



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 149 OF 2005

GALSHEET (K) LIMITED.....APPELLANT

VERSUS

CALEB OTIENO.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Mr. Kaikai delivered on 17th February, 2005 in Milimani CMCC No. 2213 of 2002)

JUDGMENT

In the Lower Court, the Respondent was the Plaintiff who filed an amended Plaintiff on 22nd March, 2002 seeking;

- (a) Special damages of Kshs. 47, 850 and general damages for unlawful dismissal ;
- (b) General damages for false imprisonment, malicious prosecution and defamation ;
- (c) costs of the suit; and
- (d) Interest at Court rate until payment in full.

In the amended Plaintiff, the Respondent averred that in the year 2000, the Appellant maliciously and without any probable cause made a complaint to the second Defendant (the Hon. Attorney General) that the Plaintiff had stolen iron sheets as a result of which the Plaintiff was charged at Machakos law court and later on acquitted. The Plaintiff also averred that in the same year the Appellant also maliciously, summarily and unlawfully dismissed him from employment.

The Appellant filed a statement of defence dated 25th April, 2002 denying the Respondent's claim in which he stated that the Plaintiff was dismissed lawfully for gross misconduct and that they are not liable for malicious prosecution as they were not in charge of the investigations and subsequent prosecution in the criminal case.

The trial Magistrate heard the case and entered judgment in favour of the Respondent against the Appellant for special damages relating to wrongful dismissal in the sum of Kshs. 39,150, general damages for false imprisonment and malicious prosecution , but not defamation in the sum of Kshs. 200,000/= making a total of Kshs. 239,150/=

Aggrieved by the trial magistrate's judgment, the Appellant filed this appeal on the following grounds:-

- i. THAT** the Learned trial Magistrate erred in law and in fact in holding the 1st Defendant liable;
- ii. THAT** the Learned trial Magistrate erred in law and in fact in failing to appreciate that the evidence adduced was not sufficient to prove liability against the 1st Defendant.
- iii. THAT** the Learned trial Magistrate erred in law and in fact in failing to appreciate that the 1st Defendant had good reason and ground to dismiss the Plaintiff from its employment;
- iv. THAT** the Learned Magistrate erred in law and in fact in finding the 1st Defendant liable for false imprisonment , malicious prosecution and defamation against the evidence adduced;
- v. THAT** the Learned trial Magistrate erred in law and in fact in failing to consider the evidence of the Defendant’s witness;
- vi. THAT** the Learned trial Magistrate erred in law and in fact in finding the 1st Defendant liable for unlawful dismissal;
- vii. THAT** the Learned trial Magistrate erred in law and in fact in awarding the plaintiff general damages in the sum of Kshs. 200,000 which was inordinately excessive; and
- viii. THAT** the Learned Trial Magistrate erred in law and in fact in awarding Kshs. 39,150 as special damages which amount was not strictly proved;

From the above grounds this appeal is on both liability and quantum and the issues for determination by this Court can be summarized as follows:

- a) Whether the evidence adduced in the trial Court was sufficient to find the Appellant liable;**
- b) Whether special damages had been specifically proved; and**
- c) Whether the award was excessive.**

The appeal was canvassed by way of written submissions which I have considered. The Appellant relied on the case of **Douglas Odhiambo Apel and Emmanuel Omolo Khasino V. Telkom Kenya Limited, Civil Appeal No. 115 of 2006** to show that liability in malicious prosecution should not be attributed to the 1st Defendant but rather the 2nd Defendant. The Respondent submitted that the complaint lodged by the Appellant leading to his arrest was unjustified and in view of the evidence adduced at the trial. He relied on **Mbowa Vs. East Menjo District Administration (1972) E.A 352** where the court stated that “...the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings”

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard, the decisions in **Jabane vs. Olenja [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs. Sunday Post [1958] E.A. 424.**

The Respondent herein being PW1 testified before the Trial Court that he was employed by the Appellant on 12th December 1994 as a Store Clerk and was promoted on 7/4/98 to a Senior dispatch Clerk earning a salary of Kshs. 7,500 and entitled to 30 days leave and termination notice of one month. The Respondent produced before the Court, the appointment letter as exhibit 1, the promotion letter as exhibit 2. He further testified that in December 1999 he was arrested for alleged theft of iron sheets. He told the court that his duty was to receive materials from production and he was not involved in loading as there was a loader for the purpose.

On the material day, it was his evidence that after receiving the materials, he proceeded to do his

recording when the alleged extra iron sheets were loaded on the lorry. Exhibit 3 produced by the Respondent is a Court ruling showing that he was charged at Machakos Law Court and acquitted as there was no prima facie case established against him. The Defence witness DW1, deputy security officer with the Appellant testified that he was informed by a security officer that on the material day, a lorry was loaded with excess materials which were not invoiced. He said that the dispatch was signed by the loader Mr. Matheka and that 6 suspects were arrested including the driver who later absconded.

My re-evaluation of the evidence on record reveals that the Respondent was actually employed by the Appellant and indeed there are letters to that effect which show that the Appellant was entitled to the leave days as pleaded and one month's termination notice. The Appellant's submission at the trial court reveals that this fact was not denied and the Appellant admitted that the Respondent was entitled to the same and continued to do its calculations for the unpaid leave days, unpaid salary, and severance pay which were due to the Respondents. The court finds that on the grounds and exhibits produced by the Respondent, the Appellant did adduce evidence to the contrary. This court finds that the finding on liability for wrongful dismissal by the Trial Court was founded and the award on special damages was founded as well.

On false imprisonment and malicious prosecution this court will be guided by the principles that govern a claim founded on malicious prosecution as laid down by **Contran, J** in the case of **MURUNGA V ATTORNEY GENERAL, [1979] KLR, 138** which was quoted with approval by the Court of Appeal in **Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR** as follows:

- a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.*
- b. The Plaintiff must show that the prosecution terminated in his favour.*
- c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.*
- d. He must also show that the prosecution was actuated by malice*

In the instant case, it is clear that the prosecution was instituted under the instructions and directions of the Appellants. Its officers made a complaint to the police thereby setting in motion the process of the Respondent's arrest. There is no record of proper investigation to link the Respondent with the offence and in the circumstances the prosecution was instituted without reasonable and probable cause.

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

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

In his evidence, the Respondent stated that on the material day he was not involved in the loading of materials as he was away balancing the stock in the computer. The lorry was being loaded by waithaka who was supposed to sign. The Appellant knew very well that the Respondent was not involved in the loading.

I find that the Trial Magistrate well factored the evidence produced before the court which includes the Respondents letters of appointment in assessing the special damages as the same was well pleaded and proved.. Factoring the trauma occasioned to the Respondent for undergoing the criminal prosecution as well as the time and resources wasted, I find that the trial Court award of Kshs. 200,000/= was not excessive

For the above reasons I find that this appeal is devoid of merit and is hereby dismissed with costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 29th Day of September, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the APPLICANT

.....for the RESPONDENT