



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 215 OF 2014

[Previously Mombasa High Court Civil Suit Number 72 of 2010]

BETWEEN

CYRUS MAINA

NJOROGE.....CLAIMANT

VERSUS

1. THE ATTORNEY- GENERAL

2. KENYA PORTS AUTHORITY.....

RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Munyithya, Mutugi, Umara & Muzna Co. Advocates for the Claimant

No Appearance for the Attorney- General

Addraya Dena Advocate for the 2nd Respondent

JUDGMENT

1. This Claim was filed by the Claimant at the High Court in Mombasa, registered as Civil Suit Number 72 of 2010, on 15th March 2010.

2. The Claimant states he was employed by the 2nd Respondent State Corporation as a Security Officer [Investigations] Grade HM3. He was alleged to have stolen a container from the 2nd Respondent. He was charged at the Chief Magistrate’s Court Mombasa for the offence of stealing. He was acquitted on 17th August 2009. As the criminal case was going on, the Claimant was taken through a disciplinary process at the workplace. The first Committee recommended the Claimant is reinstated, while a second Committee recommended dismissal. Management endorsed the recommendation of the latter. The Claimant states termination was unlawful, and his prosecution malicious.

3. He claims from the Respondents:-

- a) Arrears of salary from September 2005 to the date of decree.
- b) 1 month salary in lieu of notice.
- c) shs. 968,750 in arrears of house allowance from September 2007 to the date of decree.
- d) Gratuity for years worked.
- e) A declaration that termination was unlawful.
- f) General damages.
- g) Special Damages.
- h) Aggravated damages.
- i) Costs.
- j) Interest.
- k) Any other suitable relief.

4. The 2nd Respondent filed an Amended Statement of Defence on 20th November 2012. It agrees to have employed the Claimant, as stated in the Claim. It is denied that the Claimant was maliciously prosecuted. His dismissal was lawful. He was paid full house allowance for the period of suspension. His salary from the date of suspension, September 2005 to the date of dismissal, was Kshs. 1,391,391. After deductions, the Claimant was paid Kshs. 408,352. If the Claimant suffered any public humiliation, the 2nd Respondent did not cause that humiliation; the Claimant brought it upon himself by engaging in criminal activities. Lastly the 2nd Respondent states the Claim was filed in contravention of Section 66 of the Kenya Ports Authority Act Cap 391 the Laws of Kenya, which places a limitation period of 12 months, on commencement of legal proceedings against the 2nd Respondent. The 2nd Respondent urges the Court to dismiss the Claim with costs to the 2nd Respondent.

5. The Claimant was heard, and closed his case, in the absence of the Respondents on 20th March 2015. Parties agreed to have the Claimant's case reopen, in a consent order recorded on 11th May 2015. He was reheard on 30th July 2015 and 13th October 2015, when he rested his case.

6. The 1st Respondent did not participate in the proceedings.

7. 2nd Respondent's Head of Security Sylvester Ndongoli, Security Officers Ali Khamis Adam and David Okello testified on 18th February 2016. Human Resource Officer Marko Mulwa Ngolia testified on 18th February 2016 and 26th September 2016 when hearing closed. Parties confirmed the filing of their Closing Submissions at the last mention in Court, on 6th December 2016, and were advised Judgment would be delivered on 23rd June 2017, or if ready before then, delivered on notice.

Claimant's Case

8. The Claimant told the Court he was employed by the 2nd Respondent on 1st September 1987. He started off as a Trainee Security Officer. He was confirmed on 1st October 1988. He was promoted on several occasions subsequently. By the time of dismissal, he was the Security Officer in charge of Investigations. He last earned Kshs. 52,900 as monthly basic salary, and Kshs. 31,250 monthly, as house allowance.

9. He was called on phone by Head of Security Sylvester Ndongoli on 1st September 2005. He was informed there was possible theft to take place at the Port. He was given by Ndongoli a phone number to call for more information. When the Claimant called the number, a Person called Amin Hussein answered.

10. The Claimant and Hussein arranged to meet at the Port. When they met, the Claimant came to realize Hussein was an Employee of the 2nd Respondent, who worked as a Casual Employee in the Security Department. Amin was an informer. He did not readily have the number of container targeted for theft. He told the Claimant he would call one of the conspirators. He called and was told theft was planned for 2.00 p.m. on 1st September 2005.

11. The Claimant called his boss, Port Facility Security Officer Ndongoli, who was at the time, in Nairobi. The Claimant advised Ndongoli the information from Hussein was probably reliable, and they needed to involve the Police, to assist in arresting the suspects.

12. The Port was losing containers mysteriously. Over 30 containers had been lost that year. This happened under the Claimant's docket. Ndongoli advised the Claimant to monitor container movements. The Claimant enlisted Officers Okello, Lengisaan and Adam to assist in monitoring and arresting of the container and the suspects.

13. Hussein was strategically positioned at the point where the container would be loaded and depart from. He alerted the other Officers that the container had been loaded and departed at 2.00 p.m. The Officers followed the container. They noted the trailer's registration number. The Claimant deployed his Officers in all directions, to restrict the container's movement.

14. Suddenly the trailer moved towards the docks. Lengisaan was in control over the place where trailer loaded with the suspect container was heading. The Claimant proceeded to Lengisaan's position. Lengisaan told the Claimant the trailer had not reached where Lengisaan was. The Claimant enquired and was informed the trailer had exited the Port through gate number 10, where Lengisaan was. There was no alarm raised as the container exited.

15. The Claimant suspected his Officers, and Police Officers, were involved. Gate 10 was manned by Port Security and Police Officers. The Claimant called the OCPD for assistance. At a place called Kibarani, outside the Port, the Claimant found the trailer without the container. The driver, the trailer and the loading clerk were arrested and taken to Port Police. It was now dawn, 2nd September 2005.

16. The Claimant and the Officers manning the gate were arrested. He was charged in Court on 6th September 2005. He was suspended from employment on 12th September 2005. He was heard by a Committee of Inquiry. He received no official communication of the outcome. He eventually learnt the Committee had recommended he is reinstated.

17. The Claimant waited for 1 year 1 month for reinstatement. Instead, the 2nd Respondent called him, and read to him the same charges. He was advised in the end that suspension had been lifted, and simultaneously, he was advised he had been summarily dismissed. The criminal case went on as the disciplinary process unfurled. He was acquitted on 17th March 2009. By then, he had already been dismissed.

18. He was not paid any money by way of terminal dues. He was not paid Kshs.1.3 million. It is not true that the 2nd Respondent paid any of the Claimant's obligations to his Sacco. It is shown in the Sacco documents on record that no money was paid to the Sacco on account of the Claimant.

19. The Claimant prays the Claim is allowed. He testified he is entitled to salary and allowances calculated back from the date of suspension. His career was ruined. He cannot be employed elsewhere after the 2nd Respondent accused him of stealing. He has applied for jobs without success. He informed

the OCS and OCPD about the stolen container. He was branded a thief. His friends came to believe the Claimant is a thief. He was, through malice, prosecuted. He seeks damages. He told the Court he no longer wishes to be reinstated.

20. On cross-examination, the Claimant told the Court by the time of suspension, on 9th July 2005, his salary was Kshs. 76,250.

21. He was given information about theft of the container, by his boss. His boss was in Nairobi when he communicated to the Claimant. He called on the night of 1st September 2005. The Claimant was outside the Port, when the call came through. He sought information from Hussein, as advised by Ndongoli.

22. The Claimant had his car, and organized his Officers in trying to arrest the suspects. They followed the container within the Port. They did not wish to let the Driver know he was being pursued. The trailer stopped at Shimanzi Oil Terminal within the Port. The Claimant passed the trailer. The trailer started moving again. The Claimant slowed down, to observe through which gate the trailer intended to exit. 2 exits were operational, both manned by Security Officers. The Port Security team had agreed to undertake the operation covertly. The container left through gate 10B- the Docks gate.

23. Njoroge did not agree that he made the operational decision without consulting Ndongoli. He had 3 conversations with Ndongoli, and planned the operation in consultation with Ndongoli. He recommended the involvement of Police Officers to Ndongoli, who had his reservations, saying Police Officers had in the past been implicated in theft of containers.

24. The suspension letter contained specific charges. The Claimant was taken through a disciplinary process. He was advised he could attend the hearing in the company of a workmate. He went accompanied by Mrs. Margaret Nyaga. He was heard. He was not officially informed about the decision of the Committee of Inquiry. The decision was in the letter dated 17th August 2007. He made an appeal. He was not called for the appeal hearing. He presented a document with elaborate grounds of appeal. He was eventually told the Appeal was rejected.

25. He has not written a letter to the 2nd Respondent detailing his terminal dues. He has not cleared with the 2nd Respondent. The last rate of salary was Kshs. 76,250 per month. Withheld salary amounted to Kshs. 1,391,395. There were deductions made on this amount. He was advised by his Sacco that his loan was offset against his shares, and his liability recovered from his guarantors. Other deductions included medical bills and overpaid bonus. He is entitled to August 2007 salary. He disputes bonus deductions. Other items in the computation of dues are correct.

26. At paragraph 11 of the Statement of Claim, the Claimant prays for Kshs. 3.7 million being arrears of salary from September 2005 to February 2010, and from March 2010 to-date. Dismissal took place in September 2007.

27. It is not correct that the Claimant had serious disciplinary issues in his employment record. He had received another notice to show cause why he should not be disciplined, in a letter which he signed on 29th October 2004. The 2nd Respondent alleged the Claimant was lax, in discharging his security role. This letter was followed by another warning letter, which was occasioned by the Claimant's response to the letter to show cause.

28. He was Security Officer HM3, in Management. There were 4 positions senior to his within the security docket. He was senior and experienced.

29. Redirected, the Claimant testified he was heard by the Committee of Inquiry for 6 months. The result was not communicated to him officially. Page 63 of his bundle of Documents has the recommendation of the Committee. It was recommended Claimant's suspension is lifted, and he is reinstated. He was not told about this decision. When he enquired about it, a Second Committee was convened. He was not given fresh charges. The second Committee recommended suspension is lifted; the Claimant paid his withheld

salary; and he is dismissed.

30. The criminal case was still going on, and ended in the Claimant's acquittal.

31. The Claimant appealed against the dismissal decision. Appeal was rejected.

32. In the criminal proceedings at page 107 of the Claimant's Bundle of Documents, Ndongoli testified he specifically asked the Claimant to involve minimal people in the operation. He states Police Officers were compromised. Page 29 shows Claimant earned a basic salary of Kshs. 76,250, and house allowance of Kshs. 31,250- total Kshs. 107, 500. He confirmed from his Sacco that the Respondent did not pay his loan obligation.

33. He was employed in 1987. The warning issued to him was in 2004, 17 years after employment. The warning arose from a theft incident. The suspects were arrested and taken to the Port Police. He escalated the incident to his seniors. The warning was unjustified.

34. He has not secured a job since the year 2007. He prays the Court to allow the Claim.

2nd Respondent's Case

35. Sylvester Ndongoli was employed by KPA as Head of Security, on 9th June 2004. He worked up to January 2006.

36. On the night on 1st September 2005, he received information that certain persons were planning to steal a container from the Port. He was then at Nairobi. The informer was a junior Security Officer. He received the information at around 8.00 p.m. to 9.00 p.m. The informer gave Ndongoli the details of the targeted container, and the trailer intended to be used in executing the offence.

37. Ndongoli advised the informant he would give him the number of a responsible Officer to call, and pass on the information for action. He gave the informer Claimant's phone number. The Claimant was in charge of Investigations.

38. Ndongoli communicated with the Claimant, who assured he would move with speed to the Port, and arrest the container and the suspects. He told the Claimant to liaise with the OCPD, to be availed Officers to assist in arresting of the container and the suspects. Ndongoli talked to the Claimant twice- when Ndongoli passed the initial instructions to the Claimant; and when the Claimant called Ndongoli to say he had identified the container. He did not call Ndongoli again until the following morning.

39. The informer called Ndongoli, saying the Claimant did nothing and the container had disappeared. When Ndongoli called the Claimant, the Claimant told him he was not able to talk to Ndongoli on the phone, and that the two would talk later. Patrick Kioko was in charge in the absence of Ndongoli. Ndongoli did not consult Kioko as he did not wish to have too many Officers involved.

40. Questioned by the Claimant's Counsel, Ndongoli testified his evidence before the Criminal Court, was consistent with that adduced before the Employment and Labour Relations Court.

41. He conceded in the criminal proceedings, he testified he told the Claimant to involve few Officers in the operation. He stated Police Officers had been compromised.

42. Past incidents had made Ndongoli and his Officers very wary. He had been a Police Officer at Kenya Airways. He was above the rank of OCPD. The OCPD was not under his command, but he could walk in his Office and converse freely. Patrick Kioko was senior to Njoroge. Njoroge was answerable to Ndongoli.

43. KPA gates are manned by Police Officers and Port Officers. There is double security. Containers were not supposed to move at night. There are documents supposed to be produced at the gate on exit.

44. The criminal proceedings showed Njoroge put in place a security team in attempting to prevent removal of the container. Ndongoli did not think the Claimant was diligent in busting the container theft cartel. Ndongoli agreed the Claimant did something little in executing the instructions entrusted to him by Ndongoli.

45. Ndongoli told the Court the Claimant had worked for 17 years. He did not come to learn of any other incident of theft of containers, where the Claimant was implicated. At page 112 of the Claimant's Bundle of documents, Ndongoli stated the Claimant followed Ndongoli's instructions. All the work assigned to the Claimant by Ndongoli was carried out diligently. Ndongoli did not know if the State appealed against the Judgment of the Criminal Court. Proceedings show the Claimant was acquitted.

46. Ndongoli clarified on redirection that by minimal persons, he meant a few select Officers, are assigned the operation, to preserve trust and confidence. Kioko was Senior Security Officer in charge of Operations. The Claimant was in charge of Investigations. The container left, even with the intervention of the Claimant. Ndongoli only confirmed the Claimant complied with instructions in monitoring the container. He did not follow instructions after the container had left the Port.

47. Ali Khamis Adam was employed by the 2nd Respondent in the year 2002. He was to guard transit cargo in the night of 1st September 2005, from 3.00 p.m.

48. He was enlisted by the Claimant who briefed him about the instructions given by Ndongoli. He drove in the Claimant's car, with Officer Okello, and pursued the suspect container.

49. They found the trailer parked with the container, at a section called Kapenguria within the Port. Adam asked the Claimant to arrest the container and the suspects. He did not make an arrest. He said he wanted to know which gate the trailer would exit from. He asked Adam and Okello to proceed to gate number 5. The 2 Officers could not see the trailer from there. They adjusted their position and were able to see the trailer. They communicated on radio with the Claimant. He told them to continue monitoring the trailer, and feed him back. They did this. He did not ask them to arrest the container and the suspects. When the trailer moved towards the gate, Okello called the Claimant and Denis who were positioned near the gate. The Claimant could not be reached on the phone.

50. He testified on cross-examination that he gave evidence in the criminal trial. He stated in the criminal proceedings at page 132 of the Claimant's Bundle, that 4 Officers- Lengisaan, the Claimant, Okello and Mungai comprised the team set up by the Claimant to stop theft of the container.

51. There were Police Officers at the gate. There were Port Security Officers at the gate also. Cargo was not supposed to leave the Port at night.

52. Adam recalled the Claimant told the Officers at the gates not to let the trailer and its container to pass through the gates. All Officers knew cargo was not allowed to move out of the Port at night.

53. The Claimant positioned the Officers strategically to monitor the trailer. He did not restrict them to specific monitoring areas. Adam did not see the trailer exit. Lengisaan called saying the trailer had left through gate number 10. The gate was manned by Port and Police Security Officers. Adam did not know if the trailer was arrested. He was not able to say if Police Officers were compromised. Radio communication is open to 3rd Parties. Security at the gate would hear the conversations going on between the Claimant and his team. Lengisaan, Okello and Adam were not charged with any offence. He did not know about the outcome of the Claimant's criminal trial.

54. Redirected, Adam told the Court he had not been instructed to arrest the trailer. The team did not have the means to arrest the trailer, container and the suspects. Adam was not told that the Police Officers had been compromised.

55. Daniel Ramogy Okello testified he was employed in 1998 as a Security Officer. He was at the Port, in

his Office, within the area known as Kapenguria, on the night of 1st September 2005. He was there with Officers Lengisaan and Adam.

56. Njoroge approached Okello and the other Officers, and informed them about the instructions given by Ndongoli. Okello advised Njoroge that Lengisaan and Adam were efficient and trustworthy. The 4 Officers constituted a team to execute instructions given by Ndongoli.

57. They monitored the trailer. It at one time stopped. Okello and other Officers suggested to the Claimant that they should arrest the trailer while it had stopped. The Claimant told them he would effect arrest himself. He instructed Officers manning the gates not to allow any vehicle pass through.

58. Okello told the Court on cross-examination that the incident took place a long time ago, and he could therefore not recall every detail. He had worked with the Claimant and the Claimant trusted him. He did not see the trailer exit. Lengisaan and Adam did not tell Okello they witnessed the trailer exiting. Redirected, he testified he saw the trailer move in the direction of gate 10, where Lengisaan was positioned.

59. Marko Mulwa Ngolia told the Court there was a theft incident at the Port, on 1st/2nd September 2005. The Claimant was a suspect. He was arraigned in Court. He was suspended. He was to offer an explanation. He had previous warnings. His record was blemished.

60. A Committee was established to hear him. He was heard. The nature of the offence was shown in the suspension letter. A personal hearing was held. The first Committee exonerated the Claimant, but this was not approved. It recommended suspension is lifted, and the Claimant resumes normal duties.

61. The Management went through the records and concluded the work of the Committee was inconclusive. There was a Review Committee established. It recommended the Claimant is dismissed. The Claimant appealed. His Appeal was rejected, and decision communicated to him. He was to follow up his terminal dues. Ngolia was not able to say if he made a follow-up.

62. The Witness told the Court on cross-examination that he could not recall when the Claimant was heard by the first Panel. He could not recall who the Members of the first Committee were, but recalled Learned Counsel for the 2nd Respondent, Mr. Stephen Kyandi, was a Member. Ngolia told the Court the Panel decided the Claimant is dismissed, before correcting his evidence, stating recommendation was that the suspension is lifted, and the Claimant resumes normal duties.

63. The Committee further recommended the contract of Ndongoli, Claimant's senior, is 'suitably addressed' and that of Lengisaan be terminated. There was recommendation for termination of the contracts of other involved Officers. The Committee however, recommended Claimant resumes normal duties.

64. The Human Resource Officer did not know why it was necessary to have a second disciplinary hearing. The Claimant was tried in the criminal trial and acquitted. The Judgment of the Criminal Court was forwarded to the 2nd Respondent.

65. There were no terminal benefits paid to the Claimant. Ngolia did not have evidence that the 2nd Respondent forwarded Claimant's pension contributions. The Claimant's salary was withheld from 2005. Sacco loan of Kshs. 552,435 was recovered from the Claimant's guarantors. The guarantors had their shares in the Sacco reduced. Sacco is independent from the Employer, but the 2 work closely. Redirected, the Witness closed his evidence with the clarification that the Managing Director is not bound by the recommendations of the disciplinary committees. He directed the 2nd Respondent reconstitutes a 2nd independent Committee.

Submissions

66. The Claimant submits his conduct on 1st and 2nd September 2005 was beyond reproach. The Committee of Inquiry found so, and recommended the Claimant returns to work.

67. Strangely another Committee was set up to hear the Claimant again. He was not told why it was necessary to hear him again. The 2nd Committee recommended the Claimant is dismissed, while other Officers, who had initially been recommended for dismissal, were returned to work.

68. Terminal dues computed by the 2nd Respondent remain unpaid. There was no evidence of deductions having been remitted to the relevant Bodies. Ngolia conceded the Claimant was never paid his terminal dues. Kshs. 1,391,395 is due to the Claimant, without deductions.

69. Relying on **Industrial Court Cause Number 11/2012 between Mathew Kipchumba v. Baringo Teachers Sacco [2013] e-KLR**, the Claimant submits that where an Employer elects to report an alleged offence to the relevant criminal agency, the agency's findings would be binding on the Employer. The 2nd Respondent forwarded the Claimant to the Police. He was investigated by the Police, taken to Court, tried and acquitted. From the time he was taken to Court [2005] to the time of acquittal [2009] he is to be considered as having been an Employee of the 2nd Respondent, and paid arrears of salary.

70. The Claimant submits he merits arrears of house allowance; gratuity; compensation; and damages for unfair prosecution.

71. On the point that the Claim is statute-barred under Section 66 of the KPA Act Cap 391, the Claimant submits he was summarily dismissed on 5th September 2007. He appealed. The letter communicating dismissal of the Appeal was forwarded to him on 14th October 2007. KPA had from the very outset reported the Claimant to the Police, and criminal proceedings were ongoing, culminating in his acquittal on 17th March 2009. The Claimant issued statutory notice upon the Respondents on 20th August 2009. The objection on time-bar is made in afterthought. The Claimant relies on the decision of the **High Court at Mombasa Modern Holdings [EA] Limited v. Kenya Ports Authority [2012] e-KLR**, where the Court dismissed an objection brought under Section 66 of the KPA Act, terming the objection as procedural technicality. This default would be curable under Article 159 of the Constitution.

72. The 2nd Respondent submits the Claimant was governed by KPA Revised Staff Regulations 2002. Section G.5 of the Regulations provides for suspension and institution of criminal charges against an Employee who commits breach of discipline which may also involve criminal charges. The Managing Director may, after preliminary investigations, call on such an Employee to show cause within 48 hours, why he should not be summarily dismissed, under Section G.7. The 2nd Respondent followed these internal mechanisms with regard to the Claimant.

73. A Committee of Inquiry was constituted under Section G.7 [e]. The Claimant was heard as provided for in this Section. The Report of the Committee of Inquiry was forwarded to the Board, which is empowered to make a decision. Management, after considering the record of the Committee of Inquiry and that of Review, decided the Claimant is dismissed. All actions against the Claimant were in accordance with the Staff Regulations.

74. The Claimant is not entitled to anticipated salary. It was held by the Industrial Court of Kenya, in **Francis N. Gachuri v. Energy Regulatory Commission [Cause 203 /2011]** and **Benson Githinji v. the Attorney-General & 4 Others [Cause 2020/ 2011]**, that compensation granted where termination is unfair, suffices. Anticipatory salary is not normally payable in addition to compensation. It is further submitted that the prayer for pension is not within the jurisdiction of the Industrial Court; it is in the province of the Retirement Benefits Authority. It is well established under Section 35 of the Employment Act that an Employee registered under a Pension Plan or other Social Security Plans, cannot claim both pension and gratuity.

75. If at all unlawful, termination of the Claimant's employment should be redressed through

compensatory award. There is no case established, showing the 2nd Respondent acted maliciously against the Claimant. Damages are not awardable for defamation or malicious prosecution.

76. Lastly, the 2nd Respondent submits Section 66 of its constitutive Act, provides for a 12 months' period within which to institute a Claim against KPA. No notice of intention to sue issued upon the 2nd Respondent within 12 months. Section 66 is a mandatory law, which the Claimant did not comply with, in bringing the suit. The 2nd Respondent submits the Claim should be dismissed with costs to the 2nd Respondent.

Issues:-

77. These are, as the Court understands them:-

- i. *Whether the Claim is time-barred under Section 66 of the KPA Act.*
- ii. *Whether the Claimant was dismissed on valid ground.*
- iii. *Whether he was accorded fair procedure.*
- iv. *Whether he was maliciously prosecuted, or defamed by the 2nd Respondent.*
- v. *Whether he merits the prayers sought.*

The Court Finds:-

[i] Time limits [temporal validity of the Claim]

78. Section 66, Cap 391 [KPA Act] states:

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any other public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect-

- a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings has been served upon the Managing Director by the plaintiff or his agent;*
- b) the action or legal proceeding shall not lie or be instituted, unless it is commenced within 12 months next, after the act complained of or, in the case of continuing injury or damage, 6 months next after the cessation thereof.”*

79. There is no clear date as to when the cause of action arose. This is owing to the different dates when the 2nd Respondent made various decisions against the Claimant; and owing in part to the nature of the claim.

80. The record indicates the Claimant was suspended on 12th September 2005. This was after preliminary investigation, carried out by Senior Port Security Officer, Patrick Kioko, found that the Claimant did not involve the OCPD or DCIO in attempting to prevent theft of the container. The Claimant was taken through a Committee of Inquiry, which exonerated the Claimant, recommending he resumes work. Unfortunately the proceedings of the Committee of Inquiry which resulted in the recommendation are undated.

81. The KPA Revised Regulations 2002 applied to the Claimant. Clause G.7 [g] required the Committee

of Inquiry to forward its Report to the Human Resources and Administration Manager. This Officer would in turn, forward the Report, with his/her comments and recommendation, to the Managing Director. The Managing Director could refer the matter back to the Committee for further investigation if need be, or forward the Report, with his comments, to the Board for its actions.

82. There is no date given to the recommendation that the Claimant resumes work; secondly, the Court has not seen any Report by the Human Resources & Administration Manager endorsing or rejecting the recommendation of the Committee of Inquiry to the Managing Director; lastly, there is no evidence of the Managing Director either referring back the Report to the Committee of Inquiry, or accepting that the Claimant should resume work.

83. What is on record is that the Managing Director appointed another Committee of Inquiry on 5th March 2007, about 2 years after the appointment of the first Committee. The second Committee recommended the Claimant's suspension is lifted, and he is dismissed from the 2nd Respondent.

84. The second Committee does not seem to have forwarded its Report to the Human Resources and Administration Manager as stipulated in the Regulations. Naturally there was no Report generated by the Human Resources and Administration Manager to the Managing Director. The second Committee's Report is shown to have been submitted directly to the Managing Director by Chairman R.M. Jilo.

85. The next relevant document, in the search for the date when the cause of action arose, is the letter lifting suspension and simultaneously dismissing the Claimant, initially dated 17th August 2006, then amended by hand to read 17th August 2007. The letter does not mention there was a decision made by the Board or the Managing Director dismissing the Claimant. It does not mention any date when the Board made a decision under Section G.7 [j]. The provision states that the Board shall decide on the punishment if any, which should be inflicted on the Accused Employee; whether he should be dismissed or otherwise.

86. In the view of the Court, the defaults in the proceedings, leading to dismissal of the Claimant, make it impossible for any reasonable tribunal, exercising its mind fairly, to assign a date when the cause of action arose. This obscurity cannot be attributed to the Claimant.

87. The Claimant lodged an Appeal dated 10th September 2007. The timelines for lodging an Appeal under the Regulations were not made clear to the Court. There is a letter dated 14th October 2007 from Personnel Manager advising the Claimant his Appeal had been considered and rejected. The details of the hearing, or consideration, in whatever form are not given. Who heard or considered the Appeal? The date when the Appeal was dismissed is not given. The cause of action would not accrue until the Claimant exhausted his right of appeal, a right which is not contested by the Parties. At what point can it be said from the record, that the Claimant exhausted his right of appeal?

88. In the absence of a clear and valid date given by the Employer, when termination of employment took place, it is not reasonable for the Court to assign a date as to when the cause of action arose, little less adopt a date preferred by the offending Party.

89. The decision of the ***High Court in Modern Holdings v. KPA [cited above]*** is however not a correct exposition of Section 66 of the KPA Act. The Court of Appeal of Kenya has repeatedly ruled that where a statute limits time for bringing an action, unless the statute itself allows for extension of time, no Court has the power to extend time. This was restated in Malindi ***Court of Appeal Civil Appeal Number 39 & 40 of 2016 between Hawkins Waganza Musonye & Desidery Tyson Otieno v. Rift Valley Railways Limited [2016] e-KLR***. The Rulings subject matter of the Appeal originated from the Employment and Labour Relations Court. Article 159 of the Constitution, refers to procedural technicalities, while the law on limitation of time, is a substantive law, conferring temporal jurisdiction on the Court. This Court adopted the approach in ***Modern Holdings v. KPA*** in allowing Employees, one of whom is physically disabled, who felt they were statute-barred under Section 90 of the Employment Act 2007, to bring Claims for unfair termination. The Court of Appeal held that the undersigned Judge had engaged in judicial craft and innovation in allowing the Employees to present their respective Claims. The

submission by the Claimant that objection based on Section 66 of the KPA Act should be rejected as a matter of technicality, has no support in Judicial Authorities of the Court of Appeal.

90. The Court of Appeal did however, in **Hawkins Appeal**, point out that the act of termination of employment, was a single act of termination. This is not the case in the current dispute, where there were multiple recommendations and decisions, making it difficult to point to a single date when the cause of action arose.

91. The Court is also satisfied the date when the criminal trial ended, did not have effect on the proceedings at the workplace. Section G.5 of the Staff Regulations allowed the 2nd Respondent to refer the criminal allegations against the Claimant to the Police, after the internal preliminary investigation. The 2nd Respondent was not barred from proceeding with the administrative process after handing over the Claimant to the Police. Section G.5 states that the fact that an Employee has a criminal case pending in Court, does not in any way, prohibit Management from instituting administrative action. This Regulation has support in decisions of this Court such as **Benson Githinji v. the Attorney General & 4 Others [cited above]**.

92. The Claimant has no justification therefore, in adopting the date of the criminal judgment, as the date the cause of action arose.

93. The Court however finds the Claimant did not bring the Claim contrary to Section 66 of the KPA Act. The date when the cause of action arose is not clearly shown from the records of the Employer, a state of affairs which can only be blamed on the 2nd Respondent. Internal processes were jumbled up, with no clear decision showing exhaustion of the internal mechanisms. The objection under Section 66 of the KPA Act is therefore declined.

[ii] Validity of Reason/s [substantive justification]

94. The 2nd Respondent explained in its evidence that the offences over which the Claimant was dismissed, were stated to him in the letter of suspension. There was no other document, containing the particulars of the employment offences alleged to have been committed by the Claimant.

95. The suspension letter basically states that the Claimant was charged in Court, with the offence of stealing container PCIU 370149-4 on the night of 1st and 2nd September 2005. Was this a valid ground?

96. The Court as stated elsewhere, is not bound by the Judgment of the Criminal Court, which freed the Claimant. The decision of the Industrial Court in **Mathew Kipchumba Koskei v. Baringo Teachers Sacco** cannot apply to the dispute herein, in light of the 2nd Respondent's Staff Regulations, permitting the 2nd Respondent to refer the Employee to the Police, and simultaneously conduct its own administrative process. The outcome of one process would therefore not have effect on the other. The criminal trial was a separate process, aimed at determining if the Claimant was guilty of a criminal offence, while the disciplinary process was aimed at determining if the Claimant engaged in an employment offence. The standards of proof, the objectives and principles applying in the 2 processes are different.

97. The Committee of Inquiry which heard the Claimant at the first instance concluded that the Claimant had suggested to Ndongoli the OCPD is involved in the Operation.

98. Ndongoli advised the Claimant to use trusted Port Security Officers, as it was apprehended Police Officers were involved in the container theft syndicate. The Committee concluded the Claimant 'doggedly' executed the operation. It was confirmed by Senior Security Officer Kioko that the Claimant did not defy instructions.

99. Ndongoli confirmed in Court that he instructed the Claimant to set up a lean team of trusted colleagues. All gates were manned by Police Officers and Port Security Officers. Ndongoli, after a period

of prevarication during cross-examination, conceded the Claimant executed the instructions given to him by Ndongoli diligently.

100. Adam told the Court he recalled the Claimant instructed the Officers at the gates not to allow the stolen container to pass through.

101. The second Committee blamed the Claimant for not bringing in the OCPD. It was the finding of this Committee that the Claimant's failure to involve the Police, facilitated theft of the container. It is clear from the evidence given before the Court, that this second Committee was dead wrong on this. The Claimant was instructed by Ndongoli not to involve the Police.

102. It was concluded by the second Committee that the Officers who worked with the Claimant were trusted and honest people, while the Claimant was not made of the same mould. The initial Committee concluded the Claimant was in fact the honest Officer, who was a victim of betrayal by his fellow Officers, including Lengisaan, Ndongoli and Kioko. The evidence before the Court tends to support the conclusion of the initial Committee. The Claimant's evidence was consistent. Adam for instance stated he told the Claimant to arrest the trailer, container and the suspects at one point when monitoring the unfolding execution of theft. In Court, he testified on redirection, "*we did not have the means to arrest.*"

103. The Court is satisfied the initial Committee examined the facts fairly, and arrived at the right conclusion. The second Committee, whose legitimacy the Court shall examine under procedural fairness, went about its role with a fixed mind, determined to undo what the first Committee did. It for example blames the Claimant for failing to inject sufficient resources to the operation, giving one of the resources the Claimant failed to inject to include a car. The Claimant testified he had his own private car, and the duty vehicle. Pursuit of the trailer was not carried out on foot. The latter Committee did a shoddy job, and reached the wrong conclusion.

104. There clearly was no evidence to sustain an employment offence. In determining validity of reason, the Court has carefully weighed the evidence as recorded by the 2 Disciplinary Committees, and by the Court. It was not shown before any of the Disciplinary Committees which the Claimant was taken through, that he was involved in theft of the container. He tried to stop theft, but there were Persons above and below him, who appeared to know more than the Claimant was allowed to know about the offence. The Committee of Inquiry correctly found the Claimant was a pawn, in other Officers' chess game.

105. There was no valid ground justifying termination.

[iii] Procedural Fairness:-

106. A lot procedural issues featured in the discussion of issue number 1, on limitation of time.

107. Without regurgitating issues, it is fair to note that the Claimant was disciplined under the KPA Staff Regulations of 2002.

108. The process was initiated through a preliminary investigation under Section G.5 [a]. This was carried out by Patrick Kioko. The Claimant was suspended on 12th September 2005 under Section G.5 [e] after being charged in Court. He was called upon to show cause, and replied explaining to the Respondent his role, under Section G.7 [a]. The Managing Director, in compliance with Section G.7 [b], instituted a Committee of Inquiry, which went on to hear the Claimant, and came up with the finding that the Claimant was innocent, recommending he returns to work. The Report of the Committee was forwarded to the Managing Director, who, for a prolonged period, took no action.

109. The procedure initially appears to the Court to have been fair, involving the Claimant, and closely conforming to the Staff Regulations.

110. This was until the Managing Director came up with the second Committee chaired by Raha Jilo. Marko Ngolia, representing the Human and Administration Department of KPA, told the Court he did not

know why this second Committee was set up.

111. This was honest evidence. The establishment of the second Committee cannot be explained on the basis of the Staff Regulations.

112. Once the Managing Director receives the Report of the Committee of Inquiry from the Human Resources and Administration Manager, he is required under Section G.7 (i) to do the following:-

- Consider the Report of the Committee;
- If he is of the opinion that the Report should be amplified, or that further investigation is desirable, refer the matter back to *the Committee* for further investigation and report, or;
- Forward the Report with his own comments to the Board for its decision.

113. The Managing Director did not refer matter back to the Committee of Inquiry. This should have been the same Committee, which dealt with the matter initially. He formed a completely new Committee. It is not clear from the record, even assuming this new Committee was validly established, what part of the initial Committee's Report, the Manager Director needed to be amplified, or what part needed further investigations. The establishment, and work of the second Committee, was not based on the Staff Regulations. This Committee was illegitimate, and its proceedings and outcome of no validity.

114. Subsequently, as discussed above, the Claimant lodged an Appeal with the Managing Director. There was a letter dated 14th October 2007, stating the Appeal was considered, and found to have no merit. It is not shown who heard or considered the Appeal, and when the Appeal was heard or considered. The actual decision of the appellate Body, Person or Organ, tasked with hearing and considering Appeals, is not exhibited anywhere in the record. There is no communication from the Managing Director, to whom the Appeal was directed. The decision was communicated to the Claimant by Personnel Manager Chingabwi, who avoided mentioning on whose instructions he was acting. The letter dated 14th October 2007, simply informs the Claimant that the evidence presented against him during the inquiry was overwhelming. The Committee of Inquiry exonerated the Claimant. How then would evidence before the Committee of Inquiry be overwhelming? If by inquiry the Personnel Manager meant the work undertaken by the second Committee, the Court has concluded the work of the second Committee was underwhelming.

115. Procedure, particularly at the secondary stage, was unfair.

116. Termination was unfair. The 2nd Respondent did not demonstrate valid reason justifying termination. Procedural fairness was disregarded. The high standards of fairness of termination under KPA Staff Regulations were not met.

[vi.] Malicious Prosecution and Defamation:-

117. In ***High Court decisions Murunga v. the Attorney- General [1993] KLR*** and ***Gichanga v. BAT Kenya Limited [1989] KLR***, it was held a Claimant, in a Claim for damages for malicious prosecution, must show:-

- He was prosecuted by the Respondent.
- Prosecution ended in his favour.
- Prosecution was without reasonable and probable cause.
- Prosecution was malicious.

118. There is little doubt that the prosecution of the Claimant was initiated by the 2nd Respondent. Section G.5 [a] of its Staff Regulations authorized the 2nd Respondent to initiate prosecution of the Claimant after preliminary investigations. This was done.

119. It is similarly undoubted that prosecution ended in the Claimant's acquittal. He was not even placed

on his defence.

120. Was prosecution without reasonable and probable cause? The Judicial Authorities above held that this test requires the Court to examine, whether the material known to the prosecutor, would have satisfied a prudent and cautious man, that the Claimant was probably guilty of the offence. Secondly, the Court must be satisfied that the Respondent verified the facts through an enquiry with the level of scrutiny of facts, commensurate with the seriousness of the charges against the Claimant.

121. From the Court's discussion with regard to validity of reason, it cannot be said the Respondents, had material which would lead a prudent and cautious man to conclude the Claimant was probably guilty of the offence. The evidence from the very outset was that the Claimant received the instructions of a superior, acted in accordance with those instructions, alerting Police and Port Security Officers stationed at the gates, not to let the container out. What evidence would lead any man to conclude the Claimant was probably guilty? A Committee of the 2nd Respondent concluded the Claimant had been framed up.

122. Was the incident investigated with a degree of scrutiny commensurate with the gravity of the offence? The Claimant was faced with the offence of stealing a container from the Port, whose value was given at Kshs. 6 million. It was a serious offence. The preliminary investigation which culminated in his being charged was carried out by Senior Security Officer Kioko. This was carried out in the morning of 2nd September 2005, the incident having take place in the night of 1st/2nd September 2005. Kioko's Report, dated 2nd September 2005, blames the Claimant for not alerting the OCPD and OCS. The Court has stated why this approach was wrong. Kioko had not, by the time of preparing the Report, recorded any statement from the Claimant. He reveals that as he was preparing the Report, the Claimant was recording his Statement. There is no other evidence showing the 2nd Respondent carried out internal investigations with the level of scrutiny commensurate with the seriousness of the offence. The internal processes which followed were shambolic, save for the proceedings under the first Committee of Inquiry. The matter was not investigated by the 2nd Respondent with the seriousness it deserved.

123. The last element requires the Claimant to show prosecution was malicious. There is malice, if the criminal process is initiated for other purposes, other than carrying out the law into effect.

124. The record shows there was conspiracy involving Police and Port Security Officers, in stealing of the container. The Claimant alerted Police and Port Security Officers manning the gate not to let the container out of the Port. The container left anyhow. The Committee of Inquiry correctly found the Claimant to have been framed up. Malice involves an improper frame of mind. In the case of a juridical Person, improper frame of mind is to be read from the minds and actions of its Officers. Kioko for instance was an Officer who, the 2nd Respondent's Committee concluded, was involved in betrayal of the Claimant. Yet, it was him, who was entrusted the preliminary investigation which led to the criminal prosecution. The Managing Director, faced with a Committee of Inquiry Report exonerating the Claimant, opted to set up another Committee, until he received a desired result. The 2nd Respondent went on with the prosecution of the Claimant in Court, even when its own internal investigations had concluded the Claimant was innocent. The minds and actions of the Officers of KPA leave no doubt in the mind of the Court that KPA was driven by an improper frame of mind, in prosecuting the Claimant. The Criminal Court in the end, concluded that evidence presented before it, showed the Claimant was at the front of trying to get to the bottom of the offence.

125. The Court is satisfied the Claimant has shown he was maliciously prosecuted, and is entitled to damages.

126. In *Naqvi Syed Qmar v. Paramount Bank Limited & Another [2015] e-KLR*, this Court granted damages upon finding the Claimant's employability to have been diminished, as a result of the wrongful act of his Employer. It was held damages can be awarded, where the act of termination is accompanied by defamatory material, which diminishes, or destroys the Employee's stock in the labour market. This decision related to a Banker, who was alleged to have stolen from the Bank where he served as Manager. Arrest was prominently broadcast in the media. His employability suffered.

127. The Claimant did not satisfy the Court that he suffered employment related defamation. He did not show that information that he had stolen a container was widely dispersed by the 2nd Respondent. He did not give details of potential Employers who rejected his application for employment, on the ground that he was charged with theft of a container. He did not satisfy the Court that his employability, his stock in the labour market, diminished or was destroyed altogether. His claim for damages for employment related defamation has no merit.

[v] Remedies:-

128. ***It is declared Claimant's contract of employment was terminated unfairly and unlawfully by the 2nd Respondent.***

129. ***He is granted the equivalent of 12 months' salary in compensation of unfair termination at Kshs. 1,009,800 payable solely by the 2nd Respondent.***

130. The contract of employment allowed Parties to have 1 month notice of termination, or 1 month salary in lieu of notice. ***The Claimant is granted 1 month salary in lieu of notice at Kshs. 84,150 payable solely by the 2nd Respondent.***

131. Although the Court has concluded the date when the cause of action arose is not definitive, it is clear the Claimant did not serve with the Respondent after suspension, in September 2005. He claims arrears of salary from the date of suspension, to the date he filed the Claim in 2010, and from 2010 to-date.

132. Employment remedies are meant to be proportionate, and in keeping with the principle of fair-go-round. Fair remuneration requires the Employee to render his labour. The Claimant, for no fault of his own, rendered no labour from 2005. As he was not at fault, he has the remedy of compensation. How does he justify continued remuneration without providing any services to the 2nd Respondent? This item is rejected.

133. The Claimant was offered his arrears of salary for the period he was under suspension up to the time the 2nd Respondent allegedly dismissed him, the period May 2005 to August 2007. The amount offered was Kshs. 1,391,393, which after deductions, came to Kshs. 408,352. He did not receive the amount mainly because he was not able to agree with the Respondent, about the deductions. The Claimant urges the Court to grant this amount without deductions.

134. The 2nd Respondent did not justify deductions relating to medical bills, overpayment of bonus, and house allowance. It did not show the amount allegedly forwarded to the Pension Scheme, was remitted. No records from KRA show PAYE was remitted as alleged. Bandari Sacco loan was not shown to have been paid by the 2nd Respondent to the Sacco. There were no documents from the Sacco showing the 2nd Respondent paid anything to the Sacco. ***The amount of Kshs. 1,391,395 shall be paid to the Claimant by the 2nd Respondent solely, in arrears of salary, for the period 2005 to 2007.*** PAYE tax is payable on the global sum granted by the Court. It is not proper to impose tax on separate items.

135. There is similarly no justification in the prayer for house allowance in arrears from 2005 to-date. The Court adopts similar reasoning on this item, as given in the prayer for anticipatory salary.

136. The claim for gratuity has no foundation in law and fact. There is no clause in the Claimant's contract which entitled him to gratuity. He was pensionable, and has no right to double social security benefits.

137. ***His prayer for damages for malicious prosecution has merit, as concluded above. He is granted damages for malicious prosecution at Kshs. 2,500,000, payable jointly and severally by the Respondents.***

138. ***He is granted interest at 14% per annum, from the date of Judgment.***

139. *Costs to the Claimant.*

140. *For avoidance of doubt, the global award is subject to PAYE under the Income Tax Act Cap 470 the Laws of Kenya.*

IN SUM, IT IS ORDERED:-

- a) *It is declared termination of the Claimant's contract of employment was unfair and unlawful.*
- b) *The 2nd Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation at Kshs. 1,009,800; notice pay at Kshs. 84,150; and arrears of salary at Kshs. 1,391,395- subtotal Kshs. 2,485,345.*
- c) *The 1st and the 2nd Respondents shall pay to the Claimant damages for malicious prosecution at Kshs. 2,500,000.*
- d) *Claim is allowed at a total of Kshs. 4,985,345.*
- e) *Costs to the Claimant against both Respondents.*
- f) *Interest granted at the rate of 14% per annum from the date of Judgment till payment in full.*
- g) *For avoidance of doubt, global award is subject to PAYE under the Income Tax Act, Cap 470 the Laws of Kenya.*

Dated and delivered at Mombasa this 17th day of February 2017.

James Rika

Judge