



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 797 OF 2013

WILLIAM KIARITHA GACHERU.....CLAIMANT

VERSUS

EAST AFRICAN PACKAGING INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 27th May, 2013 the claimant averred that:-

a. He was employed by the respondent at the respondent's Nairobi Office's workshop (Mechanical) Department around July 1994. The claimant rose through ranks to the position of Technical Services Manager.

b. On the basis of his sterling performance, honesty, diligence, trust, integrity and confidence he was one of the respondent's bank signatories entrusted with the handling and management of their accounts and assets worth millions of shillings for a period of more than four years.

c. On or about the 12th day of January 2013 the claimant was served with a letter of termination of employment dated 11th January 2013 by the respondent.

d. In the said letter the respondent alleged that the claimant's employment was terminated following the uncovering of a paper stealing cartel operating at the respondent's Nairobi factory on 1st December 2012 and that the claimant was "definitely involved" in the cartel. The respondent alleged that the conclusion on definite involvement of the claimant in the cartel was as a result of their investigations by way of a polygraph examination on 19th December 2012.

e. The polygraph examination report was distributed and circulated amongst members of the respondent's board, staff and employees and was subject of discussions, decisions, debates and conclusions including the respondent's decision to terminate the claimant's employment.

f. The claimant stated and averred that the respondent's decision to include him in the list of employees suspected of having participated in the attempted paper theft on 1st December 2012 and further, the respondent's decision to have the applicant participate in, undergo and be subjected to the polygraph examination were malicious, reckless, unfair and unjustified.

g. The claimant questioned and contested the manner and the process through which he was subjected to the polygraph examination and further questioned and contested the content and the conclusion of the said examination.

h. The claimant further stated that prior to the conduct of the polygraph examination, a report on the attempted theft of paper at the respondent's godowns on 1st December 2012 had been prepared by the respondent's security agents and forwarded to them which report included the security findings of the agents and their recommendations.

i. The claimant stated and averred that he was defamed by the respondent's decision to include him in the list of employees suspected to have been involved in the attempted paper theft and further, defamed by the respondent's decision to employ the use of a truth tracker polygraph on the claimant and to have the claimant participate in a polygraph examination.

j. The claimant further stated and averred that the several words, phrases and references published, made and contained in the respondent's polygraph report of 19th December 2012 meant and had been understood to mean ordinarily and by imputation that the claimant

i. Was a thief

ii. Was involved in the attempted paper theft at the respondent' Nairobi Factory on 1st December 2012.

iii. Was involved in previous/prior thefts at the respondent's Nairobi factory.

iv. Was an untrustworthy person.

v. Engaged in dishonest and illegal practices and conducts.

vi. Was a member of a cartel that stole paper from the respondent.

vii. Was unethical and unscrupulous.

viii. Engaged in criminal and illegal activities.

ix. Was unworthy of his position in his employment.

x. Was unworthy of his position and status in society.

k. The published words, references and phrases were false, malicious, reckless, unlawful, unjustifiable and unfair and were calculated to, and had lowered the claimant in the estimation of right-thinking men and women at the respondent's company and elsewhere and had caused him to be shunned and avoided and had exposed him to hatred, contempt and ridicule.

l. And the claimant had suffered loss and damage in his employment, calling, trade and business.

Particulars of loss and damage

- a. Loss of his employment as the Technical Services Manager at the respondent's company.
- b. Loss of status and reputation.
- c. Loss of opportunity or any other/further gainful employment
- d. Loss of opportunity or any further career development
- e. Loss of high esteem amongst members of the society
- f. Physical and mental anguish

m. The claimant further stated and averred that in the letter of termination dated 11th January 2013, the respondent stated that it was restructuring the staffing and controls over the receipt, handling and issuing of all paper stocks and the claimant's services were no longer required hence a decision to retrench the claimant.

n. The respondent's decision to terminate the claimants employment through restructuring was wrongful, unlawful irregular, unfair and unjust termination of his employment the claimant has suffered loss and damage.

2. The claimant therefore sought the order to the Court directed to the respondent that the respondent gives an unreserved and unconditional retraction in writing of the entire content of the polygraph examination report of 19th December, 2012, damages for defamation, aggravated and/or exemplary damages for defamation permanent injunction restraining the respondents from further publishing the words and phrases contained in the polygraph examination report of 19th December 2012, a declaration that the decision to terminate the claimants employment through restructuring was illegal, null and void and damages for unlawful termination of employment.

3. The respondent on its part in resisting the claim averred that:-

a. On or about 1st December 2012 the respondent through its security service provider discovered a paper roll theft cartel at its Nairobi factory. Investigations by the said security provider discovered that the theft had been perpetrated by the respondent's staff in collusion with some rogue staff from third party suppliers.

b. That as part of its investigations the respondent identified 28 employees, including the claimant, closely associated with the purchasing, receipt, handling and issuing of paper stocks for voluntary independent third party polygraph examination.

c. That prior to taking the polygraph examination the claimant was duly informed of the cause of the ongoing investigation and that the results of the polygraph examination would be utilized to identify the perpetrators of the theft. The nature and the process of the polygraph examination was also explained to the claimant who thereafter voluntarily agreed to take the polygraph test.

d. That the results of the independent polygraph examination which examination was conducted in accordance with internationally accepted standards concluded that the claimant was either not candid or honest and/or was untruthful in his response to questions as regards the attempted theft.

e. That on the basis of the claimant's response to the polygraph test the respondent was justified in its suspicion on the claimant's involvement whereupon the respondent by a letter dated 11th January 2013 dismissed the claimant from employment. The said dismissal was in line with the express provisions of section 44 (4) (g) of the Employment Act, 2007.

f. The respondent averred that prior to termination the claimant was verbally instructed by the respondent's management and was given 7 days to give an explanation on the theft and give an audit on any missing papers but the claimant failed to co-operate thus compounding the suspicion and involvement of the claimant and thus justified his termination. The claimant's response was received after his termination.

g. The respondent averred that out of good will and in recognition of the claimant's years of service the claimant was paid terminal benefits as equivalent to terminal benefits payable to retrenched employees. The claimant was paid all his terminal dues in the sum of Kshs.4,607,593/= less statutory deductions. The said benefits were computed in line with the provisions of the Employment Act 2007 and a clearance certificate duly issued by the respondent.

h. The respondent further averred that the payments were made to the claimant in consultation and

upon mutual understanding between the parties that the claimant would not lodge any claims against the respondent and upon payment the claimant signed clearance certificate and confirmed receipt of all his dues and that he had no further claim against the respondent.

i. The respondent averred that the claimant had reneged on the said mutual understanding by lodging this claim in view of the fact that under normal circumstances the claimant would have been entitled to notice pay, salary up to the date of termination and any other accrued benefits. The payment of terminal benefits equivalent to the years of service was a negotiated exit package.

j. The respondent further averred that the claimant who was a member of the respondent's provident fund was further paid his pension dues in the sum of Kshs.9,529,977.25/= which sums of monies were duly remitted to the claimant's bank account.

k. In response to paragraphs 19, 20 and 21 of the memorandum of claim the respondent averred that the claimant had on several occasions and by an e-mail dated 21st June 2011 requested to be retrenched and therefore the claim had been made in bad faith.

- Further the respondent averred that the claimant's terminal package was generous and was paid ex gratia and in good faith as the claimant was not entitled to severance pay having been a member of NSSF and a duly registered Pension Fund and the present claim is in attempt at double enrichment.

l. The respondent further averred that this Honourable Court lacks jurisdiction to address and/or adjudicate on the allegations of defamation pleaded in the memorandum of claim and which in any event were denied in total.

4. The respondent by way of counter claim sought the refund of the sums paid to the claimant as exit package since the claimant had reneged on the mutual understanding by lodging the claim.

5. On 21st May, 2015 when the matter came up for hearing, counsel for parties opted to frame issues for trial and file written submissions along the framed issues.

6. In his submissions on behalf of the claimant, Mr. Ndambiri submitted that:-

a. The claimant was not involved in the cartel alleged to have been behind the paper theft at the Respondent Nairobi Factory on 1st December 2012; neither was he involved in the said theft. This he based on the following reasons.

b. First, the inaccurate and biased polygraph examination carried out on the claimant and which concluded the claimant was "definitely involved" in the cartel was and is still not sufficient to establish if the claimant was definitely involved in the cartel. Additional evidence should have been obtained by the respondent before arriving at their conclusion that there was a cartel in existence that was stealing paper from their factory and that the claimant "being a member" was definitely involved in the attempted theft on 1st December 2012. No further evidence was sought and obtained, beyond the polygraph examination report.

c. Secondly the claimant's evidence was that the respondent did not report the alleged theft of 1st December 2012 to the police who would have definitely commenced investigation. Further, no steps were taken to have the claimant, if he was part of the alleged cartel, and if there was the alleged theft, arraigned in Court or charged in a criminal trial to determine his guilt. We submit that the failure of the respondent to involve the police or to have the claimant subjected to criminal trial leads to an inference that the claimant was innocent of the theft allegations levelled against him and his being part of the alleged cartel.

d. Thirdly the respondent did not initiate any disciplinary proceedings against the claimant or

convene a disciplinary committee to investigate the claimant and verify if the said theft allegations were true or not. No evidence of minutes or documents were adduced by the respondent to prove that any investigations, beyond the polygraph examination, were conducted to establish whether indeed, there was the alleged cartel, or whether the claimant was a member. No evidence was adduced to show that the claimant was subjected to an internal disciplinary procedure which would have gone to prove whether on a balance of probability the claimant was a cartel member or whether he was involved in the alleged paper roll theft.

e. Fourthly the respondent initial investigations contained in a report dated 2nd December 2012 attached at Appendix 2 of the Respondents' documents confirms that the claimant was never part of the alleged cartel at the respondent factory on 1st December 2012 and that the allegations by the respondent that the claimant was involved in the attempted theft of paper rolls at EAPI Godowns-Kitui Road was malicious and unfounded. In addition despite the said report dated 2nd December 2012 indicating that the culprits could be positively identified by the guard in charge Luvanda, no such positive identification was ever done to identify the real culprits of the attempted theft of paper rolls at EAPI Godowns-Kitui Road. The said attempted theft of paper rolls was also not exhaustively investigated by the respondent and innocent people were terminated from employment in haste without waiting for the outcome of results of parallel investigations from other third party companies namely DHL, Excel and the police.

f. Fifthly the respondent did not avail all witness statements necessary to establish the truth in this matter especially that of Kennedy Luvanda. Their failure to do so as in this case may and does indeed lead to an inference that the evidence of uncalled witnesses especially that of Kennedy Luvanda would have tended to be adverse to the respondent case as it would have exonerated the claimant from the said theft allegations.

g. 2012 being the day of the attempted paper roll theft at the respondents factory or that he was among the group of employees who had access to the paper rolls stock or the respondent respondent's factory on the said 1st December 2012.

h. The claimant's evidence as contained in his witness statement was that on 19th December 2012 a polygraph examination was conducted on him to establish whether he was involved in the alleged paper theft at the respondent's factory on 1st December 2012. He stated that although he participated in the examination, he raised questions both on how the examination was conducted and the results obtained by the examiner. He also stated that the respondent's decision to include him in the list of employees suspected to have participated in the alleged attempted theft, and to have him participate in the examination was malicious, unfair and unjustified. Further, that the manner and the process under which the polygraph examination was conducted was unlawful, irregular, malicious, reckless, unfair and unjust.

i. The respondent's evidence was that the claimant voluntarily participated in the examination and that the same was conducted by an independent third party polygraph examiner. They also stated that the process and purpose of the examination was explained to the claimant. The question that arises from the evidence adduced is whether the conduct of the truth tracker polygraph on the claimant was lawful, regular, fair and just and whether the claimant gave his consent before and after the said examination.

j. Counsel submitted that the polygraph test was unjust in that the respondent did not explain to the claimant the basis for testing him as part of the said investigation. No evidence was adduced by the respondent to justify the use of polygraph test or the basis for attributing that the claimant was involved in and was responsible for the said loss of paper rolls if any. Furthermore the respondent did not adduce evidence proving that the claimant had access to the respondent factory on 1st December 2012.

k. The conduct of the truth tracker on the claimant was unfair and/or impartial in that the

respondent company was biased in selecting the employees who could be subjected to the polygraph test and that some employees who might have been involved were not tested. His assertion that the polygraph examination was unfair and biased was further backed by respondent's own evidence being an uncontested email correspondence referred to at paragraph 9 of the claimant's memorandum of claim and marked WKG-4 appearing at page 35 of the claimant's documents whereby the respondent indeed acknowledged that the polygraph test was not accurate and reliable.

- The use of the polygraph test in this case was unfair and irregular in that it was used to substitute the disciplinary hearing process of the attempted theft case in which the claimant was alleged to have been involved. On this issue, he referred to the South African case of **DHL Supply Chain SA (PTY) Ltd and De Beer, LW N. O. and 3 Others, case No. 0738/10** where BOQWANA AJ while quoting the case of **Food & Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Staff River 5 AC Basson J** held as follows:

"I am in agreement that polygraph testing, as they presently stand, can do no more than show the existence or non-existence of deception. Even on this score, scientists are divided. Moreover, it is an accepted principle in our law that the mere fact that a person lie (in criminal case) cannot in itself prove that the accused is guilty of a crime. By no means can it be used as conclusive proof of guilt of a crime or misconduct. At best the polygraph test can prove that a person lied, not that he is necessary guilty of a crime or misconduct.

In the light of the foregoing and in the light of the controversy that surrounds the accuracy and reliability of polygraph tests, I am not persuaded that the polygraph is a reasonable or fair alternative to minimize retrenchment ...in the context of a disciplinary process the polygraph can be a useful tool in the investigation process but can never substitute the need for a disciplinary hearing. A polygraph test on its own cannot be used to determine the guilt of an employee ..."

l. He further submitted that the issue on accuracy and reliability of polygraph test has been canvassed by various courts in various jurisdiction. In this regard he referred to the **Supreme Court of India, Criminal Appellate Jurisdiction, And Criminal Appeal No. 1267 of 2004** case involving **SMT, Selvi & Orrs vs. State of Karnataka** where it was observed as follows as regards polygraph tests.

Polygraph tests have several limitations and therefore a margin for errors. The premise behind these tests is questionable because the measured changes in physiological responses are not necessarily triggered by lying or deception. Instead, they could be triggered by nervousness, anxiety, fear, confusion or other emotions. Furthermore, the physical conditions in the polygraph examination room can also create distortions the recorded responses.

m. Counsel further submitted that the polygraph test administered by the respondent on the claimant was a illegal and irregular as there was no statutory provisions in the Employment Act or other labor laws or statutory law or procedures in Kenya legally authorizing the administering of a polygraph test. In the absence of such statutory provisions on polygraph testing, there is a likelihood as the case here of employee's rights being infringed as there is no statute to curtail the use of polygraph testing in Kenya by employers.

n. It has been put forward by the respondent at paragraph 2.5 of the reply to the memorandum of claim, that the nature and the process of the polygraph examination was explained to the claimant who voluntarily agreed to take the test. From the reading of the said consent, it was manifestly clear nowhere in the said consent does the claimant give his consent to be terminated from employment based on the polygraph test. It is thus clear that the claimant's understanding of the nature and use of the polygraph examination was that it would form part of the respondent's evidence but would never be used to infer his guilt. If at all the claimant or the respondent harbored the intention to have the polygraph exam being used to prove guilt it should have been

expressed in the said consent which was never done.

o. An analysis of the polygraph report shows that the examiner had designed and formulated self-incriminating questions and it was the response to these questions where the decision was noted and recorded as “deception indicated”. The question “Are you together with or part of the grand or cartel that was caught stealing paper on Saturday 1st December 2012” he submitted was self-incriminating. So too were questions 2, 3, 5, 9.

p. Suspects in any criminal matter are protected, under the provisions of the Evidence Act and the Criminal Procedure Act from self-incriminating questions. The claimant’s rights to this protection were certainly breached and violated by the respondent’s polygraph examiner.

q. The respondent had also breached the claimant’s legal rights in that the respondent had failed to prove the reason or reasons for the termination of the claimant’s employment as provided for under section 43 of the Employment Act which provides that:

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. The reason or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

r. Whether the claimant was defamed by the respondent’s decision to include him in the list of employees suspected to have been involved in the alleged attempted paper theft and further, whether the respondent’s report dated 19th December 2012 was published by the Respondent and if so, whether the publication was defamatory. Mr. Ndambiri submitted that in his evidence in the matter, hereof, the claimant stated that he started working for the respondent company in the year 1994. This fact was confirmed by the respondent’s witness Cor Roest who stated in his statement that the claimant was indeed employed by EAPI on 13th June 1994. The claimant testified that he was devoted, dedicated and committed employee at the said EAPI and he rose through the ranks to the position of Technical Services Manager by the time his employment was terminated. In his employment, he scooped several awards, certificates, yearly promotions and recognitions including bonuses. He also received a Certificate of Service in recognition of loyal and faithful service.

s. After the alleged attempted paper theft, and the alleged uncovering of a paper stealing cartel at the respondent’s Nairobi factory, the claimant, despite his obvious long, loyal and dedicated service had his name included in the list of employees suspected to have been behind the alleged theft, and indeed, a member of the cartel. Here we are talking about an employee whose sterling performance, honesty, diligence, trust, integrity and confidence the respondent company had fully endorsed, and had even made him one of the respondent’s bank signatories, entrusting him with handling and management of their accounts and assets worth millions of shillings.

t. As testified by the claimant in his statement, having his name included in the list meant that he was to participate in, undergo and be subjected in a polygraph examination on the alleged theft, and the alleged cartel. As a senior officer he did not have a choice in making the decision on whether or not to participate in the examination. Whether he participated in the examination or not, we submit that in the eyes of his colleagues and co employees, there was no doubt that to them, the Claimant was not after all, a clean person. His employer had identified him as one of those people who attempted to steal papers from the Nairobi factory, and that he was a member of a cartel that had been involved in stealing papers prior to the 1st December alleged incident.

u. The truth tracker report states in its concluding paragraph that “it is the opinion of the examiner that William Kiaritha Gacheru is definitely involved in the attempted theft/prior thefts. This report was published by the respondents, for it is from them that the claimant obtained his copy. It was also his evidence that the report, and the contents thereof were distributed, circulated and made

accessible to and amongst members of the respondent's board, staff and employees and the report, just like the inclusion of his name on the list of employees to be subjected to the examination, was subject of discussions, decisions, debates and conclusions.

v. From the evidence on record, it is clear the claimant was defamed by the respondent's decision to include him in the list of employees suspected of having been involved in the attempted paper theft and further he was defamed by the decision to use a truth tracker polygraph and to have him participate in the said polygraph examination. He was also defamed by publication of the 19th December 2012 report whose several words, phrases and references published meant and had been understood, by any man or woman who saw, read and heard about them to mean that the claimant was:-

i. a thief

ii. Was involved in the attempted paper theft at the respondent' Nairobi Factory on 1st December 2012.

iii. Was involved in previous/prior thefts at the respondent's Nairobi factory.

iv. He was an untrustworthy person.

v. He was engaged in dishonest and illegal practices and conducts.

vi. He was a member of a cartel that stole paper from the respondent.

vii. Was unethical and unscrupulous.

viii. Engaged in criminal and illegal activities.

ix. Was unworthy of his position in his employment.

x. Was unworthy of his position and status in society.

w. The Respondents defamatory acts and conducts, and the words, phrases and references were seen, heard, interpreted, reacted to and even believed by EAPI Board members, its staff and employees. The decision to terminate the claimant's employment because "following the uncovering of a paper stealing cartel operating at EAPI Nairobi factory on 1st December 2012 and his participation in a subsequent voluntary polygraph examination as part of the investigations, the company is compelled to let you go with immediate effectthe conclusion of the polygraph examiner was that you were definitely involved in the cartel" was proof that the board members and the author of the letter believed that the said acts and conduct and the phrases and references were true. All his workmates, both senior and junior knew about the exercise and after he was dismissed about the alleged reasons for his dismissal.

x. The claimant's character and reputation was certainly injured by the respondent's acts and conduct. They exposed him to ridicule, hatred, scandal, odium and contempt in the eyes of that reasonable man. His status and reputation were lowered and his name tarnished.

y(i). Whether the decision to terminate the claimant's employment was wrongful, unlawful, irregular and in violation of the provisions of the Employment Act and other laws and rules on labour and employment, we submit that the decision of the respondent to terminate the claimant's employment was wrongful, unlawful, irregular and in violation of provisions of the Employment Act and other laws and rules of labour employment.

y(ii). First the termination procedure employed by the respondent in terminating the claimant's employment was wrongful, unlawful and irregular as the respondent had no valid

reason to terminate the claimant's employment.

y(iii). Secondly the termination of the claimant's employment was wrongful unlawful and irregular as no disciplinary proceedings or hearing took place before the claimant was terminated from employment.

y(iv) Whether the claimant is barred from lodging any claims against the respondent

We refer the honourable Court to Annexure 8 attached to the respondent's reply to the memorandum of claim which states at paragraph 2 that "I confirm that I have no claims whatsoever against E.A. Packaging Industries Limited including claims for further compensation as a result of termination of contract of service" and submit that in his evidence, the claimant challenged the manner and way this document was presented to him for signing. He testified that when the document was presented to him, it was made absolutely clear that he was to sign the same in reference to the Kshs.3,223,922 he was being offered as terminal dues. At no point, and indeed the contents of the said document, do not state the claimant is barred from instituting any legal action against the respondent.

y(v). As stated by the respondent's witness in his written statement, the issue on whether or not the claimant was to make further follow-up on his compensation was a mutual understanding between the parties thereof. There was no agreement freely entered into between the two parties, stopping or hindering the claimant from exercising his legal and constitutional right to access justice as when his rights are threatened or violated. The right to access to justice is provided for under Articles 22, 23, 48 and 50 of the Constitution. The rights cannot be abrogated or taken away, more so by a mutual understanding between or amongst parties.

y(vi). We submit that the claimant is not barred from filling any or any suit against the respondent. He is not barred from lodging any claims against the respondent or any of its associates. The claimant's right to raise a complaint, to file suit and to lodge claims before any Court or authority is constitutional and legal right and cannot be abrogated.

7. The respondent's counsel Mr. Kabaiku on the other hand submitted that:-

a. Whether the polygraphic examination was voluntary, lawful, regular, fair and just

The respondent submits that prior to taking of polygraph examination the claimant was duly informed of the reason of the ongoing investigation, the purpose and the process of the examination. Further the examination was fair, just and objective and was professionally done by an independent third party. The polygraph examination was conducted to identify the perpetrators. The process was lawful as it was aimed to aid the respondent identify the employees who attempted to defraud the respondents.

b. In the South African case of National Union of Mineworkers and Another Versus Commission for Conciliation, Mediation, and Arbitration and, two Others Case No. JR 2512/2007 the Court observed that:

"in respect of the polygraph issue, it is accepted that a polygraph cannot be taken into account on its own. It is, however, accepted that it has some probative value and the results of such test may be taken into account in assessing the fairness of a dismissal. In my view the result may also be taken into account as one of the factors of assessing the credibility of a witness and in assessing the probabilities, the fairness of a dismissal. In my view the result may also be taken into account as one of the factors in assessing the credibility of a witness and in assessing the probabilities."

c. The respondent submits that the claimant's allegation that the examination was malicious and

unfair is just a mere afterthought and has no basis. The claimant signed a pre-polygraph examination consent on 19th December 2012 (appendix 3 reply of memorandum of claim) voluntarily agreeing to undergo the polygraph test. The consent further states that the claimant was acting as a freely and was not under any duress while signing the consent. He further stated that he understood all information from the interview and testing and went further to sign the consent on the knowledge and approval of those terms.

d. It is our humble submission that the consents being documentary in nature cannot be controverted by submissions, whether oral or written, unless the claimant adduces sufficient evidence that undue influence was exercised on him

e. The claimant had previously organized prior polygraph examination involving other employees in November/December 2012. The claimant was actually involved in the process and shortlisted the employees to undergo the test.

f. In his email dated 23rd November 2013 (Respondent's Supplementary List of Documents, page 7) a month earlier on the theft in the instant case, the claimant stated' **"I am eagerly waiting to see the results. Somebody must be very scared by now and may be beans will be spilled"** In essence a party should always stand by his word and conduct and the principles of estoppel would not allow him to deny the same. It would be unfair for the claimant to allow such an employee to be subjected to a certain test and then object to the same test when it came to him.

g. Whether the claimant's was defamed by the respondent's decision to include him in list of employees suspected to have been involved in the cartel

It is the claimant's case that he was defamed by the respondent's decision to include him in the list of employees who were suspected to have been involved in the attempted theft. Further that several words and phrases published in the respondent's polygraph report meant and were understood to be defamatory on the part of the claimant.

h. The respondent submits that the claimant has not stated the exact words that were defamatory. In his claim, the claimant just states that several words and phrases and reference published in the report on 19th December 2012 were defamatory.

i. He alleges that the list was published to other employees.

On contrary, prior to the test the respondent posted a general notice (page 3 of respondent's supplementary list of documents) on the Company's Notice Board informing the employees that the test would be done on selected 28 employees. The names of the employees were not published but the employees names were to be given by Eva, the Managing Director's Assistant or secretary. The claimant has failed to prove the mode of publication and has merely made a generalized statement.

j. The respondent further submits the claimant vide an email dated 12th February 2013 (Appendix 6, page 24 of the reply to memorandum of clam) raised his concerns over the test and copied the email to various persons in the management of the respondent.

k. It is the claimant who initially engaged several other people within the respondent company and all the respondent did was to reply to the same including the same people. In any event the contents of the respondent email were factual where investigations had been conducted and polygraph examination conducted by independent third party.

- In the case of **Joseph Karanja Wainaina v National Bank of Kenya (2009) eKLR** the court held that:

"The fourth issue for consideration is whether the termination letter is defamatory. The termination letter was written by the defendant to the plaintiff. It was not for circulation to their parties. Indeed

from the evidence on record it is the plaintiff who engaged several other people within the bank in the process of appealing. Again from the letter produced as evidence the reason given for termination was factual. I find that no evidence of the alleged defamation was adduced in Court and no proof that the contents of the said letter were false and malicious. In the circumstances this ground must fail.”

l. The elements for defamation that must be proved by a claimant were laid out in, among other cases, the case of **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others (2010)**:

- a. The statement must be defamatory;
- b. It must refer to the claimant, i.e. identify him;
- c. It must be published i.e. communicated to at least one person other than the claimant.

□ Whether the respondent’s email dated 18th February 2013 and the polygraph report were defamatory

The respondent submits that respondent’s email dated 18th February 2013 was a reply to the claimant email of the 12th February 2013. The contents of the email were neither false nor malicious and were not intended in any way to injure the reputation of the claimant as pleaded in the memorandum of claim.

- The respondent through the reply was just expressing its disappointment that 28 of its employees had been involved in a cartel and the polygraph examination was to assist the respondent to point out the employees who were involved in the attempted theft. From the results of the polygraph test it was clear that the questions as regards the theft. The respondent through its email just stated that the claimant had failed a number of the key polygraph questions.

In addition, the respondent submits that for a statement to be held to be defamatory, the works must tend to harm the plaintiff’s reputation in the minds of right thinking persons, or must cause him to be shunned. It is the respondent’s case that just before the polygraph test was carried out the claimant was given an opportunity to assist the respondent to find out how long the cartel had been going on and the claimant did not submit even a single report to that effect.

m. It is our submissions that the claimant has not proven how the contents of the respondent’s email and the polygraph report were false.

n. The claimant’s witness whom he alleges the matter was published are his friends. It is the claimant who informed these witnesses about his termination and not the respondent.

o. The principle of law in the cause of action for libel is not the estimation of the plaintiff that he was in the eyes of the public so estimated and shunned. The claimant must show that the publication reduced him in the estimation of the right thinking members of society. In addition it is also important to consider the context in which the statement in question was made. One must look at the whole of the publication to see whether it was calculated to injure the claimant’s reputation. You must see whether, taking the whole together, you reasonably think the publication likely to depreciate the claimant’s character or business interest. The respondent’s reply to claimant’s email was copied to respondent’s board members on the note that the claimant had initially copied them. In any event the respondent was under its obligation to inform its Board members of the outcome of the investigations on the attempted theft.

p. In a nutshell, in an ordinary meaning, the contents of the respondent email were not defamatory.

q. Whether the statement was published

My Lord, the claimant has not demonstrated the manner in which the words were published.

This is the essence of tortious defamation that the disparaging matter must be communicated to a third party other than the person claiming to be defamed. The respondent submits that the respondent's email in reply to claimant's email, was addressed to the claimant only and the recipient in the email were the respondent Board members.

r. In the case of **Kagwiria Mutwiri Kioga v The Standard Limited & 4 Others (2010) EKLK** it was held that:

“Communication to the Plaintiff himself is not enough, for defamation is an injury to one's reputation, and reputation is what make people think of a man and not his own opinion of himself. I therefore agree with the submission by counsel for the defendants that the self-assessing evidence of the plaintiff as to the reaction of the public or society to the publication does not corroboratively show the actual alleged impact of the alleged defamatory article.”

In addition the claimant's witness were not copied in the email complained of therefore their evidence as to what they understood the words to be defamatory does not hold water. Their evidence relies on the story given to them by the plaintiff.

s. Further, the respondent does not specify the date and the manner in which the polygraph results were published and to who. There is no single statement or paragraph from a third party in support of this allegation.

Your Lordship, we submit that there was no publication of the email or polygraph results to third parties and if the recipient copied in the email were to be taken to be third party is the claimant who initiated the conversation and copying the said recipients. In any event such publication was then done by the claimant himself and not the respondent.

t. Whether the claimant's termination by the respondent was unlawful

The respondent submits that the claimant's termination from employment was lawful and in accordance with the express provisions of section 44 (4) of the Employment Act, 2007.

u. The claimant was suspected of being involved in a theft cartel that was attempting to steal from the respondents company which was in collusion with some rogue third party suppliers. This was a ground justifying summary dismissal. The respondent instead of summarily dismissing the claimant on the said reasons advised the claimant among other suspected employees to undergo a polygraph examination.

Further the respondent, though entitled to dismiss the claimant summarily, opted for normal termination and paid the claimant all his benefits.

The claimant was also paid the statutory benefits applicable to a retrenched employee notwithstanding that he was not retrenched.

Further the claimant was given an opportunity to give an explanation on the theft and give an audit on any missing papers but the claimant failed to cooperate. The respondent submits that proper procedure was followed before termination of the claimant as required under section 41(1) of the Employment Act.

v. In any event the claimant had previously expressed his desire to resign from the respondent's company. This was via an email dated 12th February 2013.

Similarly two years earlier the claimant vide an email dated 21st June 2011 requested to be retrenched. My lord the claimant cannot now be heard to claim damages for loss of employment.

w. The respondent submits that the terminal dues paid to the claimant was with the understanding that the claimant would not lodge any claim against the respondent. Your lordship, the claimant signed the clearance certificate confirming receipt of all his dues.

x(i). The claimant is then stopped by principles of estoppel from going against his representation made to the respondent that he would not file any claim against the respondent if he is given the exit package. In any event he should then be ordered to refund the sum of Kshs.3,781,744.00 to the respondent.

8. As is obvious from the pleadings and submissions by counsel in this matter, the Court is called upon to determine whether the termination of claimant services based on the result of polygraphic test was unlawful and unfair in the context of the Employment Act, or the claimant's contract of service or employment law generally. Second, should the Court reach a finding that the dismissal was wrongful and termination unfair, can the Court award him compensation as provided in the Employment Act and or his contract of employment in light of the fact that the respondent paid him some money on account of his exit dues and that he signed that he had no further claims against the respondent. Finally, did the polygraphic report the basis upon which the claimant's services were terminated defame the claimant to warrant an order for damages for defamation?

a. **Was the termination of the claimant's services based on results of polygraphic test unlawful and unfair?**

9. As has been held by this Court before, reluctance and circumspection must be exercised when considering issues and procedures in employment which are purely within managerial discretion. The Court in essence cannot usurp this discretion from the management and replace it with its own.

10. The respondent in this case being concerned over loss of paper materials which it suspected was an inside job decided to employ modern technology to aid in unravelling the suspected theft. In the selection of those who would participate in the test the respondent took into consideration employees closely associated with the purchasing, receipt, handling and issuing of paper stocks. The claimant fell in this category. By a consent note dated 19th December, 2012 the claimant stated therein and signed that he voluntarily of his own free will and accord, without any threats or promises agreed to take a polygraph test. The level of the position held by the claimant in the respondent coupled with level of education as an engineer, he cannot claim he could do nothing about participation in the polygraph test. He had the option of refusing to participate in the process even at the pain of dismissal. The Court is of the view that the turn around to disown the results of the test is probably because the claimant either took the test for granted or did not expect the outcome.

11. The Court is in agreement that polygraph testing as presently stands can do no more than show the existence of or non-existence of deception. Due to its several limitations and margin of error, it is not safe to rely on and cannot itself be used as a conclusive proof of guilt of crime or misconduct. Besides a person can lie without necessarily being guilty of the crime or misconduct he is alleged to have been involved in. Technology however must be encouraged in development if solutions to daily and myriad problems are to be lessened. In the legal field, it was not until recently when video and email evidence became admissible in our Courts. There was initial resistance but by embracing these new technologies judicial work has been considerably simplified and expedited.

12. The claimant's termination letter dated 11th January, 2013 is categorical that he was terminated as a consequence of his participation in the polygraph examination. Whereas as observed before that polygraph test result alone cannot be conclusive on the issue of guilt or misconduct under investigation, I have not come across any minutes or record of subsequent disciplinary hearing that the claimant was taken through prior to termination of his contract. Section 41 (2) of the Employment Act requires that before termination, an employer must hear and consider any representation which the employee concerned makes. This inherently calls for some sort of hearing, however informal, prior to dismissal. To this extent the Court finds that whilst there was nothing wrong with taking the claimant through polygraphic testing, it was unfair to rely on the result of the test alone to terminate the claimant's contract,

further it was unfair not to afford the claimant an opportunity to defend himself prior to terminating his services.

13. (b) **Can the Court award the claimant compensation in the light of the facts that the respondent paid him some money on account of his exit dues?**

The Court did not have the benefit of looking at the up dated version of the claimant's letter of appointment. The one attached did not make provision for termination notice. The Court will therefore rely on the notice period given in the letter of termination as well as the Employment Act and place it at one months' notice or pay in lieu. If the claimant was to be terminated normally, he would have been given a month's notice or pay in lieu, salary for the days worked, leave earned but not taken and pension contributions. The claimant being a contributor to NSSF would not be entitled to service pay.

14. The Court has reached a finding that the claimant's services were unfairly terminated in terms of reason and procedure. Where a Court comes to such a conclusion, the claimant is entitled to an award of up to 12 months salary as compensation. The award under this head is compensatory and does not take into account terminal benefits which are payable as per contract of employment or in accordance with statute.

15. The claimant's terminal benefits were handsomely paid to him and the Court will not make any further award however the injury caused by the unfairness of the process of his termination has to be redressed up to a limit of 12 months' salary. In this regard, the Court considering all the circumstances and the conduct of the respondent of handsomely paying the claimant as if he was retrenched, will award him four months' salary as compensation for unfair dismissal.

16. Concerning the finality clause in the clearance certificate, the claimant was paid his contractual and or statutory dues which had nothing to do with compensation for unfair termination. As observed earlier an award for unfair termination is compensatory. It takes into account the inconvenience, breach of fair administrative process, violation of rules of natural justice and often times, constitutional rights in the context of employment relations. These rights and inconveniences to an employee are so profound that cannot be contracted out. They are encapsued under section 45 and 46 of the Employment Act hence no party can make a contract or agreement to exclude them. To do so would amount to contracting out of a statute without an express provision to do so.

17. (c) **Did the polygraphic report defame the claimant?**

Under section 3 of the Defamation Act, defamation is defined as "a publication without justification lawful excuse which is calculated to injure reputation, credit or ridicule. It is not enough that the words or material complained about is defamatory, there must be evidence of publication.

18. Mr. Ndambiri for the claimant submitted that the inclusion of the claimants name in the list of people suspected to be involved in paper theft cartel which was circulated amongst respondent's Board Members, staff and employees was defamatory. According to counsel, the inclusion of the claimant in the list created an impression that the claimant was after all not a clean person.

19. In this respect Mr. Kabaiku for the respondent submitted that the respondents email dated 18th February, 2013 was a reply to the claimant's email of 12th February, 2013 and that the contents of the email were neither false nor malicious. They were not intended in any way to injure the reputation of the claimant. According to Counsel, the respondent in the reply was just expressing its disappointment that 28 of its employees had been involved in a cartel and that the polygraph examination was to assist the respondent to point out employees who were involved in the attempted theft. Counsel further submitted that for a statement to be held defamatory, the words must tend to harm the plaintiffs reputation in the minds of right thinking persons, or must cause him to be shunned. In this regard Counsel relied on the case of **Kudweli v. Eureka Educational and Training Consultants & 2 others (1993) eKLR.**

20. Mr. Kabaiku further submitted that the claimant's witness whom he alleges the matter was published to, were his friends and that it was the claimant who informed these witnesses about his termination and not the respondent. Further, the claimant did not demonstrate the manner in which the words were published.

21. The annexure numbered 3 in the respondent's supplementary list of documents titled Office Notice reads as follows:-

OFFICE NOTICE

THE ATTEMPTED THEFT OF PAPER FROM CCD

By now you all know how disappointed I was to discover that certain individuals have been colluding with our security provider to steal our paper and no doubt sell it to our competitors.

I am now left wondering how long this has been going on for and who at CCD can be trusted? Who else at EAPI is involved and how high up does it go? I want to know that everyone at EAPI is on the same team as me, pursuing the same goals. That's very important to me. As things stand, some individual(s) have their own selfish agenda. And it troubles me. Deeply.

I simply will not allow a few selfish individuals to spoil the atmosphere at this company and ruin it for everyone else.

So, starting tomorrow morning Tuesday 18th December 2012, the most senior individuals in the production department and those most closely involved with the issuing and control of our paper stocks at CCD will be required to undergo a polygraph examination to establish who is and who is not involved. Eva has a list of 28 individuals who will be examined between Tuesday and Friday this week. If necessary, I will widen the list of all the casuals and contractors after the Christmas holidays but for now I am interested in clearing everyone on that list.

Remember, we are trying to prove innocence here so you have nothing to fear if you have not been involved. Simply relax and tell the truth and all will be fine. The polygraph examination process is carried out very professionally and takes approximately 1 ½ hours. It is totally harmless.

You will feel much better once proved innocent. And I will know that you are on my side.

Signed

Cor Roest

Managing Director

22. This letter appears to express the Managing Directors disappointment over the discovery that certain individuals were colluding with the respondent's security to steal paper and sell to respondent's competitors.

23. In order to resolve this issue the Managing Director decided to conduct polygraph examination of most senior individuals in the production department and those most closely involved with issuing and control of paper stocks.

24. It would seem that the 28 individuals were selected on account of their seniority and work area which according to the Managing Director were involved in production and issuing and control of paper stock. The selection was not based on suspicion of any particular persons involvement in the alleged theft. The letter goes further to state that the test was intended to prove innocence and those participating had nothing to fear if they had not been involved.

25. The Court has rendered itself earlier in this judgment on the ethics and reliability of use of polygraph examination hence will not go over the same again. Suffice is to say that this was a management discretion in handling a workplace issue and could not be reasonably said to have injured or lowered the reputation of the senior managers including the claimant who were selected for the testing on account of their position of responsibility in the company vis-à-vis the alleged theft.

26. Regarding the email of 18th February, 2013 annexed at page 6 of the respondent's memorandum of claim, a plain reading of the same reveals that it was a response to the claimant's earlier email of 12th February, 2013 in which he requested the intervention of a Mr. Andero, the CEO of the respondent in the matter of the alleged theft of paper in which the claimant was implicated and led to the termination of his services. Nothing in the letter could be said to have injured or brought the claimant into disrepute in eyes of right thinking members of the community in order to amount to defamation.

27. Termination and dismissal from employment must be for a valid reason. The validity of the reason is tested against a matter or matters which the employer at the time of termination or dismissal genuinely believed to exist and which caused the employer to dismiss or terminate the services of an employee.

28. The respondent was confronted with allegation of theft of its property, the matter had to be resolved in the interest of the business. The implication of individuals including the claimant could not be said to be defamatory for if the Courts were to do so no employer would dismiss or terminate the services of an employee on allegation of theft or other criminal activity without the risk of being sued for defamation unless such employee is eventually prosecuted and found guilty of the alleged offences. As stated severally by this Court, dismissal or termination of employment is a matter of management discretion and the Court must be reluctant to intervene unless for breach of provisions of statute or contract of employment or both. Further an allegation of involvement in theft or other crime against an employer or its property leading to termination or dismissal is tested at a lower standard of proof than when those allegations are prosecuted in Court of law. Which is why an acquittal for criminal offence is not a barrier to an employer in deciding whether to dismiss or terminate the services of such employee on the same facts.

29. In conclusion, the Court is not satisfied that subjecting the claimant to polygraph examination and eventually relying on the report to terminate the claimant's services defamed him with the consequence that the claim for defamation is found without merit and hereby dismissed.

30. The Court therefore awards the claimant four months salary as compensation for unfair termination of services.

31. The claimant being partially successful, there will be no order on costs.

32. It is so ordered.

Dated at Nairobi this 26th day of February 2016

Abuodha J. N.

Judge

Delivered this 26th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge