IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 105 OF 2007

BETWEEN

ROBERT OKERI OMBEKA ……..…….…….. APPELLANT

AND

CENTRAL BANK OF KENYA …….……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Kasango, J) dated 16th October, 2006

in

HCCC NO. 3611 OF 1995)

****

JUDGMENT OF THE COURT

1. This is an appeal against the judgment of the High Court (Kasango, J) delivered on 16th October, 2006 dismissing a suit filed by ***ROBERT OKERI OMBEKA*** (*herein the appellant)* for KShs.4,100,000/= and damages for wrongful arrest, malicious prosecution and wrongful dismissal by ***CENTRAL BANK OF KENYA*** *(herein the respondent).*

2. The relevant antecedent facts giving rise to this appeal as can be discerned from the pleadings are not contested. On or about the 16th December, 1993, the appellant who was employed by the respondent bank as a senior clerk in the Forex Department caused to be forwarded to the respondent bank convertible Foreign Exchange Bearer Certificates (annotated CFEBC) valued at KShs.4.1 million for redemption, and that the respondent paid out KShs.4.1 million to Delphis Bank Limited who had presented them on behalf of the appellant. Subsequent to the payment, the respondent bank discovered that the said certificates had been presented to it earlier and prior to 16th of December, 1993 after which the certificates were fraudulently and illegally removed from its premises and re-presented again for payment. The payment of the sum of KShs.4.1 million was immediately deferred and the respondent reported the matter to the police who carried out investigations and charged the appellant in the Chief Magistrates Court, Nairobi Criminal Case No. 301 of 1994 with the offence of *"stealing by a person employed in the public service contrary to Section 280 of the Penal Code"*.

3. The appellant throughout the trial maintained that he had lawfully and legitimately obtained the said

Forex Certificates worth KShs.4.1 million, the same having been bought in the open market, and was thereby rightly entitled to the proceeds of the KShs.4.1 million. At the conclusion of the prosecution's case, the court found that there was no ***prima facie*** case against the appellant and consequently acquitted him under ***Section 210 of the Criminal Procedure Code*** as he had no case to answer.

4. Having been acquitted of the charge, the appellant filed a suit against the respondent in **HCCC No. 3611 of 1995** for a sum of KShs.4,100,000/= on account of the Foreign Exchange Bearer Certificates and for damages for wrongful arrest, malicious prosecution and wrongful dismissal.

5. The pertinent averments in the plaint state:

> *[6] However, before the said sum of Kshs. 4.1 Million could be encashed, the defendant did lodge a complaint with the police, alleging that the CFEBC forwarded to the defendant Bank on or about the 16th December 1993 for payment were stolen from the defendant Bank by the plaintiff who was thereby subsequently arrested on the morning of 14th January 1994.*
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> *[7] Upon his arrest as aforesaid, the payment of the sum of Kshs. 4.1 Million to and for the benefit of the plaintiff was deferred, and the plaintiff was subsequently charged in the Chief Magistrates court, Nairobi Criminal Case No. 301 of 1994.*
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> *[16] At the conclusion of the case for the prosecution, the court found that there was no prima facie case established against him (the plaintiff) and he was consequently acquitted pursuant to the provisions of Section 210 of the Criminal Procedure Code (Cap 75) laws of Kenya, as he had no case to answer.*
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> *[22] Further, the plaintiff states that he was by a letter dated 28th June 1994 from the defendant dismissed from the said employment for alleged gross misconduct, with loss of all benefits.*

6. The relevant contentions in the respondent's written Statement of Defence and Counter Claim state:

> *[3] The Defendant states that subsequent to the payment as aforesaid, it discovered that the certificates the Plaintiff had caused to be presented to it had been presented to it prior to the 16th day of December, 1993 after which the same were fraudulently robbed and illegally removed from its premises by the plaintiff and re-presented afresh for payment.*
>
> *[5] The Defendant reported the matter to the police who carried out their own independent investigations and in a statement recorded by the police on the 14th day of January, 1994 the plaintiff admitted that he obtained from the defendant certificates which had not been stamped "cancelled" by Commercial Banks and forwarded the same to a friend working with Delphis Bank Limited who registered the same for him and subsequently forwarded to the Defendant for payment as aforesaid.*
>
> *[6] The Defendant states that it had reasonable and probable cause for reporting the facts stated in paragraphs 4 and 5 hereof to the police and in so doing it acted without malice and under the honest and bona fide belief that it was discharging a public duty.*
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> *[15] The Defendant admits that it terminated the plaintiff's contract of employment and states that it was entitled under the contract of employment and the relevant provisions of the Employment Act to do so for the reasons hereinbefore mentioned. [16] The Defendant states that by a letter dated 7th day of February, 1994 it requested the Plaintiff to show cause why disciplinary action could not be taken against him and avers that the Defendant failed, refused and neglected to show any such cause.*
>
> *[18] In the premises the Defendant states that the Plaintiff is not entitled to any damages for*

his arrest, prosecution or the termination of his employment and states that general damages cannot in any event be properly claimed or awarded for wrongful termination of a contract of employment.

7. The respondent also counter claimed a sum of KShs.67,509.35/= on account of a debit balance from credit facilities advanced to the appellant during the term of his employment. The respondent, however, chose not to call any witnesses during the trial.

8. After hearing the submissions, the law pertaining thereto and the authorities cited by both counsel, the learned Judge while dismissing the suit in favor of the respondent made the following determination of facts and conclusions of law. On the weight of the evidence presented by the appellant in support of his claim for KShs.4.1 million, the Judge rendered herself thus:

> ***"Having in mind the Plaintiff's claim to begin with his claim for KShs.4.1 Million the court is of the view that he failed to prove his (sic) entitled to the same. There was no sufficient evidence presented before this court which proved that the plaintiff was the owner of the aforesaid Forex-C. Indeed from his evidence it is not clear whether the bearer was himself or Angwenyi. The court found his evidence in that regard to be unreliable and untruthful.***
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> ***Indeed the court did note that when being questioned in regard to those Forex-C, he was at sometime unsure which answer to give. Accordingly the court rejects his evidence (sic) regard to this claim."***

9. In respect to the appellant's claim for damages for wrongful arrest and malicious prosecution, the learned judge while relying on this court's decision in ***NYAGA V MUCHEKE, CA NO. 59 OF 1987 (unreported)*** was not satisfied that the appellant had proved this claim. The learned Judge at page 10 held that:

> ***"Indeed, the plaintiff did not prove malice on behalf of the Defendant in reporting their complaint over the Forex-C to the police. The court finds that in the ruling delivered by the criminal court the magistrate seemed to have accepted that at least three of the Forex-C which were the subjects of the trial were "bad". If that be so that would have been sufficient reason for the Defendant to lodge a complaint and if they so did and the police decided to arrest and charge the plaintiff that act was out of control of the plaintiff. The plaintiff therefore on this claim has failed to prove the same."***

10. On the issue of wrongful dismissal, the learned judge dismissed the claim on the authority of this court's decision in ***COAST BUS SERVICE LTD V SISCO*** **E MURUNGA** ***NDANYI, CA NO.192 OF 1992*** holding at page 12 that:

> ***"It ought to be noted that this head of the Plaintiff's claim was in the nature of a special damage and there was need for the Plaintiff to specifically claim in the plaint the amount being prayed for. The plaintiff did not and therefore that claim will fail***."

11. Aggrieved by that decision of the High Court, the appellant proffered this appeal raising 38 grounds of appeal which can be condensed into that the learned judge erred in holding that: the appellant failed to prove his claim for KShs.4.1m; that there was no sufficient evidence that he was the owner of the Forex Cs; that he did not prove his claim for damages for wrongful arrest and malicious prosecution and that he did not prove malice on the part of the respondent in reporting their complaint over the Forex C to the police.

We have perused the memorandum of appeal and will re-state and emphasize the position of this Court and the law with regard to filing a lengthy memorandum of appeal. This court in ***LAW SOCIETY OF KENYA V THE CENTER FOR HUMAN RIGHTS & DEMOCRACY, JUDGES & MAGISTRATES' VETTING BOARD & 5 OTHERS, CA NO. 308 OF 2012***, cautioned that:

> "***It is time counsel practicing before this Court went back to basics and in particular re-acquainted themselves with the simple and straightforward provision of Rule 86(1) of the Court of Appeal Rules which stipulates in mandatory terms the contents of a memorandum of appeal thus:***
>
> ***A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the***
>
> ***Court to make."*** (Emphasis added).\

Per Odek JA**:**

> ***"... I hereby caution that it is a misunderstanding of the judicial process and dearth of drafting skills and acumen to be under the illusion that wordiness, verbosity, surplusage and replication of issues would enhance the chances of success of an appeal."***

12. The earlier expression of this court also bears repetition where in the case of ***ABDI ALI DERE V FIROZ HUSSEIN TUNDAL & OTHERS, CA NO. 310 OF***

2005 *(unreported),* the court stated that:

> ***"The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal, in our view, turns on the following five issues only. ..."***

Submissions by counsel

13. When the appeal came before us for hearing, learned counsel Mr Njagi appeared for the appellant while learned counsel Mr J.O. Awele appeared for the respondent. Counsel agreed by consent that this appeal be disposed of by way of written submissions with no oral submissions. The appellant filed his written submissions with the authorities in support of his case on the 27th March, 2015, while the respondent bank filed its submissions on 14th of May, 2015.

In his 98 page written submissions, the applicant elaborated on the 38 grounds of appeal stipulated in his memorandum of appeal. The appellant submits that the learned Judge erred in law and fact and arrived at the wrong decisions. In its written submissions, the respondent argues that there are only three [3] issues for determination in this appeal viz:

a. *How were the bearer certificates obtained? Was the appellant or his proxies entitled to redeem the forex certificates as claimed or at all?*

b. *Was the appellant's prosecution malicious? And was the acquittal in criminal case no. 301 of 1994 conclusive proof in the civil proceedings in Civil Suit No. 3611 of 1995?*

c. *Was the appellant's dismissal from employment unlawful/wrongful?*

14. This being a first appeal, we are in law obliged to analyze the evidence that was adduced in the High Court afresh, evaluate it and come to our own independent decision. In the case of ***SELLE AND ANOTHER V ASSOCIATED MOTORS BOAT COMPANY LTD AND OTHERS, (1968) EA 123*** the predecessor to this Court stated as follows:

> ***"An appeal to this Court from a trial of the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they***

> ***are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally*** *(Abdul Hemeed Seif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."*

15. As to findings made on matters of fact, this Court will only interfere where the finding is based on no evidence, or on a misapprehension of the evidence or where the learned Judge is demonstrably shown to have acted on wrong principles in reaching the finding. See ***MWANASOKONI V KENYA BUS SERVICES LTD, [1985] KLR 931***.

Determination

16. We have read and considered the record of appeal, the rival written submissions and the relevant law as articulated by both parties.

Our first task is to re-evaluate the evidence on the record to determine whether the totality of the evidence tendered before the learned Judge for a claim for wrongful arrest and malicious prosecution was proved by the appellant as against the respondent.

17. The principles that govern a claim founded on malicious prosecution were laid down by Contran, J in the case of ***MURUNGA V ATTORNEY GENERAL, [1979] KLR, 138*** as follows:

a. ***The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.***

b. ***The Plaintiff must show that the prosecution terminated in his favour.***

c. ***The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.***

d. ***He must also show that the prosecution was actuated by malice.***

18. Can it be said that the fact that the appellant was acquitted, rendered his prosecution malicious? In ***JEDIEL NYAGA V SILAS MUCHEKE, (CA NO. 59 OF 1987 (NYERI) (UR)*** this court said:

> ***"It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. In the instant case, there was no evidence adduced to show that the report by the appellant about the damage to his crop and trees by the respondent was false. He admitted as having made the report. There was evidence that the respondent had erected a stone building on the appellant's land although the dispute was not on the ownership of the land. The police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false.***
>
> ***Police action cannot be attributable to the appellant who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the respondent was brought without reasonable or probable cause."***

19. In the book **Clerk and Lindsell on Torts, 18th Edition** at page 823, the authors prescribe the essentials of the tort of malicious prosecution as follows:

> *"**in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving every one of this is on the claimant.***
>
> ***Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts."***

20. There was no dispute that the respondent bank lodged a complaint with the police that its Foreign Exchange Bearer Certificates annotated CFEBC valued at KShs.4.1 million which had previously been presented to it earlier were robbed and illegally removed from its premises by the appellant and re-presented again for payment on 16th December, 1993. In their wisdom, and following an investigation, the police preferred charges against the appellant. 21. It is also not in dispute that the court found that there was no ***prima facie*** case against the appellant and consequently acquitted him under ***Section 210 of the Criminal Procedure Code***. The case of ***ZABLON MWALUMA KADORI V NATIONAL CEREALS & PRODUCE BOARD, HCCC NO. 152 OF 1997*** is distinguished as in that case, the defendant's security officers arrested the plaintiff and took him to the police station while in this case, the defendant only reported the matter to the relevant authorities for investigation.

22. In the instant appeal, there is no evidence that the respondent made a *"false"* report, or that it was actuated by *"malice"*, or that his prosecution was brought *"without reasonable or probable cause"*. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.

23. In the case of ***HICKS V FAWKERS, (1878), 8 Q.B.D. 167*** at pg 171 Hawkins J. defined probable and reasonable cause as follows:

> ***"Reasonable and probable cause is an honest belief in the guilt of the Accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."***

24. The foregoing definition was adopted by Rudd, J. in ***KAGANE V ATTORNEY GENERAL & ANOTHER, (1969) EA 643*** in which the learned Judge reiterated that:

> ***"... to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."***

25. Aganyanya, J *(as he then was)* in the case of ***Socfinaf Kenya Ltd V Peter Guchu Kuria***, ***(supra)***, observed as follows:

> ***"Moreover, when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations. And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action. This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such case is***

whether or not there is a reasonable and/or probable cause for the arrest and/or prosecution of the culprit. And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution.

As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this. If the respondent's case fell in the latter category then I am sure they would not have taken to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established."

26. The fact is that the respondent bank made a report to the police who investigated and chose to charge the appellant. All that the respondent did was to report the fraudulently obtained certificates to the police. That is the duty of every citizen including public and private institutions. The rest was up to the police who conducted their own independent investigation and formed the basis of the criminal proceedings. See ***GICHANGA V BAT, [1989] KLR 352*** and ***DAVID KIRIMI JULIUS V FREDRICK MWENDA, CA NO. 270 OF 2003.***

27. In the case of ***EGBEMA V WEST NILE DISTRICT ADMINISTRATION, (1972) E. A.*** Law, Ag. V. P. as he then was, said:

"Is the respondent also liable in damages in respect of the abortive prosecution? I do not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servant or agents of the respondents after investigation. I can see no evidence of malice on the part of the respondent.

The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court must make its own finding.

In my view the circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice."

28. That appears to be the position in the case before us. The respondent bank having reported to the police about the fraudulent Forex Certificates and what followed was entirely in the control of the police. The respondent bank had nothing to do with the events that led to the appellant's arrest and the ensuing prosecution, and it cannot possibly be faulted for what happened.

29. Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.

30. Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe that crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused. This view is in accord with the decision of the South African case of ***BECKENSTRATER V ROFFCHER & THEUNISSEN, 1955 1 SA 129 (A) 135D-E***, and carried forward in the case of ***RELYANT TRADING (PTY) LTD V SHONGWE, 2007 1 ALL SA 375 (SCA)*** para 14 where Malan JA stated that:

> ***"… the requirement of reasonable and probable cause "is a sensible one" since "it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives."***

Accordingly, we find that there is no merit in this ground of appeal.

31. Our second task is to determine whether the appellant proved his claim for wrongful dismissal. Apart from his undisputed assertion that he was an employee of the respondent, the appellant's evidence in support of his claim for wrongful dismissal and loss suffered was not an accurate or fair assessment of such loss.

We are conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of. In this case, it was possible for the appellant to tender clear evidence on the claim but did not.

32. Where an action is brought for wrongful dismissal or termination of a contract of employment, the available remedy is of special damage that needs to be specifically pleaded and strictly proven. The onus was on the appellant to prove special damages strictly. In his plaint, the appellant formulated his prayers as follows:

> ***"(c) Damages for wrongful dismissal of the plaintiff from the defendant's employment with loss of benefits, together with interest , at court rates."***

33. It is clear from the above, that the appellant did not provide or plead figures either in the body of the plaint or in his prayers. Considering that the appellant's claim was based on a contract of employment, it follows that a claim for damages arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be strictly proved as well. Without having been specifically pleaded or proved, the appellant's claim could not have succeeded and the learned judge was correct in dismissing it. See ***RATCLIFFE V EVANS, [1892] 2QB S24***; ***KAMPALA CITY COUNCIL V NAKAYE, [1972] E.A 446*** and ***HAHN V SINGH, [1985] KLR 716***.

34. This court on the need to plead and prove special damages in ***WILLIAM KIPLANGAT MARITIM & ANOTHER V BENSON OMWENGA***, ***CA NO. 180 OF 1993*** cited with approval its earlier decision in ***CHARLES SANDE V KENYA COOPERATIVE CREAMERIES LTD, CA NO. 154 OF 1992*** *(unreported)* where it said:

> ***"As we have pointed out at the beginning of this judgment Mr Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law."***
>
> (Emphasis ours).

35. The learned Judge relied on this Court's decision in ***COAST BUS SERVICE LTD V MURUNGA DANYI & 2 OTHERS, CA NO. 192 OF 1992*** *(unreported)* where it stated:

> ***"We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars…"***

36. The court in ***Sande, (supra)*** further stated that the rules of pleadings and procedure are designed to crystallize the issues which a judge is called upon to determine and the parties are themselves made aware in advance as to what issues arise in the matter.

37. In the suit that was filed in the High Court, there is no doubt the particulars of what would have been special damages were known to the appellant at the time of filing the suit; and if, peradventure they were not available at the material time, the appellant had the chance to apply to amend his plaint and include them when they became known to him. As things stand there were no particulars of special damages and therefore there was nothing to prove.

38. The appellant's reliance on the case of ***BENARD PAUL DAWA V THE ATTORNEY GENERAL, HCCC NO. 3647 OF 1998*** is misplaced and can be distinguished. In that case, the plaintiff pleaded and particularized the special damages but did not quantify them. In the instant case and to the contrary, the special damages were neither pleaded nor particularized and were not quantified by the appellant. Our position is further buttressed by the provisions of the ***Section 112 of the Evidence Act*** which states that:

> ***"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."***

39. Having perused the record, the only effort made by the appellant to plead and particularize his claim is in his submissions before the High Court. For ease of reference, we have reproduced the pertinent part of the submissions in the High Court as follows:

> ***"… My Lady.....the plaintiff was at the time of his dismissal a young man aged only 37 years and earning a monthly salary of Kshs. 20,756/=. ... the plaintiff is claiming loss of salary together with interest at court rate from January 1994 to date which sum works out Ksh. 8,993,005/= (Last Salary of Kshs 20,756 compounded at 14% court rate since January 1994 to date). … Further My Lady, the plaintiff being a servant in the public service employed on permanent and pensionable terms would have worked up to the age of 55 years. ... He had a further 18 years to work. ... He is thus entitled to be compensated for loss of earnings, which should work out as follows and which kindly award (Ksh. 20,756 x 12months x 18 years= Ksh.4,483,296/=."***

40. In our considered view, these calculations in the appellant's submissions before the High Court could not come to his aid because submissions are not evidence. Such a course only militates against the law and we are unable to countenance it. The expression of this court on the law and relevance of submissions in a court of law was stated in ***HON. DANIEL TOROITICH ARAP MOI CGH V MWANGI STEPHEN MURIITHI & ANOR***, ***CA NO. 240 OF 2011***, where the court pronounced itself thus:

> ***"Submissions cannot take the place of evidence.***
>
> ***The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one.***

Submissions, we reiterate, do not constitute evidence at all.

Indeed there are many cases decided without hearing submissions but based only on evidence presented."

41. This court in the case of **DOUGLAS ODHIAMBO APEL & EMMANUEL OMOLO KHASIN V TELKOM KENYA LIMITED, CA NO. 115 OF 2006** stated that:

> *"**a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.***
>
> ***The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. … It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved."***

See ***RATCLIFFE V EVANS, [1892] 2QB S24***; ***KAMPALA CITY COUNCIL V NAKAYE, [1972] E.A 446*** and ***HAHN V SINGH, [1985] KLR 716***.

42. We cannot fault the learned Judge for holding that the claim for pension just like other special damages was also not pleaded by the appellant. We are in this respect guided by the statement in the **Halsbury's Laws of England** (3rd Edition) at para.388 where the author stated that:

> ***"In order to ascertain what was in issue between the parties in the earlier proceedings, the judgment itself must of course be looked at and the verdict, if any, on which it is founded; and where there have been pleadings, these should also be examined being in fact part of the record."***

43. We have perused the record and the pleadings and have not seen where such a claim was not pleaded. The law is that the courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts' determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case. In a picturesque exposition on the law in this regard, the predecessor to this court in the case of ***GALAXY PAINTS CO. LTD. V FACCON GUARDS LTD, [2000] 2 EA 385***, stated as follows:

> ***"It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial Court, by dint of the provisions of Order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination."***

44. In the case of ***ANTHONY FRANCIS WAREHAM & OTHERS V KENYA POST OFFICE SAVINGS BANK, CA NOs. 5 and 48 of 2002*****.** This Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

45. In ***CHARLES C. SANDE V KENYA CO-OPERATIVE CREAMERIES LIMITED, CA NO. 154 OF 1992*** the Court underscored the need for parties to have notice of issues in an action when it stated that:

> *"**All the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are**."*

46. That position accords with the earlier decision of this court in ***ABDUL SHAKOOR V ABDUL MAJIED SHEIKH NAIROBI, CA NO. 161 OF 1991*** to the effect that in general, a plaintiff is not entitled to a relief which he has not specified in his claim.

47. In the circumstances, we come to the conclusion that the learned Judge properly directed her mind to the pleadings and evidence and arrived at the correct decision. We, therefore, dismiss that ground of appeal.

48. Having so found, we now deal with the finding made by the learned Judge on the credibility of the appellant and the veracity of his testimony. In this aspect the learned Judge concluded that:

> ***"The court in summarizing the evidence presented by the plaintiff, the court would say that, that evidence was full of falsehood and untruth which were intertwined. The object of cross-examination as***
>
> ***I understand it is to test the witness's veracity. The defence counsel in cross-examining the plaintiff in deed tested his evidence and the plaintiff's evidence was found to be wanting on truth. ... The court could not trust the evidence presented by the plaintiff for as it is seen herein before the plaintiff kept changing his evidence and at the end of it all the court was unable to decide what was the true evidence of the plaintiff."***

49. In the case of ***NDUNGU KIMANYI V R, [1979] KLR 282*** it was held:

> ***"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."***

Further, in the case of ***OMURONI V R, [2002] 2 EA 508*** it was held:

> ***"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."***

50. The above decisions clearly define or set the parameters that have to be followed or established before a particular witness can be said to be a witness of truth or otherwise. It is a requirement of paramount importance, that a trial judge should indicate or point out instances of demeanor which she noted and which she relies upon as a basis of accepting the evidence of a particular witness. In this case, the learned Judge did exactly that. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how she thinks that particular witness is a witness of truth. In this case, we find that the testimony of the appellant is replete with glaring contradictions and that the learned Judge paid regard to this principle of law in arriving at the impression that the appellant was not truthful.

52. Contrary to the submissions by the appellant, we cannot fault the learned Judge's exercise of her discretion in this regard. We find support in the case of ***MBOGO & ANOTHER V SHAH, [1968] EA 93*** at page 95, where Sir Charles Newbold P. held that:

> *"…**a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise***

of his discretion and that as a result there has been misjustice……."

53. Also in ***MATIBA V MOI & 2 OTHERS, 2008 1 KLR 670***, this Court held that:

> ***"The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision."***

54. We have said enough, to show that this appeal is devoid of merit. We, therefore, order that the appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 31st day of July, 2015.

E. M. GITHINJI

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR