at Khs.30,000/=. He denied that the salary of Khs.30,000/= was subject to statutory deductions. He conceded that the deduction in respect of shares was not reflected in exhibit 1 or anywhere else in writing. He maintained his employment was terminated in his absence and denied a suggestion that it had been mutually agreed between him and Mr. Lakhani that he would leave the Company. He also denied that his employment had been terminated due to the poor performance of the Company. He conceded that his payslips showed his basic salary to be Khs.19,500/= and did not show any other payment. He also conceded that he did not dispute those payslips while he was in the

employment of the Company. When he was referred to exhibit 1 and it was suggested that eligibility to buy shares in the Company and actual buying were different things, he said he did not understand. He however conceded that he was promised shares after a two year period.

In re-examination, he stated that there was nothing in writing reducing his salary from Khs.30,000/=.

The defendant company's evidence was adduced by Mr. Jitesh Lakhani, its Managing Director. He testified that when the plaintiff sought employment from the defendant company, he asked for a salary of Khs.30,000/=, an airline ticket every two years, a credit card fully paid for by the Company, a company car and equity in the Company. After negotiations it was agreed he would get a salary of Khs.19,500/= (which was the same as that of the witness). He joined the company in June 1995 and over the next six months he was given a credit card and a company car. His evidence was that the terms of the plaintiff's employment were not reduced to a written contract. He denied that exhibit 1 was the basis of the plaintiff's employment. He said the only thing in the exhibit was an agreed salary of Khs.30,000/= per month and that the letter did not contain any of the other terms he had pointed out. The renegotiated terms were agreed before the plaintiff joined the Company. He testified that the renegotiated terms were not reduced into writing. He denied that a sum of Khs.13,212/= per month was deducted from the plaintiff's salary for acquisition of shares in the Company. He maintained that there was no contract to sell shares to the plaintiff but there was an agreement that the company would sell shares to him after two years on terms to be agreed but those terms were not subsequently discussed or agreed. He testified further that the Company's normal terms for termination of employment are either two months notice or two months salary in lieu of notice. He agreed that the plaintiff was not given either two months notice or salary in lieu of notice. He stated that he had no problem in paying the plaintiff salary in lieu of notice.

On cross examination, he confirmed that the signature at P. 2 of exhibit 1 was his and that he had prepared the letter. He said that he passed the letter to the plaintiff as confirmation that the plaintiff was in the Company's employment. He conceded that according to the letter the plaintiff was required to report at work on 1.6.95 and that he did so. He further conceded that he did not discuss with the plaintiff his terms of employment after he joined the Company. He emphasized that the negotiations with the plaintiff were held before he reported on duty. He admitted that exhibits 3a and 3B were the Company payslips and that the salary shown thereon was not what was shown in the letter of employment. He admitted that the plaintiff was a Director of the Company but denied that he was made a Director because the

Company had been deducting money from his salary for that purpose. He maintained that the plaintiff's letter of employment was not a valid one and that what was shown in the payslips was the plaintiff's negotiated salary. He reiterated that the agreement between the plaintiff and the Company was that the plaintiff would buy shares in the Company after two years of employment and that the plaintiff was made a director immediately on joining the Company. In those premises, the witness stated that no money was deducted from the plaintiff's salary for the purpose of making him a director. Confronted with exhibit 2 which showed that the plaintiff was made a director of the defendant Company in April 1996 the witness testified that the motion to make the plaintiff a Director started much earlier. He denied that he was made a director of the company in April 1996 in consideration of the monies deducted from his salary. Asked whether the plaintiff had ceased to be a Director of the defendant Company, the witness stated that a resolution to that effect had been passed immediately the plaintiff left employment. He could not however recall when the resolution was made. He further testified that as a Director of the defendant Company the plaintiff got the benefits of one airline ticket every two years, a company credit card and a motor vehicle. There was no limit on the credit card but the plaintiff actually spent Khs.383, 000/= on the card, air ticket and fuel for the vehicle. He agreed that those benefits were in accordance with clause 11 of the letter of employment, i.e. exhibit 1. He also agreed that plaintiff should be paid two months salary in lieu of notice in accordance with clause 8 of the letter of employment. He said that was normal company procedure. He added that the plaintiff was actually paid one month's salary and additional benefits were to be discussed but the plaintiff did not turn up for such discussions. Pressed on the evidence of those payments, the witness conceded he had not produced in court evidence of such payments and he had not even informed the Company's Advocate that he had paid one months salary to the plaintiff in lieu of notice. He maintained that the plaintiff had been declared redundant. He testified that the Company used to pay 2 months salary as redundancy dues. He further testified that he could not recall any letter from the

Company Secretary confirming that the plaintiff was no longer a director of the Company.

In re-examination, the witness stated that the plaintiff had not complained of any deduction from his salary for the three years he was in the Company's employment. He emphasized that infact there were no deductions from his salary. He added that the plaintiff himself was in charge of the Company's payroll and used to write all Company cheques including the witness's cheque. He pointed out that there was no indication of any deduction of Khs.13,212/= in the payslips produced. He further pointed out that even if the court were to go by exhibit 1, the plaintiff's acquisition of shares in the Company was to be discussed after 2 years. It was his further evidence that the plaintiff did infact raise the matter with him in England after two years and the witness told him to raise the matter in Kenya where the shareholders were present. In the event, the plaintiff did not raise the matter again, the witness testified. Finally the witness testified that the plaintiff got the benefits he bargained for but he did not get them because he was a director of the Company but because he asked for them and the company obliged because it was looking for a Senior Manager. The Company had no set policy on Directors/Senior Staff benefits.

On the claim for defamation, the plaintiff complained of the words set out in paragraph 5 of the plaint. Those words are the contents of a letter dated 21.8.98 addressed to a company called Compusys Kenya Ltd by the defendant Company. The letter was produced in evidence as exhibit 6. It reads -

"Dear Sir'

This is to inform you that the following people have left Lamer Techs as of 15th August 1998. We will no longer be responsible for any transactions carried out on behalf of these people.

1. Mr. Charles Mutua.

2. Mr. Amin Mughal

Please can you make a note of this in your records and amend your records accordingly.

Please do not hesitate to contact me in case you have any further queries.

Thanking you,

Jitesh Lakani

Managing Director."

The plaintiff complained that the said letter was calculated to disparage him in his office as a Director of the defendant company and as a professional and had exposed him to public ridicule and contempt. He averred that the words meant or were understood to mean that he was a person of uncouth and untrustworthy character; that he was not a director of the defendant company but mascurades (sic) as such and as such was a liar; that the plaintiff was wanting in integrity and was incapable of being trusted; and that he was a conman and a liar capable of conning the defendant's customers.

The plaintiff also complained of another letter dated 13.8.98 addressed by the defendant to Barclays Bank of Kenya whereby the defendant requested the Bank to remove the plaintiff from the Company's list of authorized signatories as he was no longer a member of the company.

In his evidence in support of the claim for defamation the plaintiff testified that both letters were written while he was still in the Company's employment and he was not even informed about them. He found copies thereof among the possessions handed back to him. Of the two letters, the one with major effect was exhibit 6. He testified that the letter was circulated across the I.T. field. It had a bad effect on his self-esteem and confidence as a person who was well known to his clients. In consequence of the letter, his professional work was greatly hindered. The suppliers refused to deal with him in business. It also

hindered opportunities for him to get another employment. It gave the impression that he was an untrustworthy character whose services had been terminated by Jitesh. He was a man with a very good reputation in the Company and had a lot of respect. Indeed on termination of his employment he got a good reference letter which he produced as exhibit 7. He also produced another letter as exhibit 8 dated 21.7.98 stating that he was on annual leave from 22nd July 1998 to 15th September 1998. He said he suffered a lot as a result of the alleged defamation.

On cross examination, the plaintiff stated that he was visiting suppliers abroad when he was on leave and that he had been sacked by the time he returned. The letters of dismissal and reference were handed to him on 28.8.98. He further stated that the letter to the Bank was defamatory of him in the eyes of the Bank staff and other staff who saw it. The letter to Compusys was distributed to the I.T. industry. Compusys was one of the defendant company's suppliers. In his view the letter should not have been written while he was away but still on company employment. Such a letter would only have been necessary if he had been carrying on unauthorized business. He was adamant that although it did not state so in black and white, the letter implied that he should not be employed. Indeed Computec and Computec Kenya Ltd and Computer Systems all refused to employ him as a result of that letter, he testified. Pressed for details about the publication of the letter, he maintained that the defendant wrote to all its suppliers and corporate clients. He could not however give their number.

Mr. Jitesh Lakhani, the defendant's Managing Director for his part testified that the plaintiff was dismissed in September 1998 on grounds of redundancy. But he had been notified of the termination of his employment by E'mail and also by a letter dated 13.8.98 while he was in England. He admitted writing both exhibits 6 and 7. He stated that exhibit 7 was written to the company's suppliers informing them of the fact that the plaintiff was no longer the Company's employee. Exhibit 5 was a letter to the Bank informing the bank that the plaintiff could no longer sign on the Company's behalf. He disagreed that the two letters made the plaintiff appear as a dishonest and untrustworthy character. In his view, there was nothing in the letter to suggest the plaintiff was a liar or a conman. On the effects of the letters on the plaintiff's employability, the witness testified that after leaving the company, the plaintiff was able to get employment with other companies which included Crescent Computers and Telemedia Communications. The former is an I.T. Communications Company.

On cross examination as to whether the plaintiff was a director of the company when exhibits 5 and 6 were written, the witness conceded that he was but stated that he was no longer his employee. Shown exhibits 7 and 8, the witness conceded that the plaintiff was a director of the defendant company as at 28.8.98. He maintained that his letter of 21.8. 98 i.e. exhibit 6 did not tell a lie about the plaintiff. It did not state that the plaintiff was no longer a Director of the defendant company. It stated that he left employment with the company. The purpose of the letter was to look after the company's interests. It was to ensure that the plaintiff did not purchase goods on behalf of the company. He admitted that by the time exhibit 5 was written, there was no board resolution removing the plaintiff as one of the signatories to the Bank. The resolution was made later. He stated that he had taken action on behalf of the Board before the formal meeting took place. He admitted that he wrote to 25 suppliers and the Bank informing them of the status of the plaintiff in the Company. He reiterated his conviction that the letters were not intended to defame the plaintiff and disagreed with the suggestion that the said letters constituted a falsehood and the impression created by them was that the plaintiff was a dishonest person. He maintained the letters did not state that the plaintiff was not a director of the defendant company but rather they stated that the company would not be responsible for transactions concluded by him. So much for the evidence adduced. I should now look at the submissions.

Mr. Kyalo, Advocate for the defendant, submitted that the plaintiff had not proved his case on a balance of probabilities. He submitted that according to the evidence, the termination of the plaintiff's employment occurred on 13.8.98 yet according to paragraphs 3 and 8 of the plaint, the plaintiff had been paid his dues up to September 1998. According to Counsel, the plaintiff's employment could be terminated on two month's notice or payment of salary in lieu of such notice. That was so irrespective of whether the court found the plaintiff's contract of employment to be embodied in exhibit 1 or in the terms subsequently renegotiated as claimed by the defendant. He submitted that as a matter of law, general damages are not available for unlawful dismissal. The measure of damages is the equivalent of the notice

period where no notice had been given. He cited the cases of **OMBANYA V GAILEY & ROBERTS LTD** [1974] E.A. 522, **RIFT VALLEY TEXTILES LTD V EDWARD OGANDA** [C.A. NO. 27 of 1992] (Unreported) in support of his proposition. In the circumstances of this case, Mr. Kyalo submitted, the evidence suggested that the plaintiff served his period of notice while still in the defendant's employment and accordingly he was not entitled to anything. However if the court wanted a mathematical approach to the plaintiff's claim, he was entitled to only two weeks pay because he had been paid for a period of one and half months after the notice of termination of employment took place, Counsel submitted.

As regards the claim for the refund of alleged contributions or deductions by the plaintiff towards the purchase of shares and/or a Directorship in the defendant company, it was submitted on behalf of the defendant that such a claim was one for special damages which required to be pleaded with particularity and proved strictly and that such had not been done. On the pleading, it was contended that the pleading was inadequate as the plaintiff had not set out the exact amount of the claim. As regards proof, it was contended that the claim was not strictly proved. In that regard it was contended that there was no documentary proof of the claim and the evidence adduced made the claim suspicious. It was pointed out that the plaintiff did not produce any agreement for the purchase of the shares, that the payslips which were prepared by the plaintiff himself did not show any such deduction, that the plaintiff had not disputed his payment as per payslip while in the defendant's employment and that even if the court were to find that the plaintiff's terms of employment were as per exhibit 1, clause 4 thereof indicated that the shares could only be offered after plaintiff had served for two years and accordingly the deductions could not have been made from the first month of the employment. It was also pointed out that it had not been indicated for how long the deductions would be effected.

As regards the claim for defamation, it was argued that it stood to reason that if a persona like the plaintiff who was a signatory to the defendant's bank account and a Senior Manager who could procure goods and services for the company had lost authority to act on behalf of the company as a result of the termination of his employment, the Bank and the suppliers had to be informed. It was also argued that the words complained of did not bear the defamatory meaning attributed to them by the plaintiff. Further more, it was also pointed out, the plaintiff was still employed in the I.T. Industry contrary to his claim that his reputation had been severely damaged in the Industry. It was also argued that it was inconceivable that the Managing Director of the defendant company who had given the plaintiff a good reference as shown by exhibit 7 would have defamed the plaintiff as alleged.

On behalf of the plaintiff, Mr. Mogeni, Advocate, argued that the plaintiff had proved his claim on a balance of probabilities. He submitted that the terms of the plaintiff's employment were embodied in exhibit I and that such a written contract could not be varied by a subsequent oral agreement. It could only be varied by another written agreement which had not been produced. He submitted that according to clause 8 of the written agreement, the employment of the plaintiff could only be terminated on two months notice or two months pay in lieu thereof. In that regard, the defendant had not placed any evidence before the court to show that it had either given the plaintiff the notice or paid him in lieu of such notice; and accordingly the plaintiff's evidence that he had not been given any notice or paid any salary in lieu of notice remained unchallenged. Counsel submitted that the evidence showed that the plaintiff's employment was terminated at the beginning of September 1998 and he should be paid 2 months salary in lieu of notice.

As regards the claim for a refund of Khs.13, 212/= per month effective June 1995, Counsel for the plaintiff submitted that the claim was particularized and proved. He pointed out that in paragraph 8 of the plaint, it was averred that the monthly deduction was Khs.13, 212/= and that the period of deduction was from June 1995 to September 1998. Such a pleading was adequate, Counsel contended. As regards the proof of the claim, it was argued that the payslips produced in evidence as exhibits 3A and 3B clearly showed that the plaintiff was not paid the sum of Khs.30,000/= as was expected under clause 4 of the contract of employment. It was pointed out that the defendant had not offered any explanation for the difference in the plaintiff's pay other than an allegation that the contract of employment had been orally altered. In that regard it was emphasized that an oral contract could not supersede or vary a written contract and in any case, no witness had been called in support of the oral contract. Counsel submitted

that the plaintiff is entitled to a refund of all the amounts deducted. It was also contended that exhibit 2, the return on particulars of Directors of the Company strengthened the plaintiff's case. In that regard, it was pointed out that the return showed that the plaintiff was appointed a director of the defendant company on 10.4.96. That showed plaintiff did not have to wait for two years before he became a director. That, it was contended, strengthened the plaintiff's claim that the deductions started soon after the plaintiff joined employment. Counsel submitted that the plaintiff's loss should be assessed strictly in accordance with his contract of employment. He cited the cases of **FRANCIS WANGANJU V UNGA GROUP LTD** [HCCC NO. 2179 OF 1998] (Unreported) and **JULIUS NKONGE NKABO V CENTRAL BANK OF KENYA** [HCCC NO. 1750 OF 1995] (Unreported) in support of that proposition.

On the claim for loss of director's benefits Counsel for the plaintiff asked for a global award. He submitted that a director's benefits included 2 air tickets, a company car and a credit card. According to Counsel, the plaintiff was entitled to those benefits even after his dismissal as an employee for no resolution had been passed affecting his status as a director of the company. He asked for Kshs.500, 000/= as damages in respect of each year of the plaintiff's service as a Director of the defendant company from 1998 to last year when he was removed from his directorship.

On the claim for defamation, Counsel for the plaintiff submitted that the letters in exhibit 5 and 6 contained untrue and false allegations concerning the plaintiff because at the time they were written, the plaintiff was still a director of the defendant company. He contended that the allegations bore the defamatory meaning attributed to them by the plaintiff and a defence of qualified privilege could not apply as the defendant was actuated by malice in writing the letters. The allegation touched on the character and integrity of the plaintiff as a director of the defendant company, counsel submitted. They affected the standing, credit and reputation of the plaintiff. He asked for an award of Kshs.1, 500,000/= as general damages for defamation. He relied on the case of **TIMWOOD PRODUCTS LTO V BANK OF BARODA** [HCCC No. 1036 of 1997] (Unreported) where a sum of Kshs. 3 million was awarded for loss of credit business reputation and loss of profits.

Finally, Counsel for the plaintiff submitted that the plaintiff was entitled to the costs of the counterclaim which the defendant withdrew on 17.11.2000 before Hewett, J. He also asked for the costs of the present suit.

Mr. Kyalo, for the defendant company, in reply, distinguished the cases relied upon by the plaintiff. He stated they must be construed on their own facts and none of them was binding on the court. He however had no quarrel with the general proposition that the award of damages should be consistent with a party's contractual terms if that was the holding in the **FRANCIS WANGANJU** and **JULIUS NKONGE NKABO** cases. The case of **TIMWOOD PRODUCTS LTD** was inapplicable as it concerned a trading concern suing a bank for damages for loss of credit and business.

I have now considered the evidence adduced and the submissions. Having done so, I take the following view of the matter. I accept the plaintiff's evidence and the submissions of his advocate that the plaintiff's employment with the defendant company was on the basis of the letter of employment produced as exhibit I. I find the defendant's contentions that that letter was invalid and that the terms of the plaintiff's employment were agreed in an oral contract prior to his joining the defendant company to be without any merit for several reasons. First, the said document was produced and admitted in evidence without any objection by the defendant's counsel. Secondly, the defendant's Managing Director's explanation of how the plaintiff came to have the document is wholly untenable. His explanation was that he passed on the document to the plaintiff merely for the purpose of confirming that the plaintiff was in the employment of the defendant company. Surely a confirmation by any employer that a particular person is their employee is never in the form of an offer of employment complete with the terms of employment and a request for acceptance of the offer. Thirdly, the letter is consistent with both the plaintiff's and the defendant's evidence regarding when the plaintiff was to assume duty, when he was to be eligible for an offer of equity from the company and his entitlements as a company director. Fourth, it is clear law that a written contract cannot be varied or superseded by an oral contract such as the defendant contended existed between it and the plaintiff. Last, but not least, I formed the impression that the defendant's Managing

Director was a witness unworthy of belief and did not infact believe him on this aspect of the matter and other aspects of the suit as will shortly become apparent. My impression was fortified by the following other considerations about his evidence. He contradicted himself on at least two key matters. First, he testified that the plaintiff's employment was terminated in September, 1998. Then he said that the plaintiff ceased to be his employee on 13.8.1998 and he informed him so by letter and Email. Secondly, he initially testified that he had not given the plaintiff either two months notice or 2 months salary in lieu thereof, then later he changed his mind and claimed that he had paid the plaintiff one months salary in lieu of notice and that the plaintiff and himself were to discuss other benefits but the plaintiff did not show up for such discussions. I also found that the witness could lie even in writing. In that regard both exhibits 6 and 8 told lies about the plaintiff. Exhibit 6 stated he had left the defendant's employment when exhibit 8 stated he was on leave. And exhibit 8 stated plaintiff had served for only one year with the company when the truth was that he had served for three years. To repeat, I find that the plaintiff was employed by the defendant company on the terms and conditions of the undated letter under the hand of Jitesh Lakhani which was produced as exhibit 1.

Now according to clause 8 thereof, the employment could be terminated by either party on two months notice or payment of two month's salary in lieu of notice. The plaintiff's evidence was that he was not given such notice or paid such salary. As I have stated earlier in this judgment, the defendant's Managing Director initially agreed that that was so but later changed his evidence and stated he had paid one month's salary in lieu of notice. I don't believe him. If he had paid one month's salary in lieu of notice, not only would such a fact have been pleaded but evidence of such payment would have been availed. In the premises I find the termination of the plaintiff's employment to have been unlawful as he was not given notice or paid salary in lieu thereof. Even if the termination was on grounds of redundancy - and again I don't believe the defendant's evidence in that regard - the plaintiff was entitled to two months salary in lieu of notice even according to the evidence of Mr. Lakhani himself. And Mr. Kyalo's attempt to show that plaintiff worked while he was on notice to leave employment is unbacked by the evidence on record. Having found the termination of the plaintiff's employment to be unlawful, what is the measure of damages? Here I completely agree with the submissions of the defendant's Advocate. 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 up to the time the contract would have ended if the employment was on a fixed term basis (see the cases of **OMBANYA V GAILEY & ROBERTS** [1974] E.A. 522, **RIFT VALLEY TEXTILES LTD V EDWARD ONYANGO OGANDA** [CIVIL APPEAL NO.197 OF1992] and **ADDIS V GRAMOPHONE COMPANY LTD** [1909] A.C. 488). General damages for unlawful dismissal are not available and there is no scope for a consideration of the plaintiff's mental anguish or injury to feelings and pride in the assessment of such damages. Of course the plaintiff is bound to mitigate his loss and he is not entitled to idle about without looking for alternative employment. In the particular circumstances of this case the plaintiff could not be accused of failing to mitigate his loss. He looked for alternative employment and did not succeed. I therefore find that the plaintiff is entitled to two months salary in lieu of notice. I assess the damages under this head in the sum of Khs.60, 000/=.

The second claim made by the plaintiff is for refund of contribution made or deductions effected against his salary from June 1995 to September 1998. I reject the defendant's Advocates submission that this claim was not pleaded with the particularity required of special damages. I accept the submission of the plaintiff that the pleading was adequate. The plaintiff having pleaded that he was claiming Khs.13, 212/= per month from June 1995 to September 1998, the defendant cannot be heard to say that it was surprised by the claim or that it was unaware of how much the plaintiff was claiming. What is more problematic is whether the plaintiff has strictly proved the claim. The plaintiff's claim is predicated on two things. First, that his written contract of employment provided that his salary would be Khs.30,000/=. And secondly, an alleged oral agreement that a sum of Khs.13.212/= per month would be deducted from this salary for the purpose of his purchase of shares in the defendant company. Indeed the strongest argument made on his behalf in that regard was that the defendant had not otherwise explained the difference between his promised pay of Khs.30, 000/= as per letter of employment and his net salary of Khs.16, 788/= as shown on his payslip. The defendant's stand is that no such deduction was made. Now the evidence and submissions pose a very tricky situation. If the plaintiff's evidence and argument is true, several questions beg for an answer. How come that the agreement for the deduction was not reduced into writing to

supplement the letter of employment? How come that the payslips which were admittedly prepared by or on the authority of the plaintiff as the man in charge of the payroll did not reflect any such deduction? How come that the deductions were allegedly made from June 1995 when the contract of employment provided that the plaintiff would be eligible to be offered shares in the defendant company after two years of his joining the company? How come that a definite amount could be deducted when there was no evidence of any offer of shares or the price of such shares? And were the deductions to continue ad infinitum? On the other hand, if the plaintiff's evidence and argument is not true, how is the discrepancy between his remuneration as shown on the letter of employment and as reflected in the payslip to be explained?

Now having already found that the defendant's evidence on the terms and conditions of the plaintiff's employment was incredible and that the terms of a written contract of employment could not be varied or superseded by a subsequent oral contract, I find on balance that the plaintiff's evidence and argument is to be preferred to that of the defendant. It is fully consistent with the level of remuneration shown on the letter of appointment and what is reflected in the payslips exhibited. There is no other explanation for the difference between what the plaintiff was promised in the letter of appointment and what was ultimately paid to him. Although it is a conclusion I reach with some reluctance due to the many questions which the plaintiff's evidence on this aspect of the matter begs, it is nonetheless the only conclusion open having regard to my findings on the credibility of Mr. Lakhani, the defendant's Managing Director. In the result I find the plaintiff made a contribution for equity in the defendant company from June 1995 to August 1998 both months inclusive at a rate of Khs.13,212/= per month and that he was not allotted any shares in the company. He is therefore entitled to a refund of such contribution. I assess the same to be Khs.502, 056/= (i.e. Khs.13,212 x 38 months).

As regards the claim for loss of Director's benefits, I reject the plaintiff's claim that he was entitled to such benefits after he left the company. It stands to reason that as his Directorship was tied to his employment in the defendant company, once that employment was terminated, the perks of a Director came to an end. That, in my view, must be so irrespective of when the formal notification of the ceasure of the plaintiff's directorship was made to the Registrar of Companies. Be that as it may be, if I am wrong on that view of the matter I would still decline to make any award for this item of loss because there is no evidence either from the plaintiff himself or the defendant as to when the plaintiff formally ceased to be a Director of the defendant company. The plaintiff's testimony is silent on the matter and Mr. Jitesh Lakhani, stated that although the plaintiff was not a director of the company as at the date of trial, he could not recollect whether the resolution to remove him as a Director was made in 1998, 2000 or 2002. Considering that the burden of proof lay on the plaintiff I must find that his claim is not proven.

I now turn to the claim for defamation. It will be recalled that in both the evidence and the submissions the parties dealt on the alleged defamation contained in the defendant's letters to its Bankers (exh 5) and to its suppliers (exh 6) dated the 13th and 26th august 1998. However in his plaint, the plaintiff only pleaded the content and effect of exhibit 6 (see paragraphs 5, 6 and 7 of the plaint) and the defendant in its statement of defence in paragraphs 5, 6 and 7 responded to that matter. That being so it was not, in my opinion, open to the plaintiff to lead evidence on the letter addressed to the Bank and the evidence led was inadmissible for the reason that pleadings contain the allegations of fact the truth of which is submitted to judicial investigation. There is no scope in our procedural law for evidence to be called on matters not pleaded. For that reason, I disregard the evidence and submissions concerning exhibit 5. As regards exhibit 6, I am persuaded that the same expressed a falsehood about the plaintiff. The letter terminating his employment (exh. 4) was dated 28.8.1998 and according to the plaintiff's own evidence, which I believe, the fact of dismissal was communicated to him either on 28.8.98 or 31.8.98 when he returned to the office from leave. So by the time exhibit 6 was written, the plaintiff had not left the defendant's employment. He was on leave abroad. In the premises I can understand and I do believe the plaintiff's evidence that he was injured in his self-esteem and confidence. However defamation is not about the publication of falsehoods about a person. It is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. In that regard, I am of the opinion that the statement to the effect that the plaintiff had left the defendant's employment, though false, was not defamatory of the plaintiff. No right thinking member of society would think any the less of a man for having left the employment of another.

I do not believe that the words published of and concerning the plaintiff were capable of bearing the meaning attributed to them by the plaintiff. In my opinion, what the defendant did do was publish an injurious falsehood concerning the plaintiff. Such a wrong though analogous to defamation is distinct from it. The difference is that an injurious falsehood may not necessarily be an attack on the plaintiff's reputation. In the matter at hand, the plaintiff having pegged his claim to damages on the tort of defamation, which he has not proved, and having not pleaded the tort of injurious falsehood, he must, I am afraid, be left high and dry. His claim for damages for defamation is rejected.

To summarize, the plaintiff succeeds in his claim for damages for unlawful dismissal and for a refund of the deductions made from his salary towards the acquisition of equity in the defendant company. I have assessed those damages at Khs.60, 000/= and Khs.502, 056/= respectively. And the claim for defamation has failed. As regards the costs of the suit, the same follow the event. He is entitled to them. He is also entitled to costs of the counterclaim, which the defendant abandoned at the trial. As regards the costs of the amendment made at the trial, I don't think the plaintiff is entitled to any for no loss of time or otherwise was occasioned to him as a result thereof.

In the result, there will be judgment for the plaintiff against the defendant in the sum of Khs.562, 056/= together with the costs of the suit and the abandoned counterclaim. Those, then, are the orders of this Court.

DATED at NAIROBI the 5th day of November 2002.

A.G. RINGERA

JUDGE

MASTER AND SERVANT

- Measure of damages for unlawful dismissal.
- Defamation of employee by employer. Whether publication of a false letter that employee has left employment of defendant is defamatory.