



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 873 OF 2017**

**[Previously Mombasa H.C.C.C Number 232 of 1999]**

**BETWEEN**

**BOAZ MAKOMERE.....CLAIMANT**

**VERSUS**

**1. CONSOLIDATED [MSA] LIMITED**

**2. THE ATTORNEY GENERAL.....RESPONDENTS**

*Rika J*

*Court Assistant: Benjamin Kombe*

*M. Ananda & Company Advocates for the Claimant*

*Aboo & Company Advocates for the 1<sup>st</sup> Respondent*

*Attorney-General Office Mombasa, for the 2<sup>nd</sup> Respondent*

**JUDGMENT**

1. The Claimant initiated this Claim through a Complaint, filed at the High Court Mombasa some 20 years ago, on 21<sup>st</sup> May 1999. Children born at the time are today almost through with their University Education. The Claim has been handled by various Honourable Judges of the High Court, including Hayanga, Seronoi, Njagi, Maraga [now Hon. CJ], Waki, Khaminwa, Azagalala, Ibrahim, Nzioka, Mwangi, Muya, Kasango, and lastly P.J. Otieno. Literally every Judge who has worked at the Mombasa High Court Civil Division, in the past 20 years, has had something to contribute in this dispute. It is not clear why the dispute was not concluded earlier at the High Court.

2. Parties had as of 31<sup>st</sup> May 2016, substantially given evidence. Proceedings were on the verge of closure, when the High Court, with the concurrence of the Parties, determined that it did not have jurisdiction, and transferred the matter to the Employment and Labour Relations Court. This determination was made in 2016, while the Claim was filed in 1999. It is not clear again, why Parties took years, to realize they were in the wrong jurisdiction. Why would the High Court declare it has no jurisdiction even after recording evidence from the Parties as late as the year 2012?

3. The Certificate of Service issued upon the Claimant by the 1<sup>st</sup> Respondent indicates:-

Name of Employer: Consolidated [MSA] Limited.

Name of Employee: Boaz O. Makomere.

Date of employment: 15<sup>th</sup> April 1991.

Date of termination: 19<sup>th</sup> July 1997.

Position at termination: Warehouse Manager.

Job description: Managing of Tea Warehouse in Mombasa.

4. These facts are uncontested.

5. The Claimant avers that on or about 15<sup>th</sup> July 1997, the 1<sup>st</sup> Respondent wrongfully directed Police Officers to arrest the Claimant, and place him in custody until 18<sup>th</sup> July 1997.

6. He was arraigned in Court and charged with the offence of stealing by servant on 18<sup>th</sup> July 1997. He was found by the Court to have no case to answer, and acquitted on 6<sup>th</sup> July 1998.

7. The 1<sup>st</sup> Respondent unlawfully and without just cause, terminated the Claimant's contract of employment, as soon as he was arraigned in Court, on 19<sup>th</sup> July 1997. The Claimant was not paid his salaries, gratuities, allowances, commissions and/or any agreed benefits upon termination.

8. The Claimant avers he was wrongfully imprisoned, maliciously prosecuted, and his credit, character and reputation injured. He was brought into public scandal, ridicule and contempt. He is a University Graduate, and his character was tarnished in the eyes of colleagues and general public. He was unable to secure another job, despite making several attempts to secure one. He suffered mental and bodily pain and anguish. He was put through considerable trauma, inconvenience and anxiety. He suffered loss and damage.

9. His salary as of the date of termination was Kshs. 71,400. He was entitled to commission of 2% of the profits realized by the 1<sup>st</sup> Respondent annually.

10. He prays for Judgment against the 1<sup>st</sup> Respondent as follows:-

- a. Loss of salary at the rate of Kshs. 71,400 from 19<sup>th</sup> July 1997 to-date.
- b. Loss of commissions earned at Kshs. 222,003.
- c. Gratuity and service pay at 15 days' salary for completed years at Kshs. 214,200.
- d. Commission for 1996 at Kshs. 888,012.
- e. Commission for 1997 at Kshs. 666,009.
- f. General Damages for breach of contract.

11. Against both Respondents, the Claimant seeks:-

- g. General damages for unlawful arrest, false imprisonment and malicious prosecution.
- h. Costs of and incidental to the Claim.
- i. Interest at the rate of 32% per annum

12. The 1<sup>st</sup> Respondent filed its Statement of Defence on 7<sup>th</sup> July 1999. Its position is that any acts taken against the Claimant by the 1<sup>st</sup> Respondent, were reasonable and justified, and expected of a prudent and vigilant Employer. The prosecution of the Claimant was beyond the control of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent denies liability in having the Claimant maliciously prosecuted. Termination was fair and lawful. The Claimant was paid terminal dues. He acknowledged receipt. The Claim is scandalous, in gross abuse of the court process and fraudulent in nature. The Plaintiff consists mere narrations and does not disclose reasonable cause against the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent prays the Court to reject the Claim with costs.

13. The 2<sup>nd</sup> Respondent filed its Statement of Defence on 1<sup>st</sup> December 1999. Its position is that a complaint was lodged by the 1<sup>st</sup> Respondent's agent, against the Claimant, with the Police at Changamwe, Mombasa. The 2<sup>nd</sup> Respondent did not wrongfully direct the Police to act against the Claimant. The Police acted based on honest and reasonable opinion that the Claimant had committed an offence of stealing by servant. Investigations were carried out before arrest and arraignment of the Claimant. His acquittal was based on the Court's own assessment of the evidence availed before it. The 2<sup>nd</sup> Respondent denies that the Claimant was wrongfully imprisoned. The Claim has no merit and ought to be dismissed with costs.

14. The Claimant testified that he was appointed by the 1<sup>st</sup> Respondent in 1991, through a letter of appointment, exhibit 1 of his documents. He rose through the ranks to become Warehouse Manager. His salary was reviewed gradually. His last salary was Kshs. 71,400 monthly.

15. 2 persons presented themselves at the 1<sup>st</sup> Respondent's Warehouse. They had documents used to remove tea from the Warehouse. They claimed they had been sent there by owners of the tea. They came in a Truck ready to ferry the tea.

16. The Warehouse Keeper became suspicious, as the Truck used did not belong to the owner of the tea. He therefore called the Claimant. It was the Claimant who alerted the owner of the tea. The owner said he had not sent anyone to collect the tea. The Claimant went to the Warehouse after reporting the occurrence to Changamwe Police Station. At the Warehouse he found the owner, and some Police Officers. 2 suspects had been arrested. They included Isaac Kioko, an Employee of the 1<sup>st</sup> Respondent. Kioko was a Messenger at 1<sup>st</sup> Respondent's Head Office in Shimanzi, Mombasa. Kioko told the Claimant and the Police, that he and the other suspect, intended to steal the tea. The Claimant briefed the 1<sup>st</sup> Respondent's Chairman James Marbils. The Claimant directed Security Personnel to take in the suspects.

17. The Claimant then had lunch with 1<sup>st</sup> Respondent's Director Dr. Nesbitt. After lunch, he encountered Police Officers who informed him they had come to arrest him. It was alleged that the Claimant had been implicated by the other suspects. The Claimant was detained by the Police for 14 days. He was later charged together with Kioko. He was released on bond. He was locked out by the Directors. He kept away from the office until he was advised by the Directors that his contract had been terminated.

18. He was paid 3 months' salary in lieu of notice; annual leave; and sundry- all at Kshs. 203,906.

19. He was denied 2% of the gross profit of the Company, in commissions. For 1996, this amounted to Kshs. 888,012, and Kshs. 666,009 in 1997. The total was Kshs. 1,554,021, payable immediately after audit. The Claimant relied on an unsigned audit report by Gill & Johnson. This report showed the 1<sup>st</sup> Respondent owed the Claimant and other Employees commissions. There was a 2<sup>nd</sup> report. The Claimant demanded for these commissions in writing, but was never paid.

20. Relying on his exhibit 9[a] [b] and [c], the Claimant testified that he earned commissions in 1994 and 1995 at 1% and 2% gross profit respectively. These were paid with the monthly salary. The commissions were based on the contract between the 1<sup>st</sup> Respondent and the Claimant. The 1<sup>st</sup> Respondent made profits over the years the Claimant seeks commissions. He was the Manager and received Financial Statements showing profits made. The Financial Statements were signed by the Senior Accountant and the Managing Director. The Company made gross profit before tax, of Kshs. 25 million.

21. The Claimant was instead offered bonus of Kshs. 100,000. He was told by the Operations Director that this was based on the 1<sup>st</sup> Respondent's performance for 1996. The bonus represented Claimant's 2 months' salary. Dr. Nesbitt told the Claimant that 1<sup>st</sup> Respondent's Board had agreed to pay to the Claimant Kshs. 100,000 in bonus.

22. The Claimant rejected the offer of bonus. He was paid terminal dues at Kshs. 203,906, salary arrears at Kshs. 13,925 and provident funds at Kshs. 474,905- total Kshs. 488,200. This did not include commissions.

23. The Claimant was charged in Court on 18<sup>th</sup> July 1997 and dismissed from employment on 19<sup>th</sup> July 1997. He was acquitted on 6<sup>th</sup> July 1998. He went to work on the date he was acquitted. He was restrained by the Managing Director. The circumstances in which the attempt to steal tea was made, was known to the 1<sup>st</sup> Respondent.

24. The Claimant was not able to find another job, because the criminal trial left his reputation in tatters. He applied for jobs with Companies he named as Mitchell Cotts, Cause Wood, Metal Box Kenya, Signon and Vesta Guard. He was turned down because of the criminal prosecution.

25. Cross-examined by the Advocate for the 1<sup>st</sup> Respondent, the Claimant testified the Terms of Agreement, did not have a provision for commissions. The Claimant was advised he would get commission of 2% in 1995. He understood this to mean he would receive this percentage henceforth. He had earlier agreed that the Board would determine payable commission. The commission was not discretionary. It had become part of the contract. On certain occasions, commission was referred to as bonus.

26. The letter of promotion from Assistant Manager to Manager, did not mention commissions. The letter offering commission was separate from the contract. The documents presented by the Claimant to Court, were draft accounts. They could not be used for purposes of tax assessment. They are not final accounts. The Claimant was offered bonus of Kshs. 100,000 which he rejected.

27. The suspects in Court were Kioko and the Claimant. Earlier it was Kioko and Gondi. He was told by the Police that Kioko recorded a statement, saying the Claimant had instructed him to steal. Kioko changed his story during trial. Kioko changed plea and was fined. Kioko was not responsible for the Claimant's arrest. The Claimant has not sued Kioko as Kioko was merely an Employee of the 1<sup>st</sup> Respondent.

28. Upon cross-examination by the State Counsel for the 2<sup>nd</sup> Respondent, the Claimant confirmed that he instructed the Police to take away Kioko, and another undisclosed suspect, at the Warehouse. Later, the Police came for the Claimant. They did not use force in arresting the Claimant. The Claimant recorded a statement. Police Officers were merely discharging their public duty. They were law enforcement agents. When they charged the Claimant, they were not merely discharging their public duty. The Police knew of the circumstances surrounding the incident. When they went to arrest the Claimant, they had information from Kioko and Gondi. They were still investigating when they arrested the Claimant. Malice was shown by the Police because they charged the Claimant based on false information.

29. The Claimant secured another job in October 2000. He had unsuccessfully sought employment between 1997 and 2000. He has his own company which does clearing and forwarding. In 2000, he was employed by Agent Cargo Handling as a Manager. He left the Company in June 2002. Kioko exonerated the Claimant, admitted guilt and was fined Kshs. 20,000 by the Criminal Court. The Claimant was acquitted.

30. Redirected, the Claimant told the Court that not all terms of employment were captured in the letter of employment. His salary was

enhanced outside of the letter of employment. He asked for and was granted commissions subsequent to the letter of employment. The initial commission was at 1% of the 1<sup>st</sup> Respondent's gross profit. It was increased to 2%. It was not a piecemeal award. It was a term of contract, negotiated and incorporated in the contract by the Parties. There was malice in the prosecution of the Claimant. He did all he was obliged to do as the Manager, to ensure the suspects were arrested. Gondi was not charged.

31. CW 2 Joseph Justine Ogowapit told the Court he operated his own Company called United E.A. Warehouses Limited. Tea Warehouses do shipment for foreign countries. Ogowapit worked for the 1<sup>st</sup> Respondent, in 1995. He joined the 1<sup>st</sup> Respondent as a Managing Director. He found the Claimant already working for the 1<sup>st</sup> Respondent. The Claimant's duty included receipt and handling of tea shipment at Shimanzi and Changamwe Go-downs.

32. There were 4 Senior Managers: Operations Manager Richard Tole; Warehouse Manager Makomere; Accounts Assistant John Mutie; and Security Officer Morris Odoni.

33. Morris would oversee all Security Guards. The Guards carried out patrols. Ogowapit was in hospital when attempted theft of tea took place. He learnt later that the Claimant was arrested over the incident.

34. Ogowapit was aware about commissions. It was 1<sup>st</sup> Respondent's policy to pay commissions. Senior Managers were paid commission out of profit before tax. Ogowapit, the Claimant and other Managers were paid commission for 1995/1996. They were not paid in 1996/1997. Ogowapit produced the Financial Statement supporting the claim for commissions.

35. On cross-examination by the 1<sup>st</sup> Respondent's Advocate, Ogowapit told the Court Bonus was payable to all staff and commission to Senior Managers only. Bonus was discretionary. Commission was an entitlement. Managing Director was entitled to 4%, and other Senior Managers to 2%. It depended on profit. If the 1<sup>st</sup> Respondent did not make a profit, there was no commission. If commission was withdrawn, the beneficiaries would be advised accordingly. The statement of accounts produced by Ogowapit was in draft form. Audited accounts would be the final ones. Ogowapit was summarily dismissed in 1997. He was not paid commission for 1995/1996. He did not recall if payment was made for 1997. He did not recall if he was paid terminal dues.

36. No questions arose from the Attorney-General to Ogowapit.

37. Redirected, the Witness confirmed there was no withdrawal of commission, and no change from the rate of 2% of the gross profit. At the time Ogowapit signed the draft accounts as Managing Director, he believed the accounts reflected a true picture of the 1<sup>st</sup> Respondent's financial performance.

38. The Claimant closed his case on 1<sup>st</sup> December 2011.

39. 1<sup>st</sup> Respondent's Witness, Bakari Omari Bweta, gave evidence on 29<sup>th</sup> October 2012. He worked for the 1<sup>st</sup> Respondent, as Human Resource Manager, from April 2007. He knew the Claimant.

40. Before joining the 1<sup>st</sup> Respondent, Bweta was Branch Secretary of the Kenya Union of Commercial, Food and Allied Workers [KUCFAW].

41. The Claimant worked for the 1<sup>st</sup> Respondent from 1991 to 1997- a period of 6 years. There was an attempted theft of 180 bags of tea at 1<sup>st</sup> Respondent's Warehouse in 1997. Police investigated. The Claimant was implicated by another Employee, Isaac Kioko. The 1<sup>st</sup> Respondent did not have anything to do with his arrest and prosecution. The 1<sup>st</sup> Respondent's Board terminated Claimant's employment. The Claimant earned a monthly salary of Kshs. 71,400 as at the time of termination.

42. The Claimant was offered bonus for the year 1996 at a flat rate of Kshs. 100,000. It was not based on anything. Bonuses were payable to supervisory staff. The Claimant declined payment of bonus. The cheque for the sum of Kshs. 100,000 was left in offices of the 1<sup>st</sup> Respondent's Advocates.

43. Bweta told the Court he found Claimant's employment records at the workplace, when he was employed in 2007. These records show what happened leading to Claimant's dismissal. He was aware that the Claimant was charged with Kioko. The Claimant was acquitted. According to the records, it was not the Claimant who called in the Police. Bweta was not aware of commissions payable to Senior Managers. The Claimant was paid commission in 1995. He was not paid in 1997. The Claimant was not denied commission.

44. Dr. Nesbitt, 2<sup>nd</sup> Witness for the 1<sup>st</sup> Respondent, was the only Witness who testified before the Employment and Labour Relations Court. He did this on 4<sup>th</sup> December 2018. The 2<sup>nd</sup> Respondent did not call Witnesses and the hearing closed on 4<sup>th</sup> December 2018.

45. Nesbitt told the Court he is currently involved in sports tourism. At the material time, he was a Director of the 1<sup>st</sup> Respondent.

46. He worked with the Claimant. The Claimant was the Warehouse Manager, Nesbitt the Operations Director. The Claimant worked between 1991 and 1997. His contract was terminated because of a criminal case.

47. The 1<sup>st</sup> Respondent did not have anything to do with Claimant's arrest. He was implicated by a messenger, Kioko. Police arrested the Claimant, without the instructions of the 1<sup>st</sup> Respondent.

48. The Claimant's contract was terminated by the 1<sup>st</sup> Respondent effective 19<sup>th</sup> July 1997. This was on the ground that he was implicated in theft.

49. The Claimant was paid, and acknowledged payment of terminal dues. He declined bonus payment. He was issued Certificate of Service.

50. The Board resolved in its meeting of 19<sup>th</sup> July 1997, that it should pay commissions based on the worth of the staff. The Claimant was offered Kshs. 100,000 with regard to 1996. He declined the bonus. He wanted more. Bonus is discretionary.

51. The Financial Statement relied upon by the Claimant was in draft form. It has no standing. The Claimant was not entitled to commission in 1996- but bonus. The 1<sup>st</sup> Respondent could not compel the Claimant to receive bonus.

52. Nesbitt testified on cross-examination by Claimant's Advocate, that he joined the 1<sup>st</sup> Respondent in 1996. The Claimant was already in employment.

53. Nesbitt did not know who called the Police, when theft was reported. He was aware the Claimant was acquitted with no case to answer. The 1<sup>st</sup> Respondent could not retain the Claimant, while the criminal case was ongoing.

54. The Board meeting of 19<sup>th</sup> July 1997, did not mention Claimant's termination. The letter of termination states the Board resolved to terminate. The Board did not mention termination and only followed what was in its agenda.

55. Termination was not malicious. Offer of bonus was not malicious. Difference between commission and bonus is a matter of semantics. Nesbitt was aware that the former Managing Director, Ogowapit gave evidence. He was not aware that Ogowapit stated commission was an entitlement.

56. The Claimant was paid 2% commission for 1995. The 1<sup>st</sup> Respondent made profit in 1995/1996. Nesbitt was not aware that the Financial Statement produced by Ogowapit was accepted by the Court as best form of evidence

57. Cross-examined by the State Counsel, Nesbitt told the Court that the 1<sup>st</sup> Respondent offered Witnesses to the Police. Police could not have approached the 1<sup>st</sup> Respondent, without a report made by the 1<sup>st</sup> Respondent.

58. Redirected Nesbitt testified that Ogowapit was in the Board meeting which resolved payment of bonuses. The 1<sup>st</sup> Respondent did not state that the Claimant stole; arrest was based on police investigations.

59. The issues as understood by the Court are:-

**§ Whether the Claimant's arrest and prosecution was malicious, wrongful and injurious to the Claimant.**

**§ Whether termination of his contract was unlawful.**

**§ Whether he is entitled to commissions, arrears of salary, gratuity and service pay, and damages for false imprisonment, malicious prosecution and breach of contract.**

**The Court Finds:-**

60. The Parties do not disagree on the employment history of the Claimant, the last salary payable to him monthly, and his designation as of the date he left employment. It is similarly not disputed that his contract was terminated by the 1<sup>st</sup> Respondent on 19<sup>th</sup> July 1997, the Claimant having been arraigned before the Court for the offence of stealing by servant the previous day, 18<sup>th</sup> July 1997.

61. There are prayers which are far removed, from the oral evidence adduced by the Parties and their respective Witnesses, as well as the evidence contained in the documents on record.

62. There is no support at all, for gratuity and service pay. The Claimant has not shown the Court any clause in his contract of employment, as originally crafted or subsequently varied, granting to him gratuity or other form of service pay. He has not alluded to any law, allowing the Court to grant these prayers.

63. The prayer for salary arrears is based on the period between the date of Claimant's arrest, and the date of Judgment. He pleads he is entitled to Kshs. 71,400 monthly, from 1997 to-date.

64. The Claimant's contract was terminated on 19<sup>th</sup> July 1997, a day after he was arraigned in Court for the offence of stealing by servant. He was aware there was no mutuality of obligations from 19<sup>th</sup> July 1997.

65. His acquittal on 6<sup>th</sup> July 1998 by the Criminal Court did not have the effect of reconstructing the contract that was terminated on 19<sup>th</sup> July 1997. It did not reinstate the Claimant to where he was on 18<sup>th</sup> July 1997, so as to justify payment of back and front salaries. The Claimant was paid salary for days worked in July of 1997, and has no justification to demand other unpaid salaries. The prayer for arrears of salary is declined.

66. With regard to commissions, the Claimant moved the 1<sup>st</sup> Respondent for payment of commissions, in his letter dated 3<sup>rd</sup> November 1993. He writes:

*“ I write to humbly draw your attention to the above [commission to management] which entails payment of certain percentages of the Company’s annual profits before taxation to Senior Management Staff.*

*Sir, since my appointment as the Assistant Warehouse Manager in April 1991, I have never received my share of the aforementioned commission which I believe I am entitled to.*

*I would be most grateful if you would kindly enlighten me on the Company’s position in this matter.”*

*Yours faithfully,*

*B.O.Makomere.*

67. The 1<sup>st</sup> Respondent replied in a letter dated 8<sup>th</sup> November 1993, as follows:-

*“I refer to your letter of 3<sup>rd</sup> November.*

*You are not entitled to any share of profits as commission. However, your letter will be put before the Board in due course, for consideration in respect of 1994 and subsequent years.”*

*Yours faithfully,*

*T.S. Aikman.*

68. In the pay slip of June 1994, the Claimant is shown to have received bonus, not commission, of Kshs. 136,116. In the pay slip of May 1995, he is shown to have received Kshs. 119,020 as bonus. On 20<sup>th</sup> March 1996 the Board Chairman wrote to the Claimant:-

*“ I am happy to advise the Directors have approved that you will be entitled to a profit share of 2% per annum. This will be applicable for 1995 profits.”*

69. From the above mails, it is the view of the Court that commission, which was a term used interchangeably with bonus at the 1<sup>st</sup> Respondent’s business, was not an invariable benefit, incorporated in the Claimant’s contract. It was payable at the discretion of the Board. The 2% commission given in 1995 was peculiar to 1995. Commissions and bonuses are forms of variable pay, contingent on something happening. Commissions are normally paid to an Employee based on sales they bring to the Employer. They can be paid as part of the salary, or separately. Bonuses are paid in addition to one’s salary, as a reward for good performance. It is money, or an equivalent given, in addition to an Employee’s usual salary. Bonuses cannot be an Employee’s sole earnings. In the labour market, we for instance have commission agents, but there is no such thing, as bonus agents. The 1<sup>st</sup> Respondent appears to have at different times paid commissions and bonuses, and assumed they are one and the same thing.

70. On 19<sup>th</sup> July 1997, the day Claimant’s contract was terminated, the Board met and resolved that the 1<sup>st</sup> Respondent would not award commissions to Management Staff, based on a percentage of the profit. It was recommended that Management Staff are paid commissions based on their worth to the 1<sup>st</sup> Respondent. It is not clear how the 1<sup>st</sup> Respondent determined the worth of its Management Staff. The Claimant’s contract was terminated on the date the resolution not to award percentage based commissions, was made. He was worthless to the 1<sup>st</sup> Respondent at the time of the resolution.

71. Nonetheless as can be read from the Board minutes, it was resolved that Ogowapit the Managing Director gets a commission/ bonus of Kshs. 480,000 for 1996/1997; Nesbit Kshs. 320,000; Makomere Kshs. 100,000; B. Swal the Business Manager Kshs. 100,000; and K.Ogada Senior Accountant, Kshs. 75,000.

72. This amount of Kshs. 100,000 is what the Claimant was offered. He declined the amount and asks the Court to award him commissions based on the earlier rate of 2% of the pre-tax profits.

73. The Claimant has not convinced the Court that he was entitled to commissions or bonuses, at 2% of the profits after 1995. The award in 1995 was specific to that period and was given after the Board met and made a decision. The non-percentage based, and more or less ad hoc award of Kshs. 100,000 given to the Claimant, similarly issued through a valid decision of the Board. Commissions and/or bonuses as understood by the Court, were variable, and not part of the principal terms and conditions of service. They were payable at the discretion of the 1<sup>st</sup> Respondent.

74. In January of 1997, the 1<sup>st</sup> Respondent had reviewed the Claimant’s salary from Kshs. 51,000 monthly to Kshs. 71,400. The 1<sup>st</sup> Respondent must have taken into consideration all factors, including Claimant’s demands for profit sharing and the ability of the Respondent to pay, in increasing the Claimant’s salary. His demands for commissions as an invariable form of pay does not look reasonable.

75. And even if it was founded on the contract or established workplace policy, it is not shown that the 1<sup>st</sup> Respondent made profits for the years claimed, to warrant profit-sharing. The Claimant conceded the financial statements he exhibited in Court were in draft form. They were

not the final audited accounts of the 1<sup>st</sup> Respondent. They are not useful in determining if commissions or bonuses were payable as demanded by the Claimant.

76. It is the view of the Court that the 1<sup>st</sup> Respondent was within its prerogative in granting bonus to the Claimant at Kshs. 100,000. The Claim for commissions is declined.

77. Both Respondents did not establish reasonable basis for Claimant's arrest and prosecution. It was the Claimant who called in the Police. The 1<sup>st</sup> Respondent made the complaint and supplied Witnesses to the Police to move forward the process of prosecution. The Claimant had advised Security to pursue 2 suspects- Kioko and Gondi. These are the persons who presented themselves at the Shimanzi Warehouse ready to steal a Client's 180 bags of tea. The Claimant alerted the Client, and did all a reasonable Manager was expected to do.

78. The Respondents did not fill up the Court with adequate evidence on why suspicion shifted to the Claimant. Nothing is said about the letting go of key suspect Gondi, and why the Claimant, Warehouse Manager was put in the place of Gondi to face criminal trial. Either the complainant supplied the Police with false or half-baked information about the Claimant's involvement, or the Police were themselves grossly incompetent and complicit in malicious arrest and prosecution of the Claimant.

79. The Ruling of the Chief Magistrate's Court acquitting the Claimant states several Witnesses testified. It was only PW1 P.C. Martin Sangoro who linked the Claimant with the offence. The link was Kioko who was charged alongside with the Claimant. Kioko told PW1 that he was given the delivery note used in attempting to steal from the Warehouse, by the Claimant. The Court held that the evidence of Kioko could not be relied upon being the evidence of an accomplice. It could only suffice if corroborated in material particular.

80. The Court observed that Kioko was not called as a Witness to implicate the Claimant and be subjected to cross-examination. Kioko pleaded guilty and on mitigation absolved the Claimant. There was therefore no other evidence called to connect the Claimant to the offence.

81. Both Bweta and Nesbitt were not able to link the Claimant to the offence of attempted theft of the tea bags, in their evidence before Court in the current proceedings.

82. In this Court's *Naqvi Syed Qmar v Paramount Bank Limited & Another [2015] e-KLR*, the Court, citing other decisions from Superior Courts in Kenya, held that the Claimant in a Claim for malicious prosecution, must show he was prosecuted by the Respondent[s]; prosecution was determined in his favour; prosecution was without reasonable and probable cause; and prosecution was malicious.

83. There is no denying that the Claimant was prosecuted by the Respondents, and prosecution ended in acquittal.

84. Whether there is reasonable and probable cause, requires the Court to examine whether the material known to the prosecutor, would have satisfied a prudent and cautious man, that the Claimant was guilty of the offence.

85. The Court found there was no material to link the Claimant to the offence, other than the information alleged to come from Kioko, who in his own mitigation exonerated the Claimant. The Respondents did not verify facts before rushing to Court, particularly in light of the Claimant's role in calling the Police and having the initial arrests made. There was no material to lead a prudent and cautious man to believe in the guilt of the Claimant.

86. The Respondents must be shown to have an improper frame of mind in prosecuting the Claimant. The Respondents had 2 suspects who entered the Warehouse driving a Truck, ready to carry out an offence. The 2<sup>nd</sup> suspect was let go, and the Claimant put in the place of the 2<sup>nd</sup> suspect. Charges against the Claimant were not shown to have been preferred for the sole purpose of carrying the law into effect.

87. Police are liable for a tort that has come to be characterized as negligent investigation. They owe a duty of care to suspects. Police become liable when they are sufficiently connected with the laying of the charges, or carriage of the prosecution once started. Why would prosecution against the Claimant continue without any link to the offence, and even after Kioko has exonerated the Claimant in his own mitigation, after pleading guilty? Did the Police have to wait for the Court to find the Claimant was not linked with the offence after Kioko's mitigation? The 1<sup>st</sup> Respondent made the complaint but what link did the 1<sup>st</sup> Respondent provide to the Police, to have a probable and reasonable prospect of a conviction?

88. The Court finds for the Claimant on the prayer for malicious prosecution and false imprisonment. ***He is granted against both Respondents general damages for malicious prosecution and false imprisonment at Kshs. 2,500,000.***

89. Termination of the Claimant's contract took place before the advent of the Employment Act 2007. Submissions made by the Claimant that he was denied procedural fairness under Section 41 of the Employment Act cannot hold. This law was not in place, at the time.

90. The old Employment Act allowed Employers to terminate Employee's contract for just cause, no cause or bad cause. There was no requirement for procedural fairness as known under the current regime. The old Act however allowed the Employee to dispute the correctness of the reasons advanced by the Employer, to justify termination based on summary dismissal for gross misconduct.

91. The Claimant was not allowed any chance to dispute the correctness of the reasons advanced by the 1<sup>st</sup> Respondent, to justify termination.

92. It has also been argued in other decisions of this Court that at the time termination occurred in 1997, there was in place another regime applicable to Unionisable Employees, the Trade Disputes Act, which required Employers to justify termination and accord the Employees fair procedure in termination. There were essentially 2 legal regimes, one espousing the principle of employment-at-will, the other requiring

justification and procedural fairness.

93. There is nothing therefore to prevent the Court from awarding damages today, to an Employee whose contract was terminated unlawfully, if not unfairly in 1997.

94. The Claimant led evidence showing that as a result of 1<sup>st</sup> Respondent's wrongful actions, his employability suffered. He made job applications to various Companies who turned him down based on his criminal prosecution. He only secured employment 3 years later, in 2000.

95. In *Naqvi Syed Qmar* as well as *Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] e-KLR*, the Court held that loss of employability is compensable by an award of damages.

96. ***The Claimant is granted general damages at Kshs. 2,500,000 against the 1<sup>st</sup> Respondent, for breach of contract, unlawful termination and loss of employability.***

97. ***He is allowed costs of the Claim payable by the 1<sup>st</sup> Respondent.***

98. ***Interest is allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED: -

***a. The Respondents shall jointly and severally pay to the Claimant, general damages for malicious prosecution and false imprisonment, at Kshs. 2,500,000.***

***b. The 1<sup>st</sup> Respondent shall pay to the Claimant general damages for breach of contract, unlawful termination and loss of employability at Kshs. 2,500,000.***

***c. Costs to the Claimant payable by the 1<sup>st</sup> Respondent.***

***d. Interest is allowed at 14% per annum from the date of Judgment till payment is made in full.***

**Dated and delivered at Mombasa this 14<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**