IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 108 OF 2009

KENYA REVENUE AUTHORITY ……...……..…. APPELLANT

AND

MENGINYA SALIM MURGANI ……..…… RESPONDENT

(Being an appeal from the judgment and decree of the High Court Kenya at Nairobi (Ojwang, J.) dated 22nd September, 2008

in

H.C.C.C.NO.1139 OF 2002

****

JUDGMENT OF THE COURT

This appeal arises from the judgment and the decree of the superior court, ***Ojwang, J.*** dated 22nd day of September, 2008. In addition, there is the respondent's cross appeal dated 3rd November, 2009.

According to the pleadings, the respondent states that he and the appellant authority entered into a contract of employment on or about 7th June 1996 by dint of which the respondent was employed as a Senior Research Officer on permanent and pensionable terms and was contributing 7.5% of his basic salary to the appellant's pension scheme. In 2001, the respondent was promoted to the rank of Senior Assistant Commissioner earning a monthly salary of Kshs.135,187. According to the respondent, his employment was regulated by the appellant's Code of Conduct and was not to be terminated save in accordance with the said Code and it was an implied term of employment that unless the respondent was dismissed for misconduct or gross misconduct or compulsorily retired under the Code of Conduct, he would continue until the respondent attained the age of 55 years. In the alternative, the respondent pleaded that it was a further express term of the contract of employment that his employment would continue until determined by a six month notice in writing on either side or in lieu thereof, a payment of six months' salary and alternatively, it was an implied term that the respondent's employment would be determined only on service of a reasonable notice which in the circumstances meant six months or three months.

In the superior court, the respondent enumerated a litany of grievances against the appellant which included that on or about 19th April 2000 the appellant wrongfully and in breach of the contract of employment, suspended the respondent from his employment contrary to ***clause 3:5:14*** of the Code of Conduct, allegedly in relation to the importation of goods by other persons into the country under the

Schools Equipment Production Unit [SEPU] without payment of duty or in circumstances which constituted evasion of duty; that on or about 3rd May 2000 the suspension was lifted and the respondent reported for duty and thereafter nearly eight months later on 18th January 2001, the appellant once again wrongfully and in breach of the contract of employment suspended the respondent for alleged contravention of ***clause 3:5:14*** of the Code of Conduct in respect of the same importation of goods under the SEPU arrangement and finally, on 9th of Mach, 2001, the appellant, without giving the respondent a six month notice in writing, or any notice at all, and without tendering payment in lieu of notice, dismissed the respondent from his employment with loss of all his benefits. As regards the SEPU goods importation, he asserted that the persons charged in respect thereof in a court of law were acquitted, and that the acquittal of those persons must have absolved or vindicated the respondent, and as a consequence thereof, the respondent claimed general damages for the termination of his career without reasonable remuneration and in addition claimed exemplary damages for destruction of his career and for injury to his dignity. He further claimed special damages in the sum of Kshs.1,945,453 being his pension contributions, leave allowance, six months pay in lieu of notice and costs and interest on each head of his claim as set out above.

On the other hand, the appellant's defence was that, although it admitted having employed the respondent, it denied *inter-alia*, that there was any contract for permanent and pensionable employment; that the respondent contributed 7½% of his basic salary towards pension as from 7th June, 1996; that there was a provision for six months notice before termination or that the contract of employment had any implied terms as alleged; and that the dismissal was wrongful or in breach of contract. The appellant contended that it took disciplinary action against the respondent by dismissing him and the said dismissal was in accordance with the Code of Conduct and further that, the basis of the appellant's action was based on the fact that the respondent who was in charge of research, refused neglected and/or failed to prevent or uncover a conspiracy to defraud the Government of revenue through evasion of duty on goods imported under the SEPU scheme and finally, concerning the effect of the acquittal of the persons arrested in connection with the importation of goods by SEPU, the appellant contended the acquittal per se did not absolve the respondent, because the persons ended up paying Government taxes and such payment was proof that the respondent should have, in the course of his employment, prevented the tax evasion and failure to have done so constituted abdication of duty on his part.

Following a full hearing, the superior court in a 45 page judgment found for the respondent and awarded one head of damages namely exemplary damages in the sum of Kshs.1 million only and at the same time gave "***directions***" that the Deputy Registrar of the High Court "***calculates***" the other heads of damages which aspects of the judgment have been hotly contested by the appellant including the following determinations by the superior court:-

(i) "The award of damages whether for breach of contract or for the commission of a tort as already noted, seeks to restore the aggrieved as far as possible to the place where he or she would have been but for the supervention of the injury. Therefore substantially, the breach of the employment contract in the instant case coalesces into the tort, constituting one broad damage in respect of which, given the public character of the wrongdoer, and the wrongdoers' failure to adhere to basic constitutional and legal principles, the propriety of exemplary damages speaks for itself.

(ii) The appellant to pay the respondent salary and leave allowance for a period of seven years and six months.

(iii) The appellant to pay the respondent exemplary damages in the sum of Kshs.1 million."

In short, the remedies granted were as follows:-

1) "From date of determination of service, namely 9th March, 2001 to date of judgment, namely 22nd September, 2008, the pension amount falling due to the plaintiff shall be calculated, and paid with interest at court rate.

2) From date of termination of service, namely 9th March, 2001 to date of judgment, namely 22nd September, 2008, plaintiff's gross salary at the figure of Kshs.125,081 per month be calculated, and paid with interest at Court rate.

3) I award exemplary damages in the sum of one million (Kshs.1,000,000/-) Kenya shillings, payable with interest at court rate with effect from the date of this judgment.

4) I award the costs of this suit to the plaintiff, payable with interest at court rate as from 5th July, 2002.

5) This matter shall be listed for mention before the Deputy Registrar in the High Court's civil Division, on Friday 26th September, 2008. The Deputy Registrar shall give directions for the calculation of damages, in accordance with the orders of this Court listed herein under headings (1), (2) and (3)."

Following the intervention of the Deputy Registrar as ordered by the Judge, the awards as reflected in the decree were:-

1. The plaintiff be and is hereby awarded damages in the sum of Kenya Shillings Twenty Eight Million eight Hundred and Eighty three Thousand, seven Hundred and Twelve (Kshs.28,883,712.00) Kenya Shillings made up as follows:-

a) Pension in the sum of Kenya Shillings Six Million, sixty Seven Thousand Three Hundred and Sixty One (Kshs.6,067,361.00).

b) Leave allowance in the sum of Kenya shillings four hundred and twenty seven thousand five hundred (Kshs.427,500/-.

c) Salary in the sum of Kenya shillings twenty one million, three hundred and eight thousand eight hundred and fifty one (Kshs.21,388,851/-).

d) Exemplary damages in the sum of Kenya shillings one million (Kshs.1,000,000/-) payable with interest at court rate from the date of judgment.

2. The plaintiff be and is hereby awarded costs of the suit payable with interest at court rates from 5th July 2002.

3. This matter be listed for mention before the deputy Registrar in the High Court's Civil Division on Friday 26th September, 2008 to give directions for the calculation of damages, in accordance with the orders of this court listed herein under headings (1),(2) and (3).

Aggrieved by the said judgment and decree, the appellant has appealed to this Court on the following grounds:-

***1. THAT, the learned Judge erred in directing that the quantum of damages be assessed by the Deputy Registrar* of the superior court and in so doing, failed to appreciate sufficiently or at all that the Deputy Registrar of the court has no power in law to assess damages on behalf of the court**.

2. THAT, the learned Judge erred in falling to appreciate sufficiently or at all that the once the judgment was pronounced and signed, the superior court became functus officio and the Deputy Registrar of the court could not lawfully do what the court itself could not do.

3. THAT, the learned Judge erred in falling to appreciate sufficiently or at all that the legal effect of the assessment of damages by the Deputy registrar of the court was to add to the judgment the court had pronounced in breach of the provisions of* Order XX Rule 3(3) *of the Civil Procedure Rules.

4. THAT, the learned Judge erred in directing the appellant to pay to the respondent salary and leave allowance for a period of seven years and six months which period was not reasonable and was infact manifestly excessive in the circumstances of the case which was before him.

5. THAT, the learned Judge erred in holding, as he did, that the respondent was entitled to exemplary damages and in awarding the same to him when there was no justification in law for doing so and particularly after awarding him all his salary and leave allowance for a period of seven years and six months.

6. THAT, the learned Judge applied the wrong principles in the assessment of damages and in holding, as he did, that the termination of the respondent's employment was illegal or that the applicant breached the rules of natural justice in terminating the employment.

7. THAT, the learned Judge erred in holding that a suit against the applicant did not require prior notice of the intention to institute the same under the provisions of the Government Proceedings Act and in so doing, failed to correctly interpret the provisions of *section 3(2)* ***of the Kenya Revenue Authority Act.***

8. THAT, the learned Judge made a fundamental error of law in holding that the applicant committed an actionable wrong known as misfeasance in public office when the respondent did not prove or establish the ingredients of that tort to the degree required by law or at all."

At the hearing, the appellant was represented by ***Mr Chacha Odera***, advocate, and the respondent was represented by ***Dr. Kamau Kuria***, advocate. As regards the conduct of the appeal counsel for the parties agreed to rely on written submissions and authorities and filed them as follows:-

1. Appellant's written submissions and authorities on 3rd March, 2000.

2. Appellant's written submissions on the respondent's cross appeal on 12th March, 2010.

3. Respondent's submissions on 3rd March 2000.

4. Respondent's reply to the appellant's submissions on 11st March, 2010.

5. Respondent's reply to the appellant's submissions on the cross appeal on 19th March, 2010.

The five categories of submissions and authorities constitute a bulky bundle which is almost half the size of the actual record of appeal! For the purpose of good order and clarity we consider it unnecessary to set out the written submissions in *extenso* although we have fully considered them. On our part so as to separate the wheat from the chaff, we consider the following as the central issues:-

1) Although it is common ground that there was a contract of service between the two parties, there were divergent views on whether it was determinable and if so, by what period of notice and if the same was on permanent and pensionable terms whether it could be terminated by the giving of a reasonable notice.

2) In the circumstances, was the contract properly terminated and if so what are the legal consequences of such termination and if wrongly terminated what were the legal consequences of such termination?

3) Was the superior court justified in law in awarding general damages in respect of a contract of employment in lieu of the award of salary for the period of notice?

4) Was the superior court justified in law in awarding exemplary damages?

5) Was the superior court correct in law in awarding only one head of damages, namely exemplary damages in the sum of kshs.1 million and directing the calculation of the other heads to be done by the Deputy Registrar and what is the effect of the court's directions?

6) Was the superior court justified in holding that in the circumstances, the appellant had committed an actionable wrong known as misfeasance in public office?

We shall consider issues in that order. Going by the recorded evidence, it is common ground that the respondent was employed on permanent and pensionable terms and it is also not in dispute that the Code of Conduct applied to the respondent on matters of discipline. In this regard, DW1 ***Mr Michael Aringo Onyura***, Senior Department Commissioner (Human Resources) in his evidence did outline the procedure followed before the respondent was dismissed. He also indicated that in dismissing the respondent the Board had relied on the Efficiency Monitoring Unit report concerning the involvement of the respondent in the SEPU related importations. He explained that, although the respondent was not accorded a formal hearing by the Staff Committee, the charge he faced was put in writing and the respondent responded to it in writing both at the Staff Committee level and at the Board level. We note with concern that the superior court did not in its adjudication process make reference at all to the evidence concerning the disciplinary steps taken by the appellant pursuant to the Code of Conduct as it applied to the respondent. Instead, the court right from the outset purported to import into the contract both the rules of natural justice as it understood them including incorporating into the contract of employment the provisions of ***section 77*** of the Constitution. The requirements of a fair hearing or the right of hearing under ***section 77*** of the Constitution and the rules of natural justice were two ideas which formed part of the respondent counsel's submissions and which the superior court accepted hook, line and sinker, and unilaterally incorporated them into the Code of Conduct. With respect, this was a serious misdirection or misapprehension of the applicable law and of the factual position on the part of the Court. Firstly, as regards the terms of a contract of service or any other contract it is not the business or function of a court of law to rewrite a contract for the parties by prescribing how the organs entrusted with disciplinary matters in a contract must operate or to introduce terms and conditions extraneous to the contract. Secondly, it is for the parties to provide in the contract how such organs should operate and how the hearings, if any, are to be conducted. A court of law cannot in our view, import into a written contract of service rules of natural justice and the Constitutional provisions relating to the right of hearing.

Section 77(9) of the Constitution is inapplicable to the organs of discipline or tribunals which have been specifically provided for in a contract of service by the parties. ***Section 77(9)*** even on its own wording clearly applies where a court or other adjudicating authority has been established by a law. The section applies only where a law has prescribed the manner of determination of the existence of a civil right or obligation and does not apply to contractual tribunals. The wording of the section is in these terms:-

"A court or other adjudicating authority prescribed by law for the determination of the existence of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicatory authority, the case shall be given a fair hearing within a reasonable time."

With respect, the superior court's importation and application of the concept of fair hearing as defined in the context of the Constitution was a clear misapprehension of the law. The section does not and was not intended to apply to contracting parties at all or for that matter to a contract of service unless the parties themselves have specifically stated so in their contract. In the matter before us, neither the Staff Committee nor the Board of Kenya Revenue Authority constituted a court of law or an adjudicating authority as defined in ***section 77*** of the Constitution. At the outset, we are clear that the superior court's judgment is silent on the defence case in terms of evidence on this important aspect of the case. Without recording the appellant's evidence as it did in respect of the respondent's case, the record shows that the court in its judgment immediately started demolishing the appellant's case and the appellant's counsel's submissions on the basis that the appellant's counsel did not address the cause of action and law concerning the application of tortious liability to a contract of service! Again, the court with respect, failed to properly address itself on the critical issue on how the contract of service between the parties

could be terminated. It is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a yoke of slavery or a contract of servitude. This is the reason why either party is allowed to terminate the contract by giving the stipulated notice or a reasonable notice if not specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. This applies whether or not the contract is permanent or pensionable and this right vests in both the employee and the employer. The superior court, in our view, ought to have examined the ***Code of Conduct*** and if as it finally found it was silent on the period of notice it had the power to award salary in lieu of notice and also determine a reasonable period of notice, which in the circumstances and according to the applicable law and decided cases in this country ranged from six (6) months to twelve (12) months. Indeed, a contracting party does not have to rely on a misconduct in order to terminate a contract of service and a party can terminate such a contract without giving any reason! In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice. It follows therefore that the concept of the destruction of the respondent's career and the subsequent arbitrary application of the tort of misfeasance in public office just because the appellant was a parastatal had, with respect, no basis in fact or law because whatever powers the appellant was exercising in dismissing the respondent stemmed from a contract of service between it and its employee and did not with respect spring from the statutory power conferred on the appellant by the statute creating it, which is, the Kenya Revenue Authority Act. In our view for the purposes of entering into contract of employment a parastatal is just like any other employer and there cannot be any legal basis for creating a distinction between contracts of service entered into by private companies with their employees and those entered into between parastatals and their employees.

The thrust of Dr Kuria's submissions was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the respondent either by the Staff Committee or the Board being the appellate body or both.

However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.

In the case of ***LOCAL GOVERNMENT BOARD vs ARLIDGE*** *[1915] A.C. 120, 132-133,* ***SELVARAJAN vs RACE RELATIONS BOARD*** *[1975] I WLR 1686, 1694,* and in ***R vs IMMIGRATION APPEAL TRIBUNAL ex-parte JONES*** **[1988] I WLR 477, 481** it was held:-

"the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."

……

Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made …"

According to the evidence adduced, it cannot be said that the respondent did not receive adequate notice of the charges leveled against him and allowed to present his case in writing. The appellant as an employer in finally making the decision to dismiss the respondent was not exercising its statutory power under the Act creating it but rather exercising disciplinary power under a contract of service. As mentioned above and with respect, the superior court's findings that the appellant was exercising statutory power was a serious misdirection in law which in turn led to the court's erroneous findings that in the circumstances, the tort of misfeasance in public office had been committed by the appellant. As far as we can see those, findings had no factual or evidential foundation at all and consequently, the respondent could not in law opt to pursue what the court referred to as "*advantageous remedy based on the tort of misfeasance in public office*" instead of a remedy based on breach of contract.

To illustrate the point that the superior court erred in applying the law of torts to a contract of service, and we make reference to the respondent's evidence in chief, as follows:-

"Once case is handed over to CID, the Commissioner of Customs had nothing to do with it. Some people were dismissed after we completed investigations because (sic) the goods 19th April 2000 (sic) four officers suspended, Commissioner, Deputy Commissioner and others including myself.

……

Same letter of September … of exemption had been used to import the goods earlier ……. I was suspended, asked to write appeal 22nd February 2001 my appeal had nothing to do with the rapid Gate goods. Rapid Gate Bonded Warehouse 9 containers went through Rapid Gate. I heard of the 9 containers during investigations. Then I learnt there were 9 other containers imported by SEPU. I was not handling that case. 9th March 2001, I now got a dismissal letter. *Section 3.5.14* ***of Code of Conduct it is claimed I contravened it (sic). Reference to goods purportedly imported by SEPU. I filed an appeal. 29th May 2001 my appeal was given a hearing – KRA headquarters by Staff Committee of Board of KRA. I do not know if that was my case. I presume it is the body charged with conduct of the hearings. …….. Letter of 1st appointment exhibit 1, it does not indicate period of termination notice. It does not refer to my retirement age. 6 months would have been reasonable time, in lieu of notice."***

On the other hand, Mr Michael Aringo Onyura (DW1) testified as under:-

"18th January 2001 letter Exh 16, I wrote that letter. Laying charge against the plaintiff – illegal importation of goods by SEPU. I was asking her (sic) to explain. I got an answer 22nd January 2001 (plaintiff's letter) – exhibit 17. Matter then forwarded to Staff Committee of the Board which found that Mr Menginya had committed the offence alleged in exhibit 16 (letter of 18th January 2001) 9th March, 2001 communication of decision to Mr Menginya, 9th March 2001. Letter of dismissal. That Staff Committee had carefully considered 22nd January 2001 defence in accordance with Code of Conduct of KRA, - explanations found unsatisfactory. Recommendations for dismissal. Board of Directors accepted the committees recommendations and dismissal takes effect 20th February 2002 - Plaintiff reminded of his right of appeal. He appealed on 29th May 2001. On appeal – letter 2nd October, 2001 Exhibit 19 – on appeal against dismissal. Staff committee considered the same found it inadequate, commissioner recommended to Board – dismissal. Board accepted recommendation and uphold (sic) dismissal."

Regarding the period of notice, it is common ground that since the period of notice was not specifically provided for, the contract would be terminated by issuing a reasonable notice. From the evidence set out above, even the respondent in his evidence admitted that a six months' notice would have constituted a reasonable notice for the contract of service. It follows therefore that the findings by the superior court that the respondent was entitled to salary for seven years and six months from 9th March 2001 to the date of judgment was not based on any evidence and was, with respect, arbitrary. Similarly it was the contract of service which regulated the leave allowance payable, and the pension payable.

The remedies referred to as 1,2, and 3 above did not therefore have any basis on the evidence and are not for grant.

There are clear past decisions of this Court that even where dismissal or termination is wrongful, the damages payable to the employee is the salary which would have been paid in lieu of notice – see ***ALFRED GITHINJI vs MUMIAS SUGAR COMPANY LIMITED*** ***(Nairobi Civil Appeal No.194 of 1991*** (Unreported) and ***DAVID CHEGE MWANGI vs UNIVERSITY OF NAIROBI*** ***Civil Appeal No.144 of 1995.***

Touching on the reasons for dismissal, it is again clear from the evidence that what provoked

the suspension and finally the dismissal, was the unsatisfactory performance of the respondent concerning the importation of SEPU goods following investigations that the letter of exemption had also been used to import other containers quite apart from SEPU imports and as a result, taxes had been evaded by the importers. Upon being asked to explain in writing, the respondent did not give a satisfactory answer. It is quite clear from the recorded evidence that the suspension, reinstatement and dismissal were based on the results of the ongoing investigation which took a long time and the decision by the appellant as an employer was based on the investigations. The appellant had in its possession the Efficiency Monitoring Unit report on the pertinent issues. It is also evident that the appellant did substantially follow the procedure outlined in the Code of Conduct in laying a charge against the respondent and requesting a written explanation coupled with the deliberations of the Staff Committee and the Board. It is also clear to us that the fact that the persons involved in the evasion of duty were acquitted after proof of payment of duty after the event, did not absolve the respondent as far as his employer was concerned because the respondents' duties included research and inquiries meant to prevent and to detect tax evasion. Thus, the appellant sought a written explanation and thereafter advised the respondent on his right of appeal which he invoked but his appeal was rejected.

It is clear to us that both liability and the quantum of damages in this matter were based on two submissions of counsel which included the additional amendments to the plaint and which the court, wrongly in our view, misapplied as the law. The two submissions by the respondent's counsel are these:-

(i) "The appellant's (sic) contract of employment with the appellant was for an indefinite period with an element of permanency and a degree of security of tenure achieved through the (sic) its code of conduct which forbids the appellant from terminating employment of any employee without a strict adherence to the rules of natural justice; for this proposition, he is relying on the well known decision of this Court. *Alfred, J. Githinji vs Mumias Sugar Company Ltd,Civil Appeal No. 94 of 1991;* ***however, unlike the plaintiff in that case, the appellants claim is based on concurrent liability in contract and tort as demonstrated below, in such cases, a plaintiff is entitled to take the most advantageous redress and the respondent sought and obtained redress for the tort of misfeasance in public office.***

(ii)The applicant is a public authority established by *section 3* ***of the Kenya Revenue Authority Act and given powers to promote public interest or good; it is under a common law duty*** *not to use its public power to destroy the careers of any of its employees* ***through either maliciously targeting them for destruction or a reckless application of its disciplinary procedures; the appellant breached both duties; it targated the respondent's career with it for destruction or acted recklessly in the handling of the purported disciplinary proceedings and thereby committed the tort of misfeasance in public office."***

Briefly summarized, the respondent contended that the termination of the respondent's employment was wrongful and that the termination was both a breach of contract and also a commission of the tort of misfeasance in public office.

As stated earlier, it was the superior court's finding that, the appellant had violated rules of natural justice, firstly because the said rules were implied in the Kenya Revenue Authority Act by virtue of this Court's decision in the case of ***Onyango vs Attorney General [1987] KLR 711*** and consequently ***clauses 3.2(1)*** and ***3.2(5)*** of the Code of conduct failed to provide that if the respondent/employee were to be disciplined, he must be supplied with the prejudicial report on the alleged offence and the employers defence was to accompany such a report from the Human Resources Department and since such report was not availed to the Staff Committee the disciplinary procedure as per the Code of Conduct violated limbs 4,5 and 6 of the requirements of natural justice as set out in the case of ***Desouza vs Tanga County Council (1963) 1EA-377*** at page ***387*** and secondly, the rule against bias which was implied by ***rule 3.4(2)*** of the Code of Conduct required that both the Staff Committee which heard the complaint and the Board of Directors which was the appellate body should not have had an overlap of members so as to ensure that the appeal was heard by an independent Board of Directors.

Arising from the above, the respondent's strong contention was that the respondent's case fell within the principle established by the House or Lords in the case of ***Herderson vs Merrett (1994) 2 ALL***

ER 506 that where there is concurrent liability under tort and contract arising from the same facts, the plaintiff is entitled to take the remedy which is most advantageous to him. In this regard, the respondent submitted that this Court in the case of ***Obongo vs Municipal Council of Kisumu (1971) EA at page 91,*** held that exemplary damages will be awarded in Kenya in torts where there is appearance of arbitrary or unconstitutional actions by the servants of government and therefore the facts of the case before the Court fell for determination along similar lines as in both the ***Herderson*** case and the ***Obongo case***.

With respect, the above submissions as stated elsewhere in this judgment are not based on any factual or evidentiary foundation of this case. As stated elsewhere, the termination was based on the contract between the parties and its invocation by the appellant to terminate or dismiss the respondent cannot constitute an actionable tort just because the appellant happens to be a creature of statute. The principle in the ***Herderson case*** is therefore inapplicable. In our view, the acceptance and application by the superior court of the above submissions, was tantamount to rewriting for the parties the contract of employment for which there was no justification. On the facts and evidence as recorded, we find no serious violation of the Code of Conduct on the part of the appellant except the fact that the appellant did swing from one remedy to another that is, suspension, reinstatement, termination and dismissal, but all these steps were within the ambit of the contract of employment and were perfectly available to the employer. We think that, in the circumstances, the appellant should have demonstrated consistency in its choice of the remedy at the earliest time possible, so as to enable the respondent to plan his future professional life. As concerns the overlapping membership of the Staff Committee and the Board of *Directors* we do have some sympathy for the view of the respondent's counsel that it was not shown whether the Board consisted substantially the same membership as the Staff Committee. In our view, it was implied in the contract of service or the parties contemplated at the time of making the contract that the membership of the appellate body would be as far as it is practicable different from that of the Staff Committee otherwise it would not have been necessary to provide for the two disciplinary organs. The onus was on the appellant to show that the appeal was handled in accordance with the contract. We do not think that the onus was discharged. Nevertheless, we find no action or step taken by the appellant which could convert the disciplinary measures into the tort of misfeasance in public office as held by the Court. By analogy if there was no tort, the respondent never had the option to choose the most advantageous remedy and his choice could only arise from the contract. In the case of ***Central Bank of Kenya vs Nkabu [2002] EA 34,*** this Court in a somewhat similar situation involving a contract of employment entered into by the Central Bank and its employee held:-

"Although section 13 of the Central Bank of Kenya Act empowers the Management Board of the Bank to make rules and regulations to govern employment of staff and related matters, such regulations are not in the nature of Subsidiary Legislation. If that were so they would have been made part of the Act but they are not ……. That being our view of the matter, we hold that the respondent's case is not different from those covered by the authorities which Mr Ougo cited to us. It then follows that in the absence of any other proper basis for departing from those authorities some which were cited to the trial Judge, the learned trial Judge erred by computing damages beyond the notice period. In view of the conclusions, we have come to, above, we are of the view and so hold that, on the assumption that the respondents dismissal was wrongful he is only entitled to damages equivalent to the salary he would have earned for the period of notice, namely, three months and that the trial Judge erred in awarding him more."

We repeat those findings and apply them to the circumstances of this case. We further agree with the learned counsel for the appellant that even if the tort of misfeasance in public office was established on the basis of the facts in the matter before us, it would not lie against the appellant as a public body and that it would only lie against a public officer of the appellant, whereas, in this matter the suit had been filed against the appellant. In our view, the concept of abuse of power in this country is very well taken care of under the superior court's

judicial review jurisdiction which is not what is being canvassed in this appeal. Thus, in the case of ***Calverley & others vs Chief Constable of Merseyside Police & Others appeals [1989] ALL ER 1025*** the court held that, for the tort of misfeasance in public office to be proved it had to be shown at least that a ***public officer*** had done in bad faith or possibly, without reasonable cause, an act in the exercise or

purported exercise of some power or authority with which he was clothed by virtue of the office he held. Similarly, in the case of ***Three Rivers District Council & others vs Bank of England [1996] 2 ALIL ER 58*** the court observed that the tort of misfeasance in public office was concerned with a deliberate and dishonest wrongful abuse of powers given to a ***public officer*** and the purpose of the tort was to provide compensation for those who suffered loss as a result of abuse of such power. The facts in the case before us fall outside the parameters set out in the two cases.

As observed elsewhere in this judgment, the introduction of a constitutional dimension concerning the right of hearing into a contractual setting was a misapprehension of the law. This view has the solid backing in the case of ***Watkins vs Secretary of State for the Home Department and Others [2004] 4 ALL ER 1158*** where it was held that infringement by a holder of a public office of a right identifiable as a constitutional right, together with the requisite mental element could give rise to a cause of action for the infringement of that right. There was no infringement of a constitutional right in the matter before us. Any departure by the appellant, as employer, from the strict provisions of the Code of Conduct would in a worst case scenario, only constitute a breach of contract and such a breach would spring from a contractual obligation and not from exercise of power conferred by statute or the Constitution.

Indeed, the contractual nature of the disciplinary process invoked by the appellant has been summarised by the respondent's counsel in his written submissions as follows:-

1. "On 19th April 2000, the appellant was suspended from employment by a letter for which was exhibited in the superior court.

2. On 3rd May, 2000, the suspension was lifted and the appellant transferred to tax program office, KRA on 2nd June 2000. In the same year, 7 persons whom the respondent identified as suspects were charged with evasion of duty in the Chief Magistrate's Court Criminal Case No. 1018 of 2000 allegedly because taxes due to the government had not been paid. This state of affairs led to the second suspension of the respondent and *rules 3.2.2* ***at*** *3.2.3* ***of the Code of Conduct were invoked that the respondent be charged and he be required to defend himself.***

3. On 22nd January 2001 the respondent sent his written defence to the Chief Human Resource & Administration Manager and the matter was at that point referred to the Staff Committee of the appellant.

4. On 18th January 2001, the Staff Committee, found that the respondent had committed the charged offence and recommended the respondent's dismissal.

5. A dismissal letter was issued to the respondent.

6. The respondent appealed against the decision in writing.

7. The Staff Committee considered the appeal and dismissed it in writing.

8. The respondent filed suit the subject matter of this appeal on 5th July, 2002."

From the above outline, it is evidently clear to us the respondent's dismissal was done pursuant to a contractual provision.

Turning to the respondent's cross appeal, the gist of it is that the learned Judge erred in awarding damages to the tune of Kshs.28,883,712.00 but should have awarded Kshs.91,629,856.00 made up as follows:-

a. Special damages pension – Kshs.3,599,856.00

Leave allowance ***Kshs. 30,000.00***

b. General damages for destruction of

a career or for misfeasance in public office ***Kshs.87,000,000.00***

c. Exemplary damages ***Kshs. 1,000,000.00***

d. ***Interest from the date of judgment.***
Kshs.91,629,856.00

The grounds for the cross appeal were:-

a. That the damages awarded to the respondent are not such as to place him in the same position as if his contract of employment had been performed.

b. As an alternative to (a) above, the damages awarded to the respondent were not such as to put him in a good position as if no tort had been committed.

c. The learned Judge erred in not applying the measure of damages applicable to the tort of misfeasance in public office.

d. The learned Judge erred in not holding that were it not for the unlawful termination of his employment, the respondent would have worked and attained the office of the Commissioner of the Kenya Revenue Authority.

e. The learned Judge erred in not holding that the respondent would have been promoted over time and that his salary would have risen progressively until he was appointed the commissioner of the Kenya Revenue Authority.

f. The learned Judge erred in not holding that where a respondent has two causes of action, the court is obliged to apply the measure of damages which grants the plaintiff the higher compensation for the loss suffered.

As is clear from the grounds as outlined above, the cross appeal is based on the same sinking sand as in the claim itself and must fail for the same reasons.

It is clear to us that the appellant in exercising its powers under the contract did follow the procedure outlined in the Code of Conduct in laying a charge against the respondent. It sought a written explanation and thereafter availed to the respondent the right of appeal which he invoked but his appeal was unsuccessful.

On the issue of the quantum of damages awarded the superior court was not justified in awarding general damages in respect of an alleged breach of a contract of service. By so doing, the superior court overlooked a long line of authorities cited to it by the appellant counsel touching on this well trodden area of law. In our view, the respondent's entitlement in the circumstances was six months' salary in lieu of notice and only for the reason mentioned above that there was a violation of the contract of service because the appellant did not sufficiently explain the apparent overlap of the membership of the Staff Committee and the Board.

We have no hesitation in stating that on the basis of the evidence, the appellant's conduct could

not be said to be oppressive, arbitrary or unconstitutional. Yet it is clear to us that it is for this reason the court held that there was tortious liability by the appellant, and proceeded to award exemplary damages.

As held in the celebrated case of ***Rookes vs Barnard [1964] I ALL ER 367,*** there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant's conduct had been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff. None of these ingredients was in existence in the matter before us. The principles enunciated in ***Rookes vs Barnard*** were followed by this Court in the cases of ***Haria Industries vs P.J. Products Limited, [1970] E.A. 367*** and in ***Obongo & another vs Municipal Council of Kisumu, [1971] E.A.91.*** For this reason we think that the award of exemplary damages was a serious error.

On the issue of the superior court's delegation of judicial powers to the Deputy Registrar at page 814 of the judgment under the heading – ***Grant of Remedies***, although the Court expressed itself as having awarded one head of damages namely exemplary damages, in the sum of 1 million and as regards the other heads of damages, the court went on to state – "***the Court's award of damages is as follows: 1,2,3,4,5 and 6***." According to the superior court what it had delegated to the Deputy was the "***calculation***" of those other heads, a task the court considered purely ministerial and within the mandate of the Deputy Registrar. With respect, it was erroneous to convert a judicial function into a ministerial function. Both the award and the level or quantum of damages is in our view, judicial functions which the superior court cannot rightfully delegate to a Deputy Registrar. Indeed, both aspects are appealable to this Court and not to the superior court whereas orders of the Deputy Registrar under ***Order 48*** are appellable to the superior court. The Deputy Registrar's ministerial powers are set out in ***Order 48***. There is no provision in law for delegating any judicial functions to the Deputy Registrar. Any such delegation would be a nullity. A judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it.

Assessment of damages is not a ministerial act as envisaged by ***Order 48*** of the Civil Procedure Rules and a direction to "assess" or "calculate" damages in a judgment

would be contrary to the requirements of ***Order 20*** of the Civil Procedure Rules because it would be incomplete without the assessment and would patently be a nullity. In the case of ***Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited, Civil Appeal No. Nai 358 of 1999*** (unreported) where a Deputy Registrar had delivered a judgment of the superior court this Court did hold that the Deputy Registrar had no such power under either ***Order 20 rule 2*** or ***Order 48***. Similarly, in the case of ***Kola Chacha v Kenya commercial Bank limited & another, (KSM) Civil Appeal (Application) No. 342 of 2001*** where the judgment, the subject matter of the appeal, was undated and was delivered by a deputy registrar in breach of ***Order 20 rule 3***, the Court held that ***Order 48*** of the Civil Procedure Rules did not give the registrar any power or authority to read and date a judgment of a Judge.

Finally, in the case of ***Herbert Asava & 10 others vs Timothy Vilindi & 3 others, Civil Appeal No. 196 of 2000*** (unreported) in which a judgment of Mbito, J. was delivered by a Senior Resident Magistrate, this Court allowed the appeal on the ground that the judgment was a nullity.

For the foregoing reasons, we consider the delegation of the assessment or quantification of damages a more serious judicial function than the signing or delivery of judgments by a Deputy Registrar and therefore we would allow this appeal on this ground as well.

In conclusion, it is our finding that the superior court failed to take into account the evidence adduced in Court concerning the contract between the two parties and as a result, seriously misdirected itself on the applicable law.

It is also our finding that the appellant was in breach of the contract in not keeping the two disciplinary bodies separate as far as it was practicable and accordingly, we find that it should have terminated the contract by giving a reasonable notice which we hereby set at six months. The cross appeal is dismissed

for the same reasons.

The upshot is that, the appeal is allowed and the judgment of the superior court is set aside in its entirety. In substitution thereof, we award to the respondent six (6) months' salary in lieu of notice in the sum of Kshs.527,794.20 together with the respondent's own contributions to the pension fund in the sum of Kshs.1,387,658.80 with effect from the date of this judgment.

Ordinarily, the general principle on costs is that they follow the event and therefore the appellant would have been entitled to the costs of the appeal as it was substantially successful. However, an order for costs in favour of the appellant would not reflect the appellant's own contribution to the dispute as stated earlier. In the circumstances, the order that commends itself to us is that the parties shall bear their respective costs of this appeal and in the court below.

It is so ordered.

DATED and delivered at Nairobi this 16th day of July, 2010.

R.S.C. OMOLO

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JUDE OF APPEAL

P.N. WAKI

……...…….

JUDGE OF APPEAL

J.G. NYAMU

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR