



NO. 258./ 014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 18 OF 2007

FIRESTONE EAST AFRICA [1969] LTD.....APPELLANT

VERSUS

ALPHONCE KYALO1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the original Judgement in Machakos Chief Magistrate's Court Civil Case No. 299 of 2005 by Hon. Mwendwa, R.M on 20/12/2006

JUDGMENT

1. The 1st Respondent sued the Appellant and the 2nd Respondent claiming general damages for unlawful arrest and defamation; special damages for summary dismissal from services, costs and interest. Judgment was entered in his favour against the appellant who was condemned to pay him a sum of **Kshs. 70,000/=** being damages for unlawful arrest and defamation of character, then **Kshs. 21,326/=** being one month's salary in lieu of notice. He was also awarded costs and interest. A claim for malicious prosecution was dismissed.
2. The appellant being dissatisfied with the decision of the court in an Amended Memorandum of Appeal dated **22nd February, 2007** raised the following grounds:-

“ i. That the learned magistrate erred in law and in fact in finding that the plaintiffs arrest was wrongful and malicious.

ii) That the learned magistrate erred in law and in fact in failing to find that the plaintiff admitted to having the intention to steal the appellant's property not only to the appellant's witness (DW1) but also to other officials of the appellant.

iii) That the learned magistrate erred in law and in fact in relying only on the written confession as being the only evidence of the defence against the plaintiff's claim.

iv) That the learned magistrate erred in law and in fact in not acting judiciously by only relying on the plaintiff's evidence and ignoring most of the appellant's evidence in coming to his conclusion.

v) That the learned magistrate erred in law and infact finding that the

appellant witness (DW1) had acted maliciously to the plaintiff.

vi) That the learned magistrate erred in law and in fact in finding that the plaintiff was entitled to payment of one month's salary in lieu of notice.

vii) That the learned magistrate erred in law and in fact in finding that the plaintiff was entitled to damages for unlawful arrest and defamation.

viii) That the learned magistrate erred in law and in fact by awarding general damages of Kshs. 70,000/= for unlawful arrest and defamation.

ix) That the learned magistrate erred completely and wholly misapprehended and misunderstood the applicable law.

x) That the learned magistrate misdirected himself and arrived at a wrong decision.

3. The 1st respondent was employed by the appellant as a forklift driver. On the **12th September, 2002**, he was arrested following allegations that he had stolen from the appellant. He was made to confess in writing having committed the offence. Following his confession he was arrested by the police and charged with the offence of stealing by servant. The action was followed by summary dismissal. The criminal case was terminated. He was discharged under **Section 87A of the Criminal Procedure Code**. Since no charges were preferred against him thereafter he filed the civil claim. It was his averment that the arrest and subsequent confinement was unlawful. He was also defamed in the eyes of right thinking members of the society and his reputation lowered in the eyes of his friends and relatives. The report made to the police represented by the 2nd respondent having portrayed him as a thief, an unfaithful servant unfit to be employed, untrustworthy and a criminal.
4. It was stated by the appellant that indeed the 1st respondent admitted having had an intention to steal the new tubes and valves he was found in possession of. He made a verbal confession prior to being asked to reduce it into writing. Administratively, when asked to show cause why he could not be dismissed, he admitted what he was being accused of and pleaded for leniency.
5. The appeal was canvassed by way of written submissions. Having considered rival submissions filed, issues for determination can be summarized as follows:-
 - i. Whether the arrest of the 1st respondent was wrongful and malicious?
 - ii. Whether the 1st respondent was entitled to payment of one months' salary in lieu of notice?
 - iii. Whether the 1st respondent was entitled to damages for unlawful arrest and defamation?
6. This is a first appeal, I must reconsider the evidence, evaluate it and make my own conclusions, bearing in mind that I neither saw nor heard the witnesses who testified and hence give such an allowance. Failure of the trial court to consider some relevant facts or circumstances would not make this court accept the trial court's finding of fact. (see ***Mariara versus Kenya Bus Services (msa) Ltd [1987] KLR 440.***)
7. According to the evidence adduced by both the 1st respondent and the appellant's witnesses at the trial court, it is apparent that some 205 pieces of tube valves described as TR 78A and 15 pieces of tubes size 700 x 13 were found at the backyard where the 1st respondent used to keep pellets collected from the company in the cause of his duties as a forklift driver. He was later seen loading the goods on a pick up. **Mr Webo** a security guard on discovering the goods notified the security supervisor DW2, **Antony Kairu Joseph** who in turn called the Security Manager, DW1.
8. DW1, **Okoth Omondi**, upon enquiring why the 1st respondent had the company properties illegally, he confessed having taken the items, sought forgiveness and requested to retire from employment. The matter was reported to the police. Investigations were carried out, which culminated into the 1st respondent who was arrested being charged.
9. Prior to reporting to the police there was information that some properties belonging to the

appellant had been taken away and dumped where they were not supposed to be, apparently with an intention to deprive the appellant of the same.

The question to be answered is whether the appellant in making the report acted as a result of some spite or malice.

10. Malice is defined by the **Black's Law Dictionary**, (8th Edition, 2004) page 976 as -

- “i) the intent, without justification or excuse, to commit a wrongful act***
- ii) Reckless disregard of the law or a person's legal rights.***
- iii) ill-will; wickedness of heart”.***

11. From the evidence adduced the appellant acted having received a report from the security guards and after it was established that the 1st respondent had indeed dumped some items at the scrap yard instead of delivering them to where they ought to have been. The action taken by the appellant which made the police carry out further investigations cannot be concluded to have been wrongful. They were justified in taking the action.

12. In the case of ***Kagane and Others versus Attorney General and Another [1969] E.A. 643***, it was held that;-

“whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty”.

13. From the foregoing it is obvious that there was reasonable and probable cause that the 1st respondent had committed an offence. This was subject to further investigations being carried out by the 2nd respondent. therefore, no malice could be attributed to the appellant

14. It was stated that the prosecution was malicious because the 1st respondent was acquitted under **Section 210** of the **Criminal Procedure Code**. Proceedings in ***Criminal Case No. 299 of 2005 Republic versus Alphonse Kyalo Musyoki*** were produced in evidence. The proceedings were indeed terminated under **Section 87** of the **Criminal Procedure Code**. This means that subsequently the same charges may be brought against the 1st respondent. To-date it has not been concluded that the 1st respondent did not commit the offence. Even if the 1st respondent had been acquitted of the criminal charge. That per se would not necessarily connote malice on the part of the appellant. In the case of ***Joseph Mwambuvi and 3 others, Nairobi C.A. No. 171 of 2000*** it was stated thus;-

“To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is, and the burden of proving that the prosecutor did not act honestly or reasonably is on the person prosecuted.”

15. This is a case the 1st respondent acted reasonably by reporting the matter to the police. At the stage of termination of the criminal case only two (2) witnesses had testified. The investigating officer had not testified. It can therefore not be said with certainty that in prosecuting the 1st respondent, the 2nd respondent acted dishonestly and unreasonably.

16. It has been submitted by the 1st respondent that the confession extracted by the appellants from the 1st respondent was not admissible in evidence. Therefore, continued insistence by the appellant of the unlawful confession was a misconception of the law. A purported confession would generally be inadmissible as clearly stipulated by the **Evidence Act. (vide Section 25A and 26 of the Evidence Act, Cap 80 Law of Kenya)**. It is important to note that such an argument would suffice in criminal matters. The argument ought to have been raised in the criminal case.

- However the document was not produced in that particular case. There is no indication that the prosecution intended to use it in their evidence.
17. The document was however adduced in evidence in the civil matter. It was treated as a response to a notice to show cause why he could not be dismissed. The learned trial magistrate in reaching his finding dwelt at length on the purported confession and dismissed it. It is interesting to note that the 1st respondent does not challenge the authorship of the letter save that he claims he was duped to believe that if he wrote the letter he would be forgiven and not sacked. Even if we were to believe that he was tricked to so believe this does not absolve him from the blame of having been found with the items at an improper place. In the circumstances it was misdirection on the part of the learned trial magistrate when he reached finding that the arrest was unlawful.

This brings in the issue whether the 1st respondent was defamed?

18. It was pleaded by the 1st respondent that the plaintiff was portrayed as a thief, a criminal, unfaithful servant who was unfit to be employed and trusted with any property. In his testimony the 1st respondent did not adduce evidence of defamation of character. The duty was upon the 1st respondent to prove that the act of the appellant which portrayed him as a criminal or an unfaithful servant who could not be trusted with any property was published to a third party. The statement was false; it was disparaging and injurious to the 1st respondent. In his own words the respondent did not attempt to establish how defamatory the issue was. His only witness was an officer who produced the record of the criminal case. He did not call any third party in whose eyes his esteem was lowered. And as aforesaid, the allegation having been founded on some evidence, this court fails to comprehend on what basis the Lower Court reached a finding that he had been defamed.
19. There was an award of one month's salary in lieu of notice awarded to the 1st respondent. Such a prayer was not specifically pleaded and particularized. In his prayer for compensation the 1st respondent stated thus:-

“I was only paid last month pay plus leave due and no other terminal benefit. I am asking for the court to order for payment of terminal benefits and compensation for wrongful dismissal and malicious prosecution”.

20. An employer has the mandate to summarily dismiss an employee. An employee can be dismissed summarily when the employment is terminated without notice following gross misconduct. A good example is where an employee is arrested lawfully for a cognizable offence punishable by imprisonment or where the employee on reasonable ground is suspected of having committed a criminal offence against his employer. (***see Section 44 (4) (f) of the Employment Act***). In this case the suspicion in issue having been reasonable the 1st respondent was not entitled to payment of the one month's salary in lieu of notice.
21. Finally, there was an award of **Kshs. 70,000/=** general damages for unlawful arrest and defamation. As aforesaid stated there was no evidence of unlawful arrest and defamation. No damages should have been awarded by the court.
22. From the foregoing the appeal succeeds, the judgment entered in the Lower Court and the awards thereof are set aside. Costs of the trial court as well as the appeal shall be borne by the 1st respondent.
23. It is so ordered.

DATED, DELIVERED and SIGNED this 3RD day of APRIL 2014.

L.N. MUTENDE

JUDGE