



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 62 OF 2007**

PATRICK ONYANGO IMEMBI .....APPELLANT

VERSUS

1. BURNS ENTERPRISES (K) LIMITED ..... 1ST RESPONDENT
2. THE ATTORNEY GENERAL .....2ND RESPONDENT

**JUDGMENT**

This appeal arises from the Judgment of Honourable Ndungu – Principal Magistrate in Civil Case Number 2826 of 2004 dated the 2nd of April, 2007.

The Appellant together with two others namely Bellfax Jared Atuta and Moses Omondi were on the 22nd day of January, 2002 charged with the offence of stealing by servant.

The case was terminated on 16th June, 2003 under Section 89(5) of the Criminal Procedure Code.

It is upon that termination of the Criminal case that the Appellant filed a Civil Suit Number 2826 of 2004 claiming general damages for wrongful dismissal, wrongful arrest, false imprisonment and malicious prosecution.

At page, 32 line 30 of her Judgment the learned trial magistrate had this to state,

***“ In my considered view there was reasonable cause and or suspicion leading to the arrest where theft has been suspected it cannot in my view be said that such arrest lacked reasonable or probable cause or that the subsequent prosecution was malicious, the plaintiff himself had cashed a cheque in the name of Baraza who was not an employee of the 1st Defendant. It became apparent for the evidence that there was a conspiracy amongst the 1st Defendants employees to defraud the company. The plaintiff allowed himself to be used by his co-workers in this plot. He was a mere guard and it was not his duties to receive salaries or cash on behalf of the 1st Respondent”.***

In the case of **Murunga -Vs- The Attorney General 1979 KLR page 138 Cotram Judge** held,

***“ In proceedings for malicious prosecution, the plaintiff must show***

***(1) That a prosecution was instituted by the Defendant or by someone for whose act is responsible***

***(2) That the prosecution terminated in the plaintiffs favour***

***(3) That the prosecution was instituted without reasonable and probable cause.***

***(4) That it was actuated by malice. The test whether the prosecution was instituted without reasonable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence”.***

On the first two its not denied that the 1st Respondent initiated the arrest and the prosecution of the Appellant and that the case was determined in Appellants favour.

It is submitted that what is denied is that the prosecution lacked reasonable or probable cause or that it was actuated by malice.

Counsel for the 1st Respondent has cited the Case of Hicks –Vs- Faulker (1878) 8 GBD 167 at page 171 which defined reasonable and probable cause thus,

***“Reasonable and probable cause in 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”.***

The 1st Respondents submissions are that the Appellant admitted before the trial magistrate at page 29 line 20,

***“(1) That he did cash a cheque drawn in the name of one Baraza who was no longer an employee of the 1st Respondent.***

He further told the trial magistrate,

***“I went to the bank and was paid Ksh. 23,300/= . I brought to the company. At the police station they told me the problem with the money was that it was alleged the man supposed to have been paid had died while indeed he was alive”.***

It is contented that, the fact that the Appellant cashed the cheque but did not give it to Baraza made him a prima suspect.

The Court does note and agree with the learned trial magistrate that the Appellant was a mere guard who had no business in involving himself with receiving salaries or cash payments on behalf of the 1st Respondent.

Was the prosecution actuated by malice? The plaintiff was to prove whether there was a grudge between him and the employer before the arrest and or with the police officers who ultimately charged him in Court.

Further the plaintiff has not pleaded the particulars of malice as required under order VI Rule 8 of the Civil Procedure Rules.

In the Case of Gitau – Vs- E.A. Power & Lightning Co. Ltd. 1986 KLR page 365 it was held,

***“In a claim alleging malice, the facts constituting malice ought to be particularized as per order V rule 8(1) of the Civil Procedure Rules.***

***In order for a claim of malicious prosecution to succeed, the plaintiff must not only show that he was prosecuted upon the instigation of the Defendants and that there existed***

***malice and which malice he must prove”.***

In the present case it is observed that no particulars of malice were pleaded as required and therefore no malice was proved.

Wrongful dismissal. In the plaint the Appellant claimed damages for wrongful dismissal and particularized them as follows

(a) One month salary in lieu of notice Ksh. 3,668.

(b) Severance pay for twelve years completed service Ksh. 26,409.60/=

Total Ksh. **30,077.60/=**

The Appellant was summarily dismissed for desertion of duty by a letter dated 29th January, 2002. He was not paid a single cent. Under the employment Act he was entitled to at least one month's notice of termination or payment of one month's salary in lieu thereof.

In the treatise. The **Modern Law Employment by GHL Friedman at page 495** it is stated,

***“The idea is to compensate the employee for loss of his wages or salary, not to punish the employer for wrongful dismissal. Normally damages recoverable will be the amount of wages or salary for the period of proper notice, for that amount will represent what the employee has lost by being dismissed without such notice. Hence if the employee has been given the amount which represents his salary or wages for the period of such notice no action for wrongful dismissal will lie against the employer”.***

In the present case no proper notice was issued to the appellants and no salary for the proper notice was paid to the appellant.

He is therefore entitled to one month's salary in lieu of notice which is Ksh. 3,668/=.

Severance pay relates to redundancy which is not the issue here as this was a summary dismissal. The claim for Ksh. 26,409/= therefore does not lie.

This appeal succeeds only on the prayer for wrongful dismissal which amount has been ascertained as one month's salary of Ksh. 3,668/=. The claim in the other prayers was not proved and is dismissed.

The liability on wrongful dismissal is attachable only to the first Respondent.

Each party to bear its own costs. Interest on the amount allowable to be paid by the 1st Respondent from the time of filing of the suit till full payment.

Judgment delivered dated and signed this **3rd** day of **April, 2014**.

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**M. MUYA**

**JUDGE**

**3RD APRIL, 2014**

**In the presence of:-**

Counsel for the Appellant Mr. Maundu holding brief Anada

Learned Counsel for the Respondent Miss Kwaya

Miss Masila holding brief Eregi for 2nd Defendant.