REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 108 of 2004

NELSON MAINA KAMAU ….....……..…..……. APPELLANT

AND

REPUBIC ……..……. RESPONDENT

(Appeal from the ruling of the High Court of Kenya at

Nyeri (Khamoni J.) dated 5th April 2004

in

HC Cr. Misc. Appln. No. 1 of 2004)

JUDGMENT OF THE COURT

1. The charge against the appellant was that on the 2nd day of June 2001 at Total Petrol Station in Karatina Township in Nyeri District within Central Province, he created a disturbance in a manner likely to cause a breach of peace by abusing and threatening to beat Mr. Peter Weru Kahumbu using his fist contrary to Section 95 (1) of the Penal Code. The appellant was then an Assistant Chief of Baricho sub-location, Konyu location, Mathira Division in Nyeri District.

2.The appellant was initially charged at Karatina in Criminal Case No. 245 of 2001 which case was transferred to Nyeri as CM Cr. Case No. 2025 of 2001. The appellant was tried, convicted and sentenced to pay a fine of Ksh. 6,000/= and in default he was to serve four months imprisonment. He paid the fine. No appeal was lodged against conviction and sentence within the stipulated time frame. The appellant filed a Notice of Motion in H.C. Misc. Criminal App. No. 129 of 2002 seeking for leave to file appeal out of time; however that application was dismissed by Honourable Justice Mitey on 16th September 2002.

3. The appellant filed another Notice of Motion dated 5th January 2004 seeking orders *inter alia* that he be re-instated to his employment in the civil service on the ground that a *nolle prosequi* had been entered by the state. He also sought orders that the fine of Ksh. 6,000/= be refunded to him. The other ground in support of the notice of motion was that the ruling by Justice Mitey in HC Misc. App. 129 of 2002 was made in error.

4.The learned Judge (Khamoni J) by a ruling delivered on 5th April 2004 dismissed the Notice of Motion and this is the basis of the present appeal. The learned Judge in the ruling stated that the appellant ought to have lodged an appeal against the judgment under which he was convicted. Since no appeal was filed, he held that the Notice of Motion should not have been entertained. The learned Judge also stated that it was wrong for the appellant to question the proceedings before High Court in Misc. Criminal App. No. 129 of 2002 under the Revision Provisions of Section 362 to 367 of the Criminal Procedure Code as these provisions apply to proceedings from subordinate courts only. The learned Judge held that the order for reinstatement sought by the appellant could not issue. Further, the Judge noted the issue raised was civil in nature, whereas the case before him was criminal in nature. The appellant should have filed a civil suit against his employer for wrongful dismissal. Aggrieved by the ruling, the appellant filed this appeal.

5. The appellant filed a memorandum of appeal in which he contends that the learned Judge erred in law and in fact by failing to note that a *nolle prosequi* dated 21st September 2001 had been entered in the criminal case. That the Judge erred in law and fact by failing to call for the records in the Chief Magistrates Criminal Case No. 2025 of 2001 for purposes of revising the correctness of the proceedings and judgment. That the judge erred in dismissing the notice of motion dated 5th January 2004. That the learned Judge erred in failing to note that the appellant was a layman and acting in person. The appellant prayed for orders setting aside the ruling made by the honorable Judge on 5th April 2004.

6. At the hearing of the appeal, the appellant appeared in person while the Assistant Director of Public Prosecution Mr. KAIGAI appeared for the state.

7. The appellant submitted that he was not satisfied with the ruling of the honourable Judge on the ground that a *nolle prosequi* had been entered in the magistrate court and the Judge erred in failing to call for the trial court file to ascertain this fact. The appellant restated his grounds of appeal and observed that he wanted his name cleared of any criminal record since the *nolle prosequi* had been entered.

8. In opposing the appeal, Mr. KAIGAI supported the findings and conclusion of the honourable Judge. He submitted that an order of re-instatement to employment could not be made in a criminal case. That the issues raised by the appellant before the honourable judge were employer-employee issues well suited for trial in a civil case before the industrial court. It was submitted that there was no *nolle prosequi* produced before the trial magistrate. That the record before the Judge at the High Court also shows that there was no *nolle prosequi*. It was submitted that the appellant had attached an alleged copy of a *nolle prosequi* in his affidavit. Counsel for the state submitted that the origin, source and authenticity of the attached document is in issue as none was tendered in court before the trial magistrate.

9. In reply the appellant insisted that the attached copy of the *nolle prosequi* was valid and it was "supposed" to be produced in court before the magistrate.

10. We have listened to the submission by the appellant and the state. We have examined the ruling by the honourable Judge made on 5th April 2004. We have also examined the record of proceedings before the judge on diverse dates. Our examination of the record reveals that on 2nd Febraury 2004, the honourable Judge called for the case file CM Cr. Case No. 2025 of 2001 and the High Court Misc. App. 129/2002. On this day, the appellant was in court in person. On 30th March 2004, it was reported that these files were before the court. The record shows the appellant was in court in person. Going by the information on record, the ground of appeal that the learned Judge failed to call the files cannot succeed. We are satisfied that the learned Judge called for the files and perused the record.

11. The appellant submitted that the learned Judge erred in dismissing the Notice of Motion dated 5th January 2004 when there were triable issues. The appellant has not demonstrated what triable issues were ignored. We agree with the learned Judge that the issue of re-instatement to the civil service is not a triable matter in criminal proceedings. We find that in so far as the appellant did not appeal against conviction and sentence, the learned Judge could not set aside the judgment by the trial magistrate.

12. The appellant contends that a *nolle prosequi* had been entered before the trial court and he should not have been convicted. Mr. KAIGAI for the state submitted that there is no record that a *nolle prosequi* was presented to court and entered in the criminal case. The learned Judge in his ruling stated:

"I have also read proceedings both in the Karatina and Nyeri Magistrate's Courts. I find no mention of a *nolle prosequi*. I find that criminal prosecution against the accused was fully, correctly, legally, properly and regularly conducted. A *nolle prosequi* should have been handed by the prosecutor over to the trial magistrate in the presence and observation of the applicant who was conducting his own defence".

13. This court has stated many times before that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or are based on a misapprehension of evidence or the courts below are shown demonstrably to have acted on wrong principles in making the findings (**Chemagong – v- R 1984 KLR 611**).The appellant in this case has not demonstrated that the learned judge misapprehended the facts or acted upon wrong principles of law. There is no record that *nolle prosequi* was presented before the trial court and the learned judge perused the record and confirmed this fact. We find no reason to interfere with the fact as established by the learned Judge who perused the record of proceedings before the trial magistrate. We are satisfied that there was no *nolle prosequi* that was formally produced and was entered in the criminal case against the appellant.

14. The appellant sought for an order of reinstatement to his employment. The proceedings against the appellant before the trial magistrate were criminal in nature. All subsequent proceedings and applications

to the High Court are based on the criminal trial. We uphold the decision by the learned Judge that an order for re-instatement to employment cannot be made in criminal proceedings.

15. The appellant contends that the learned Judge erred in failing to take into account that he was a layman appearing in person. We have considered this ground and examined the record to ascertain if there was any miscarriage of justice or prejudice to the appellant since he was acting in person. We have not found any evidence that the appellant was prejudiced before the trial court and even in the high court. Nowhere in the proceedings did the appellant ask to be given time to engage legal representation. The appellant has been satisfied in conducting his defence and appeal in person.

16. For the reasons stated above, this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 23rd day of May, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR