

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**HCCC NO. E003 OF 2021**

**MARSABIT SERVICE STATION LIMITED.....PLAINTIFF**

**-VERSUS-**

**NEWTON MUREITHI.....1<sup>ST</sup> DEFENDANT**

**ABDI ISACKO MAMO .....2<sup>ND</sup> DEFENDANT**

**HADIJA YUSUF ABDULLAH.....3<sup>RD</sup> DEFENDANT**

**HAWO HUSSEIN ANO.....4<sup>TH</sup>  
DEFENDANT**

**EZEKIEL LTAJEWA NAMBERE Alias EZAKIEL .....5<sup>TH</sup>  
DEFENDANT**

**TONY HALAKE WARIO .....6<sup>TH</sup> DEFENDANT**

**SIMON GITAU .....7<sup>TH</sup>  
DEFENDANT**

**EDWARD KAMAU MWANGI.....8<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

1. The Plaintiff company operates a petrol station at Marsabit town. Mr. Abdulhakim Omar Salim who was PW1 in the case is a director of the company. The Defendants were employees of the Plaintiff company.
2. Vide a Plaint dated 13<sup>th</sup> August 2021, the plaintiff brought suit against the Defendants seeking the following reliefs:
  - (a) Special damages of Ksh.33,647,144/=
  - (b) Punitive damages for breach of trust

(c) Interest on (a) and (b) above

(d) Costs of the suit

3. The 1<sup>st</sup> Defendant did not enter appearance in the case and interlocutory judgment was entered against him. The 2<sup>nd</sup> to 6<sup>th</sup> Defendants did not file formal statements of defences but they filed witness statements, testified in the case and denied the claim. The 7<sup>th</sup> and 8<sup>th</sup> Defendants denied the claim.

### **Case for the Plaintiff**

4. The case for the Plaintiff is that the 1<sup>st</sup> to 6<sup>th</sup> Defendants were working as pump attendants at the subject petrol station while the 7<sup>th</sup> Defendant was the manager at the petrol station. The 8<sup>th</sup> Defendant was the accountant at the petrol station.
5. The case for the plaintiff is that the petrol station`s pump attendants manipulated the opening meter readings while selling fuel at the petrol station and colluded with the manager and the accountant of the petrol station and as a result they misappropriated a sum of Ksh. 33,647,144/= belonging to the Plaintiff company.
6. The Plaintiff called 3 witnesses in the case - a director of the company, Abdulhakim Omar Salim PW1, the auditor Michael Mwangi Wachira PW2 and a brother to the director, one Salah Omar Salim PW3.
7. The director, PW1, testified that the 2<sup>nd</sup> to 6<sup>th</sup> Defendants as pump attendants were reporting to the manager, the 7<sup>th</sup> Defendant. That sometimes in the year 2020, the petrol station was facing cash flow problems. He instructed his brother PW3 to keep an eye on the activities at the petrol station. PW3 then reported to him an incident where a pump attendant had altered the opening meter reading. The director thereupon engaged an auditor PW2 to audit the business. PW2 did an audit of the years 2018 to 2021 and

found that the pump attendants were recording a higher figure when opening the pump meter reading as a result of which the actual fuel sold was not being recorded. He found that the pump attendants with the collusion of the 7<sup>th</sup> and 8<sup>th</sup> Defendants had misappropriated money to the tune of Ksh. 33,647,144/= of which Ksh.29,261,060/= was ascribed to the Defendants.

8. It was further evidence of PW1 that the manager, the 7<sup>th</sup> Defendant used to send him daily reconciliation reports of the sales through a whatsapp group as contained in Volume 6 of the Plaintiff`s list of documents, P.Exh.9.
9. Salah Omar Salim PW3 testified that he was in the month of December 2020 instructed by PW1 to take up supervision duties at the petrol station as sales were depreciating. That he took up the duties.
10. It was the evidence of PW3 that the pump attendants were doing daily reconciliation after the end of their shift which they would submit to the manager. That the manager would prepare his own daily reconciliation which he would submit to the directors.
11. It was further evidence of PW3 that on a certain date while on routine check he noticed that a pump attendant had tampered with the opening meter reading. He reported the incident to the director, PW1 who engaged the auditor. The auditor did an audit for the years 2018 to 2021 and the report forwarded to the police.
12. The auditor PW2 testified that he was instructed by the director of the Plaintiff Company, PW1, to conduct an audit of the activities at Total Petrol Station, Marsabit, for the years 2018 to 2021. He was handed over Daily fuel reconciliation reports that had the following details:
  - Daily meter readings - opening and closing readings for each pump for each shift and per individual Customer Attendant.
  - Summary of daily sales from all pumps.

- Receipts from sales through mpesa, credit cards, Total BV Cards, credit/invoice sales and expected cash sales.
- Expected cash banking totaled from the individual Customer Attendants.

-Cumulative sales and bankings.

13. It was the evidence of the auditor that he went through the Daily Reconciliation reports prepared by the Customer/Pump attendants as contained in Volumes 3, 4 and 5 of his report and found that the attendants would inflate the opening meter readings recorded on their daily reports when taking over the shift. That in doing so, the opening meter reading would be at variance with the closing meter readings as recorded by the attendant handing over from the previous shift. As a result, the Pump Attendant would report and handover lower than actual cash sales thereby defrauding the company by the value of the undeclared litres sold.

14. Upon considering the individual daily reconciliation reports, the auditor allocated the loss incurred by the pump attendants for the years 2018 - 2021 as follows:

Newton - 1 <sup>st</sup> Defendant .....	Ksh. 5,334,378
Abdi - 2 <sup>nd</sup> Defendant .....	Ksh.8,031,431
Hadija - 3 <sup>rd</sup> Defendant .....	Ksh. 2,105,774
Hawo - 4 <sup>th</sup> Defendant .....	Ksh. 10, 100,003
Ezekiel - 5 <sup>th</sup> Defendant .....	Ksh. 2,782, 385
Tony - 6 <sup>th</sup> Defendant .....	Ksh. 907,090
Total .....	Ksh.29,261,060

15. The conclusions by the auditor were supported by extracts of the manager`s monthly reconciliations as contained in Volume 1 and 2 of his documents; individual

pump attendants daily reconciliation reports contained in volumes 3, 4, and 5 of his documents and whatsapp group communication volume 6 between the manager (7<sup>th</sup> Defendant) and the director PW1.

16. It was further evidence of the auditor that the Daily Reconciliation Reports were being handed over to the manager who would review them. That the same formed part of the record of the daily sales and banking. That the Pump attendants were handing over the cash to the manager at the end of the shift for banking as recorded on the daily report. That the manager would prepare a monthly report named as Daily Fuel Reconciliation Report which is updated on a daily basis from the daily reconciliation reports from the individual Customer attendants. That the manager would maintain an Excel report for each month which has separate sheets for each individual Customer Attendant which duplicates the information from the Customer Attendant`s manual reports.
17. The auditor testified that the daily fuel reconciliation report formed the basis of the daily summary report sent to the director and the monthly sales postings for accounting purposes. That the manager would on a daily basis send a WhatsApp report to the director on sales for diesel, petrol and lubricants in terms of litres/ units and Kenya shillings value.

## **Defence Case**

18. Though the 1<sup>st</sup> to 6<sup>th</sup> Defendants did not file formal statements of defence, they filed written witness statements in which they denied the claim. They also testified in court.
19. The 2<sup>nd</sup> defendant, Abdi (DW1), in his defence adopted his witness statement as evidence in the case and stated that he was a Customer/Pump Assistant. That Customer

Assistants were reporting to a supervisor, in this case Farid Salah. That the Customer Assistants were filling the Daily Reconciliation Reports when taking over and closing the shift where they would record down the opening and closing meter readings. That the supervisor had to be present on both occasions as he had his own book, the Black Book, where he was noting down the opening and closing meter readings. That his meter readings and that of the supervisor had to have the same readings. That on completing the shift he would hand over the daily reconciliation report to the supervisor. It was his evidence that there is no time that his meter readings and that of the supervisor were at variance. He stated in cross-examination that the plaintiff did not produce the Black Book in court. It was his further evidence that he was charged in a criminal case No. E361 of 2021 with the offences of stealing by servant and conspiracy to commit an offence.

20. The 3<sup>rd</sup> Defendant Hadija Yusuf Abdallah who testified as DW4 in the case, stated that she was working for the Plaintiff as a Pump Attendant. That she was reporting to a supervisor, Farid Salah. That on reporting to work she would pick the daily reconciliation report and fill her name on it. She would check the meter reading left behind by the person she was taking over from. She and the supervisor would read the pump meter reading together and she would note it down in her daily reconciliation report whereas the supervisor would note it down in his book. That at the closing of her shift, she would record the closing meter reading in the daily reconciliation report. She would get the day`s sales by calculating the difference between the opening and the closing meter readings. She would record the amount she had sold on that day in the daily reconciliation report. She would hand over the daily reconciliation report to the supervisor. It was her evidence that there is no time that her

meter readings and that of the supervisor had different readings. That she was on maternity leave when the audit was done and she was not charged in the criminal case.

21. The 4<sup>th</sup> Defendant, Hawo Hussein (who testified as DW2 in the case), adopted her witness statement as evidence in the case. She stated that she worked for the Plaintiff as a pump attendant between the years 2018 and 2021. That on reporting to work she would fill in a daily reconciliation report. That she would record the opening meter reading in the reconciliation report in the presence of the supervisor who would record the same in his book. The same would happen during closing. That to get the amount of fuel sold she would subtract the difference between the opening and closing meter readings. It was her evidence in cross-examination that her closing meter reading would be the opening meter reading for the person taking over the shift from her. That the person taking over and the supervisor would be present to confirm the meter reading.
22. The 5<sup>th</sup> Defendant, Ezekiah Ltajewa (who testified as DW3 in the case), stated that he was working for the Plaintiff as a pump attendant. He similarly adopted his witness statement as evidence in the case. He then stated in cross-examination that on reporting to work he would pick and fill his name in the daily reconciliation report. He would record the opening meter reading in the said report. At the end of the shift he would note down the closing meter reading in the report. He would get the sales for the day by subtracting the difference between the closing meter reading and the opening meter reading. That he would hand over the day's sales and the daily reconciliation report to the supervisor. That his closing meter reading would be the opening meter reading for the person taking over from him.
23. The 6<sup>th</sup> Defendant, Tony Halake (DW5) similarly adopted his witness statement as evidence in the case. He

stated that he was working for the Plaintiff as a pump attendant. That there was a daily reconciliation form where he was recording the opening and closing meter readings. He confirmed that his opening meter reading would be the same as the closing meter reading of the person he was taking the shift from. That he would hand over the daily reconciliation reports to the supervisor.

24. The 7<sup>th</sup> Defendant, Simon Gitau (DW7 in the case) stated in his defence that he is a hospitality management consultant and a human management trainer. That he worked for the plaintiff between 10/4/2017 until mid-August 2021 when his services were terminated. That he was the station`s pioneer manager for setting up the system, coordinating branch standards and in charge of HR training and development, corporate compliance and communication.
25. It was his evidence that all the stock at the station was recorded in the Master Control Book of which the forecourt supervisor, Farid Salah was in charge of. That the pump attendants were reporting to the forecourt supervisor and though the pump attendants pump had their own papers where they could record their activities, that was for their own consumption as their records were being captured in the Master Control Book. That it is the forecourt supervisor who did the daily stock reconciliation and it is him who could detect any discrepancy at the end of the shift.
26. The witness stated that he was not involved with reconciliation except when facilitating the auditor. That though they provided all the documents to the auditor including the purchases sales, the auditor left out the information from his report. More so that the audit report did not capture Mpesa and bank statements. That there was no

reconciliation of the stock delivered at the station as captured in the Master Control Book with the sales

27. It was the evidence of the witness that the management had created a WhatsApp group whose communication was as captured in Volume 6 of the auditor's report. That he was the source of the information contained therein. That volume 3, 4 and 5 of the auditor's report are photocopies of the daily reconciliation reports from the pump attendants. He said in cross-examination that he never received the daily reconciliation reports from the accountant but received them from the forecourt supervisor. That he never interacted with the pump attendants except on issues concerning hygiene, safety, health and customer service.
28. The 8<sup>th</sup> Defendant, Edward Kamau Mwangi (who testified as DW6 in the case) testified that he worked for the Plaintiff as an accountant from 28/8/2018 until when he resigned on 30/4/2021. It was his evidence that the pump attendants would fill the daily reconciliation reports which they would hand over to the forecourt supervisor, Farid Salah, who was cousin to the director, PW1. That the supervisor would do the reconciliation and pass the reports to him. He would then do his own reconciliation from the reconciliation given to him by the supervisor after which he would post the daily sales to the computer system, the Quick Books, which was not produced in court. It was his evidence that the company had an external accountant, Mr. Kariuki Mwangi and another accountant at the director's office, all who could log into the system at any time.
29. The 8<sup>th</sup> Defendant stated that if there was any disparity between the daily reconciliation reports prepared by the pump attendants and the Black Book, it is the supervisor Farid Salah who should have raised the issue but he never did so. He said that he had already resigned when the auditor conducted the audit and was not given an

opportunity to give his input into the audit report. That though the auditor said that the company lost Ksh.33 million of which Ksh.29 million could be allocated to specific pump attendants, his report was not conclusive as it was only limited to the activities at the pump. That no profit and loss statement was prepared to determine if there was any loss. It was his case that loss could not be determined by mere consideration of the daily reconciliation reports. That for this to be determined, the auditor should have considered bank statements and master control book, which documents were not produced in court. He said that he was only posting what he received from the supervisor.

30. At the close of both the Plaintiffs` and the Defendants` cases, the counsel for the plaintiff and the defendants themselves made written submissions.

### **Plaintiff`s Submissions**

31. Counsel for the Plaintiff submitted that the 2<sup>nd</sup> to 6<sup>th</sup> Defendants were pump attendants. That they admitted that the closing meter reading of the person handing over a shift should be the same as the opening reading of the person taking over. That the plaintiff through the auditor PW2 adduced evidence showing that the pump attendants used to record a higher unit for the opening pump reading and gave the correct closing reading. That in doing so the actual units sold was not recorded and as such the pump attendants reported lower sales than the actual sales which was outright theft from the plaintiff. That the auditor`s report demonstrated that a sum of Ksh.33,647,144/= was defrauded from the plaintiff.
32. Counsel submitted that the theft took place under the watch of the plaintiff`s manager and accountant, the 7<sup>th</sup> and 8<sup>th</sup> Defendants. That though the two feigned ignorance of what was going on they colluded with the pump attendants

to commit the fraud. That the 7<sup>th</sup> Defendant admitted that he summarized the reports and sent them to the director, PW1 on a daily basis as captured in volume 6 of the Plaintiff's documents. That though the manager and the accountant tended to shift the blame to the forecourt supervisor, Farid Salah, the evidence of PW1 indicated that the supervisor had not been contracted when the fraud took place. That there is no evidence that the meter readings were taken in the presence of the said supervisor nor is their evidence that the daily reconciliation reports were being handed over to him nor were they signed by him.

33. It was submitted that the master stock control book that was cited by the defendants was not produced in the case.

Counsel for the plaintiff urged the court to award special damages as pleaded in the plaint. On the plaintiff's claim for punitive damages, counsel submitted that the award is deserved in the circumstances of this case. He relied on the holding in the case of **Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021 (2021) KEHC 333(KLR) (Commercial and Tax) (3 December 2021) (Judgment)** where it was held that:

**Punitive damages also known as exemplary damages are awarded in two instances. First, where the Government action or conduct complained of is oppressive, arbitrary or unconstitutional. Second, where the defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant (see D. K. Njagi Marete v Teachers Service Commission NRB CA Civil Appeal No. 316 of 2013 [2020] eKLR, Obonyo and Another v Municipal Council of Kisumu [1971] EA 91 and Godfrey Julius Ndumba Mbogori and Another**

**v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR).**

34. Counsel submitted that the defendants sought to unjustly enrich themselves at the expense of their employer and urged the court to award punitive damages.

**Defendants` Submissions**

35. The defendants submitted that the plaintiff`s director PW1 involved his brother, Salah Omar, in the management of the company thus leaving the manager PW7 with no role to play in the management of the company safe for corporate compliance coordination.
36. The defendants submitted that the audit report was not presented before the court. More so that the audit report was limited to reconciliation of the actual sales per meter readings and did not cover the dips. That the only way to ensure accuracy and identify discrepancies is by comparing fuel transactions recorded at the point of sale (pump) with the actual inventory levels in the fuel storage tanks (dips). That the auditor did not have inventory of the fuel supplied to the station and did not rely on the Master Stock Control Book to do the reconciliation and as a result the auditor did not verify the loss.
37. It was submitted that the defendants did not admit that the primary source documents were the daily reconciliation as contained in volumes 3, 4 and 5 of the plaintiff`s bundle of documents. That the auditor did not refer to bank statements, Mpesa records, the Bon Voyage cards, general ledgers and stock reports, failure of which the auditor made faulty conclusions. That the result was that there was no loss proved.
38. It was submitted that the Plaintiff`s email and WhatsApp extracts, Volume 6, is in the form of electronic evidence which were produced in court without the requisite

certificate as demanded by Section 106B (4) of the Evidence Act. That the documents were not admissible for lack of a certificate. The defendants relied on the case of **Republic v Mark Lloyd Stevenson (2016) eKLR** where the court held that documents that are not authenticated and do not meet the requirements of the Evidence Act must be expunged and not admitted as evidence.

39. The 2<sup>nd</sup> to 8<sup>th</sup> defendants submitted that special damages were not proved. On punitive damages, they submitted that the same are awardable only in two situations: first, where there are oppressive, arbitrary or unconstitutional action by servants of the government and secondly, where the defendant's action was calculated to procure some benefit, not necessarily financial. The case of **Bank of Baroda (Kenya) Limited v Timwood Products Ltd, Civil Appeal No.132 of 2001** which cited **Obongo & another v Municipal Council of Kisumu (1971) EA 91**. They also cited the case of **D K Njagi Marete v Teachers Service Commission (2020) eKLR** where it was stated that:

**In the circumstances of this appeal, we are not satisfied that the respondent's actions were so arbitrary and oppressive as outlined in *Obonyo and Another v Municipal Council of Kisumu (supra)* so as to justify an award of exemplary damages. We are fortified in this finding due to the fact that the appellant went ahead to secure employment shortly after the termination of his employment. Our consideration of the circumstances herein alongside the case law on the subject as well as Section 49(f) and 49(g) of the Employment Act lead us to find that the claims for exemplary or aggravated damages must fail.**

40. The defendants urged the court to dismiss the suit with costs.

### **Analysis and Determination**

41. I have considered the pleadings, the evidence adduced before the court and the submissions filed by the counsel for the Plaintiff and those of the Defendants.

42. The matter before the court is a civil claim and that being so the standard of proof is on a balance of probabilities. The standard was discussed by Kimaru J. (as he then was) in **William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLR 526** as follows:

**“In ordinary civil cases, a case may be determined in favour of party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations he made occurred.”**

43. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. The relevant sections of the Evidence Act provide as follows:

**107 “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the**

**existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

Section 112

**“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

44. The issue for determination in the case is whether the Plaintiff has proved the claim of Ksh.33,000,000/= against the Defendants as pleaded in the plaint.
45. The procedure of selling fuel at the petrol station was laid out in the evidence adduced before the court. It was explained that upon are on reporting for duty, a pump attendant would pick the Daily Reconciliation Report in which he/she would record the opening meter reading which has to be the closing pump meter reading of the person the pumb attendant was taking over from. At the close of the shift the pump attendant would record the closing meter reading in the Daily Reconciliation Report. The pump attendant would then calculate the litres of fuel sold by substracting the opening meter reading from the closing meter reading.
46. The case for the Plaintiff is based on the ground that the pump attendants who are the 2<sup>nd</sup> to 6<sup>th</sup> Defendants used to manipulate the pump opening meter reading when taking over the shift to show a higher opening meter reading than the actual meter reading. At the end of the shift they would

record in the Daily Reconciliation Report the actual closing meter reading. This would mean that as a result of the inflated meter reading at the time of taking over the shift, the pump attendants would report a lower sale of the litres of fuel sold than the actual litres sold. The difference between the inflated meter reading and the actual meter reading at the time of taking over would be fuel lost by the company.

47. The 2<sup>nd</sup> to 6<sup>th</sup> Defendants admitted that at the time of taking over the shift a pump attendant would record the opening pump meter reading in the Daily Reconciliation Report. It was admitted that the closing meter reading of the person who was handing over was the opening meter reading of the person who was taking over. It was further admitted that at the end of the shift a pump attendant would record the closing meter reading in the Daily Reconciliation Report. He/she would then calculate the litres of fuel sold by subtracting the opening meter reading from the closing meter reading.
48. The documents from the auditor, Volumes 3, 4 and 5 (P.Exh. 7,8, and 9) are copies of the Daily Reconciliation Reports prepared by the pump attendants, the 2<sup>nd</sup> - 6<sup>th</sup> Defendants for the years 2018 to 2021. The documents show that the pump attendants used to alter and inflate particular meter readings when taking over duty which caused loss of money to the company as tabulated in the auditor`s report. The auditor prepared the loss occasioned by the pump attendants as a result of the manipulation at the pump and attributed the loss occasioned by the pump attendants at Ksh. 29,261,060/=.
49. The 2<sup>nd</sup> to 6<sup>th</sup> Defendants never disputed the authenticity of the Daily Reconciliation Reports as compiled by the auditor in volumes 3, 4 and 5 of his report. They did not give any explanation on many instances of altered meter

readings when they were taking over work. All they said is that the supervisor did not raise any issue if there was any variance between their Daily Reconciliation Reports with the meter readings recorded by the supervisor in his Black Book.

50. It was however proved that the Daily Reconciliation Reports were the primary documents in the running of the business. The supervisor was not a signatory of the said documents. It is the said documents that formed the basis of the daily sales and banking and the preparation of the daily reports and monthly reports. Any alteration in the meter readings as shown in the documents placed before the court had to be explained. The Defendants did not offer any explanation for the obvious meter alterations as contained in the Daily Reconciliation Reports as prepared by the pump attendants.

51. The auditor's report tabulates what each of the pump attendants defrauded from the company, all totaling to Ksh. 29,261,060/=.

52. The defendants argued that it was not proved that the plaintiff company lost money as the auditor's report was only limited to the activities at the pump. That other document such as the Quick Book, bank statements and Mpesa statements were not considered during the audit. That no profit and loss statement was prepared so as to ascertain whether the plaintiff lost money.

It is abundantly clear that the loss in this case emanated from discrepancies noted at the pump. There was no need of extending the investigation to other areas when it was obvious where the loss was - manipulation of meter readings. The pump attendants were liable for the loss.

53. Having found the pump attendants culpable for the fraud, the question is whether the manager and the accountant were involved with the fraud.

54. It was the duty of the manager, the 7<sup>th</sup> Defendant, to prepare the daily summary Reports and monthly Reports that he was sending to the director, PW1 through Whatsap group as contained in Volume 6 of the auditor`s report. The accountant, the 8<sup>th</sup> Defendant, said in his evidence that he was receiving the Daily Reconciliation Reports from the forecourt supervisor. He was doing monthly bank reconciliations. However, there were no daily reconciliation reports prepared by the forecourt manager that were placed before the court. That would mean that the forecourt manager was not preparing any reports from the daily reconciliation reports received from the pump attendants. It is the 7<sup>th</sup> and 8<sup>th</sup> Defendants who were doing so. The two, the manager and the accountant, are professionals in their own right. It is not believable that they interacted with the Daily Reconciliation Reports from the pump attendants for a period of 3 years and they never discovered the manipulation at the meter readings. The altered meter readings were glaring to any professional accountant or manager. The fact that the two never reported the fraud to the director can only mean that they were part and parcel of the conspiracy.

55. The Defendants argued that email and WhatsApp extracts, Volume 6, were not admissible for lack of a certificate as required by Section 106B (4) of the Evidence Act. However, the documents were produced in court without any objection from the Defendants. In fact, the 7<sup>th</sup> Defendant who was the author of the documents admitted in his evidence in court that he was the source of the said documents. He never alleged that there was any of them that was not genuine or not from him. The argument is therefore dismissed.

56. It is therefore my finding that the 7<sup>th</sup> and 8<sup>th</sup> defendants were involved in the fraud on the plaintiff as a result of

manipulation of fuel pumps by the pump attendants. The pump attendants would not have stolen the money without the 7<sup>th</sup> and 8<sup>th</sup> covering them. The defendants are jointly and severally liable for defrauding the Plaintiff the sum of Ksh.29,261,060/=. I do not find sufficient evidence to prove theft of the rest of the money claimed by the plaintiff in the plaint.

57. On the claim for punitive damages, the same are payable in circumstances stated in the case of **Barclays Bank of Kenya Limited v Mema** (supra). The facts of this case do not warrant payment of such damages. That part of the claim is dismissed.

58. The upshot is therefore that I find the plaintiff to have proved the claim for special damages to the sum of Ksh. 29, 261, 060/= against the Defendants. I accordingly enter judgment for the plaintiff, jointly and severally, against the 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in the stated sum with interest at court rates from the date of filing suit, together with costs of the suit.

**Delivered, dated and signed at GARSEN this 19<sup>th</sup> day of February, 2026**

**J. N. NJAGI**  
**JUDGE**

**In the presence of:**

**Mr. Odhiambo for Plaintiff**

**Defendants- 2<sup>nd</sup> - 8<sup>th</sup> present in open court at Marsabit except the 7<sup>th</sup> defendant who is present virtually**

**Court Assistant - Abdow**

ORIGINAL