



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO.567 OF 2005**

**GILBERT IRANGI.....PLAINTIFF**

**-VERSUS-**

**KENYA WILDLIFE SERVICES.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit on the 12<sup>th</sup> May 2005, through an amended Plaint dated 20<sup>th</sup> January 2008, Plaintiff claims for damages under various heads against the defendant, for wrongful dismissal.

**PLEADINGS**

2. The Plaintiff alleges that on 27<sup>th</sup> November 2000 the defendant illegally and wrongfully terminated his employment on grounds of gross misconduct and alleged theft of the defendant's money and property; that on or about 30<sup>th</sup> November 2000 the defendant accused him causing him to be arraigned in Court and charged with the offence of theft by servant contrary to section 281 of the penal code in criminal case NO.787 of 2000 at Kajiado; that on or about 3<sup>rd</sup> December 2004 the plaintiff was acquitted of all charges of theft by servant and that as a result of the said wrongful and illegal dismissal the plaintiff has suffered loss and damages as particularized here under;

- i. Loss of salary at Kshs. 33,054 per month for 25 months ...Kshs.826,350/-
- ii. Loss of house allowance at 10,000/- for 25 months .....Kshs. 250,000/-
- iii. Loss of leave allowance at Kshs. 10,000/- for 25 months ...Kshs.250,000/-
- iv. Lost salary at Kshs. 59,600/- for 56 months .....Kshs.3,337,600/-
- v. Lost house allowance at Kshs. 12,000/- for 56 months .....Kshs.672,000/-
- vi. Lost leave allowance at Kshs. 12,000/- for 56 months .....Kshs. 672,000/-
- vii. Lost pension .....Kshs.5,751,400/-

Kshs. 11,759,350/-

The plaintiff further claims Kshs. 33,054/- being unpaid salary for month of November 2000. The plaintiff prays for judgment against the defendant for;

- i. Special damages Kshs. 11,792,404/-
- ii. General damages and future earnings.
- iii. Costs.
- iv. Interest on a, b and c.

3. The Defendant countered this claim and filed an amended statement of defence dated 17th March 2009. It admits that the plaintiff was dismissed but states that he was dismissed for misapplying Kshs. 14,120/- contrary to the provisions of his employment and misconduct and indiscipline for keeping the defendant's money for about sixty three (63) days without any authority or proper cause and that in doing so the plaintiff acted contrary to the provisions of his employment namely regulation 5(bb) of the Defendant's Armed Wing Disciplinary Code 1990 which constitutes the terms of the plaintiff under which he agreed to serve. The Defendant denies that the plaintiff's dismissal was wrongful, illegal or malicious. It denies any malice in causing the plaintiff to be charged as it acted on bona fide belief that it was discharging a public duty and that the prosecution was determined in the plaintiff's favour and resulted in his acquittal. It denies that the plaintiff suffered loss and damage and or claim in future earnings and adds that the claim for loss and damage as particularized by the plaintiff in paragraph 7 is untenable and the Court lacks jurisdiction to award damages in breach of contract of employment and that in any event the claim cannot lie as it is not the subject matter of claim in the plaint. The defendant states that the salary due and owing to the plaintiff up to and including 27<sup>th</sup> November, 2000 of Kshs. 34,054/- was paid to him in full and denies being indebted to the plaintiff; that the plaintiff appealed against his dismissal as stipulated in the terms of employment but the same was heard and confirmed in his presence. The defendant urged the Court to dismiss the plaintiff's suit as the same is untenable and discloses no cause and/or reasonable cause of action.
4. The Plaintiff and defendant duly filed their statement of issues on 28<sup>th</sup> and 23<sup>rd</sup> August 2007 respectively.

#### **PLAINTIFF'S CASE**

5. The case was partly heard before Justice Dulu. The Plaintiff's evidence and DW1 Wilson Mulwa were heard before Justice Dulu. I heard the evidence of DW2 Ignatius Ipapo. I now proceed to summarize the plaintiff's evidence as follows;
6. The Plaintiff testified that he was employed by the defendant on the 1<sup>st</sup> July 1990 as an assistant warden and was later promoted to Warden II on the 20<sup>th</sup> July 1999 in charge of Naivasha Wildlife Station his salary was Kshs. 33,054/-. That on the 27<sup>th</sup> of November 2000 he was called to report to KWS headquarters to report to the Human Resource Personnel on the 28/11/00. He did so and on arrival he was arrested and taken to Court.
7. Prior to that he had received a letter of intended removal from service dated the 27/3/00. The allegations in brief were; that being a pilot in the service he had misused the aero plane belonging to KWS and also that he had used the company car to carry cement. He was accused of illegal activities of trapping animals at Marula ranch in Naivasha. He was also accused of corrupt practices, of demanding financial favors from the local croppers in order to turn a blind eye to irregular activities and of abetting, poaching.
8. On the 7th April 2000 he wrote a response only to receive a dismissal letter on 27<sup>th</sup> November 2000 (8 months later). He wrote a letter appealing the decision of the dismissal and on 10<sup>th</sup> December 2001 he received a letter of rejection of his appeal.
9. On the allegation of illegal activities at Marula ranch the Plaintiff testified that at the said time the said offence took place he was away on leave and another warder based at Naivasha was in charge; on the allegation of corruption he stated that no incident or specific details were given on the same to enable him respond to the allegations; he denied the allegations that he took part in poaching and pointed out that on various occasions despite having a few staff and motor vehicles to conduct patrols he had mobilized for motor vehicles from the ranches and arrested poachers who were taken to Naivasha Law courts and convicted; on the allegation that he had seen the KWS vehicle at Ngong petrol station and took it upon himself to report ,he however denies that he was the one who had it and only appeared in court to give evidence. In regards to the allegations that he took the aero plane without permission he indicated that he was the pilot in command and only took the aero plane for service but admits carrying the District Accountant and the manager Sarova Lodge on request of the District Commissioner. On the allegation that he had collected the census money on 26<sup>th</sup> November 1999 and the same was not used for the intended purpose he

- stated that amount was recovered from his pay. He claimed that no internal procedures and proceedings were taken and that subsequent to his dismissal he was charged with the offence of theft by servant at Kajiado Law Courts, the matter went to full trial and he was acquitted on all counts of theft by servant.
10. The plaintiff testified that at the time of his dismissal he was earning Kshs. 33,054/-, that he is claiming salary for 25 months, plus loss of house allowance for 25 months, loss of leave allowance, lost salary of Kshs. 59,600/- per month for 56 months as there was a salary review and that the 56 months is the total period for the months that he would have worked to 55 years, that the lost house allowance is on the reviewed scale for 56 months, that he lost leave allowance for 56 months in the reviewed circular and that he lost pension due to his dismissal and that he also claims Kshs. 33054/- the unpaid salary for November 2000 as he worked and was not paid. That he is also claiming general damages for loss of future earning, costs of the suit and interest.
11. On cross examination the Plaintiff testified that there was no clause in his contract that indicated that he would retire at the age of 55 years, that clause 5 of the appointment letter stated that termination could be by giving one months notice and that he accepted the offer and signed the appointment letter. He admitted that he only gave a lift on the intervention of the District Commissioner and stated that if an accident occurred he did not speculate that the families of the unauthorized passengers would claim compensation from KWS and that in his view everyone was there at their own risk. He denied the rest of the allegations.

### **DEFENDANT'S CASE**

12. DW1, Wilson Mulwa a Human Capital Officer with the defendant testified that the plaintiff was an employee of KWS but left on disciplinary grounds as he had misapplied service funds, replaced two receipts and also used a defective aircraft to carry non KWS staff to Nairobi putting the unauthorised persons at risk. He stated that the dismissal was in order as he committed disciplinary offences. That the plaintiff was given an appointment letter which he signed; that the said letter of appointment stated clearly at paragraph 5 that plaintiff would be given one month's salary payment in lieu of notice in case of wrongful dismissal. That on misappropriation of funds the amounts were recovered from his salary as it was not properly accounted for, that the Kshs. 13,000/- he had been given was to cater for fuel and allowances of Kshs. 2,000/- for wildlife census at Soysambu. That of the said amount Kshs. 800/- was paid to personnel and this did not match to the amount given to him. He added that before the plaintiff was dismissed after the was given a hearing and that when called upon he was not able to explain the two receipts and expenditure of money leading to the dismissal of his appeal and the results of the same were communicated to him via a letter in 2001. That the plaintiff in his amended plaint did not ask for refund of the imprest and he was not entitled to damages or costs sought. He testified that the plaintiff gave false information when he used the motor vehicle and kept money allocated for fuel for 60 days. He urged the Court to dismiss the plaintiff's suit with costs.
13. On cross examination DW1 admitted that he was not an accountant and was never in the KWS accounts department and that the Plaintiff did not directly account to him. He also stated that he was never involved in the investigations of the offences committed by Mr. Irangi but that he attended the appeal proceedings and that he was not a witness in the criminal case. He denied authorizing the plaintiff to fly the air craft at KWS.
14. On re-examination he indicated that he sat in the appeal proceedings as a secretary and was conversant with the issue and that there were documents presented from investigations.
15. DW2, Ignatius Ipapo testified that he works at KWS headquarters he was seconded to KWS on 16<sup>th</sup> May 2010 from CID, that he was the investigating officer in criminal case no. 787 of 2002 and that he arrested and charged the plaintiff at Kajiado Law Court. That during his investigations he found that the cash receipts that were used to account for the imprest that had been collected by the plaintiff were fake. That if the receipts were lost as alleged he should have produced duplicates of the same and not get other originals. That it was wrong for the plaintiff to fly the air

craft without permission as the consequences are that one can be charged in court or an internal action is taken or that the management could decide to terminate ones services. That he had visited the petrol stations and electrical shops where the said it was purported that the fuel and electrical goods were bought and on showing the owners the receipts they denied having sold him the fuel and goods. That this made him conclude that the receipts were fake. He stated that the said witnesses' statements were recorded and they even gave evidence in Court.

16. On cross examination by Miss Limo DW2 reiterated his testimony and further added that he testified in the said case and the plaintiff was acquitted of all nine counts under section 215 of the Criminal Procedure Code and the suit was dismissed. That the document examiner had indicated that the receipts were in the plaintiff's handwriting.
17. On re-examination he indicated that he submitted original documents plus the specimen handwriting of the plaintiff to the document examiner for examination and that Samson was from the said petrol station, that he testified that the petrol did not come from his station.
18. Parties filed written submissions. The Plaintiff filed his written submissions dated 29<sup>th</sup> May 2013. Counsel for the plaintiff reiterated the evidence that was adduced in Court he also analyzed the evidence that was adduced by the witnesses and the proceedings in the Lower Court.
19. The plaintiff sought to rely on the case of ***Grace A. Omolo vs Attorney General and 3 others Petition No. 252 of 2011 [2012] eKLR*** where it was held, "in order to vindicate her rights, I award her the sum of KShs. 300,000/- as General damages as against the 3<sup>rd</sup> and 4<sup>th</sup> respondent who shall pay her costs and the case of ***Robert Brown –vs- Livingstone Registrars Limited And 2 Others Civil Case No. 545 of 2006 (2012)eKLR***, where it was held that, "the rule is that the wrongful dismissed employee should so far as money can do so be placed in the same position as if the contract had been performed and this is to be done by awarding damages the amounts of remuneration that the employee has been prevented from earning by wrongful dismissal."

He submitted that the defendant wrongfully and illegally dismissed and maliciously terminated the plaintiff's employment and urged the Court to award him damages in the amount of Kshs. 11,792,404/- being special, general and for loss of future earnings.

20. The Defendant submitted that the Plaintiff's claim for wrongful dismissal must fail and further stated that the Plaintiff was only dismissed after being accorded a hearing by the Defendant. The defendant submitted that it was clear that the Plaintiff's conduct indeed amounted to gross misconduct and the defendant was properly placed to take disciplinary actions against him. Counsel also stated that though the plaintiff was acquitted because the prosecution did not prove his case this is not the same as findings in the civil case which are on a balance of probability. The defendant further submitted that the plaintiff stated in clause 5 that his contract could be terminated by one month notice and there was nowhere it was indicated that his position was permanent and pensionable. The said contract also had no clause that stated or indicated that he would retire at the age of 55 years and as such his claim for special damages in the sum of Kshs. 11,792,054/- cannot lie, that should the court be obliged to find in favour of the Plaintiff then the court could only award him one month's salary Kshs.33, 054/- which was inclusive of his house allowance. That the plaintiff's allegation that there were circulars that purported to increase salary was not substantiated. The defendant relied on the following cases; ***Kenya Reinsurance corporation ltd vs Eliud M. Ndirangu (2006) eKLR*** It was held that; "the employer has duty to give reasons for terminating an employee reasons but do not have undergone legal scrutiny. To establish their irreputable or their corrections." ***Barclays Kenya Ltd –Vs- Joseph Mwaura Njau (2006) eKLR***, the court of appeal held that; "where the contract of employment embodies a notice period, then damages to a person dismissed unlawfully are to be worked out on basis of the notice period.", ***Civil Appeal No.270 of 2003 David Kirimi Julius –Vs- Mwenda***, where the court held that; "the decision to prosecute or not to squarely lies with the police who are not agents of the respondents. The Defendant could not force the police to prosecute when there was no case. Even the trial Court in the criminal case placed the plaintiff on his defence which ment that the prosecution had made a prima facie case against the Plaintiff."

## **DETERMINATION**

21. I have considered the pleadings, evidence and submissions made by respective counsels. The plaintiff claims that he was illegally and wrongfully terminated from his employment on grounds of gross misconduct and alleged theft of the defendant's money and property. The burden of proving unfair termination of employment or wrongful dismissal lies with the employee. Section 47(5) of the Employment Act provides that;

***“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”***

The defendant vide letter dated 27th November 2000 sought to dismiss the plaintiff from service and stated the grounds for his dismissal. The plaintiff at paragraph 4 of the same letter was given a chance to appeal the sentence within 7 days. Vide a letter dated 1st October 2001 he sought to appeal the said decision dismissing him but the same was not successful as communicated to him vide defendant's letter dated 10th December, 2001. I find that the plaintiff was given an opportunity to be heard and as such the employer satisfied section 41(2) of the Employment Act which obliges the employer to hear and consider any representations which the employee may wish to make. I do note that in the case in the lower court the plaintiff was acquitted because of the prosecution's failure to call some witness, he was given the benefit of doubt and acquitted. I do agree with the defendant's submissions that an acquittal because the prosecution has not proved its case beyond all reasonable doubt is not the same as finding on a balance of probabilities as required in civil cases. The defendant chose to terminate the plaintiff's employment after giving him a chance to be heard, I do not find that he was wrongfully and illegally dismissed as claimed, or that he was maliciously terminated on grounds of gross misconduct. The plaintiff was charged on the basis of the finding made after the investigations done and his response to the allegations.

It is not in dispute that the contract of service must be terminated by notice. It is not in dispute that the plaintiff was an employee of the defendant and that there was a letter of appointment dated 14<sup>th</sup> May, 1999. I have looked at the plaintiff's letter of offer paragraph (v) of the same provides that;

*“The appointment may be terminated by either party giving 1 months' notice or paying 1 month's salary in lieu of notice.”*

In the case of **Walter Musi Anyange –vs- Hilton International Limited & Anor. Civil appeal no. 269 of 2003** it was held;

*“on disputes arising out of contracts after the passage of the 2007 labour law , ...t there can be no damages where the employee employer relationship is contractual.”*

In the case of **Ombwaya –vs- Gailey & Roberts limited (1974) EA 522** it was held that;

*“Where an employer summarily dismisses an employee and is later found that there was no justification for summarily dismissal then the measure then the measure of damages is the period of Notice which the employee would have otherwise been entitled to.”*

Considering there is a contract of employment between the plaintiff and defendant, I find and hold that the plaintiff is entitled to one month's pay in lieu of notice as per the letter dated 20th July 1999 appointing the plaintiff to be the officer in charge of Naivasha station the same stipulated that his salary would be Kshs. 33,054/- gross, plus the one month salary that he was not paid in November 2000.

In the case of **Kenya Airways Corporation Limited –vs- Auma & 5 Others [2007] 2KLR** the Court held that,

“we would think that it was their entitlement and right to be employed by the employer during working life. The expectation has no basis in law as employment relationships are contractual and thus terminable under the terms of the contract.”

The plaintiff also claims for damages for unlawful termination and future loss, I find that he is not entitled to this claim as in law employment relationship are contractual and terminable under the terms of the contract. The plaintiff case is unlike the case cited of *Grace A. Omolo and the A.G (supra)*, where the issue raised by the petitioner was that she was denied a right to a fair administrative process that was expeditious, efficient, lawful, reasonable and procedurally fair and in the case of *Robert Brown vs. Livingstone Registrar Ltd and another (supra)*, the plaintiff’s employment was not properly terminated and it was held that the plaintiff’s employment was wrongfully terminated.

Lastly he who alleges must prove his case, the plaintiff has failed to prove his entire claim as stated at paragraph. 7A of his amended plaint. He needed to have adduced evidence to show his entitlement under the contract that he had with the defendant. He mentioned a salary review yet tendered no evidence on the same, nor did he exhibit the review circular. His letter of employment states when he would be entitled to pension, in his evidence the plaintiff did not adduce evidence that he was a pensionable. The defendant claimed that the plaintiff was paid all his dues but did not adduce evidence of what the plaintiff was paid. I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs. 66,108/-. The plaintiff is awarded interest on the said sum from the date of filing suit until payment in full. The plaintiff is also awarded cost of the suit.

Orders accordingly.

Dated, signed and delivered this **8<sup>th</sup>** day of **July** 2014.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk