



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 714 OF 2000

1. COSMAS M NZAU
2. CANUTE IFUTE BUTOYI
3. STANLEY MUNENE MUTHIGANI.....PLAINTIFFS

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

J U D G M E N T

1. The Plaintiffs were at the material time civil servants working with the **Ministry of Agriculture** (the Ministry). The 1st Plaintiff was a Deputy Secretary in charge of the Finance Department; the 2nd Plaintiff was an Under-Secretary while the 3rd Plaintiff was a Senior Clerical Officer.

2. Their case as pleaded in the **amended plaint dated 20th September 2000** is as follows. On 19th August 1996 the 1st and 2nd Plaintiffs received identical letters sending them on compulsory leave. Seven months later, they were charged in **Nairobi CM Criminal Case No 2458 of 1997** with **neglect of official duties contrary to section 128 of the Penal Code**. The particulars of the offence were that

on diverse dates between 1st July 1995 and 30th June 1996, jointly with others at Kilimo House in the Ministry of Agriculture, Livestock Development and Marketing, in Nairobi within Nairobi Area, being persons employed in the public service, they willfully neglected their official duties by signing and issuing Excess Authority to Incur Expenditure (AIEs) totaling to Kshs. 540,084,560/00 to various District AIE Holders at the Ministry of Agriculture, Livestock Development and Marketing which was in excess of approved estimates for the financial year.

3. The charge sheet was amended on 25th March 1998 to include all the three Plaintiffs and to add other counts. The Plaintiffs pleaded not guilty to the charges. The trial lasted until 7th May 1999 when judgment was delivered acquitting all the three Plaintiffs under **section 215 of the Criminal Procedure Code**.

4. Soon thereafter, the Plaintiffs informed the Ministry's Permanent Secretary of the outcome of the criminal case. The 1st and 3rd Plaintiffs sought reinstatement to their jobs while the 2nd Plaintiff sought clarification on effective date of retirement as he had during pendency of the criminal case attained the mandatory retirement age. The Permanent Secretary, after protracted correspondence with the Plaintiffs, conveyed to them the decision to dismiss the 1st and 3rd Plaintiffs and to withhold the 2nd Plaintiff's

pension.

5. The Plaintiffs then filed the present suit seeking appropriate general and exemplary damages for wrongful and unlawful suspension and ultimate dismissal from service, breach of their constitutional rights, false imprisonment and malicious prosecution, attendant mental anguish and suffering, and defamation. They also claimed lost income respectively of KShs 406,890/00, KShs 71,625/00 and KShs 93,155/00. No particulars were pleaded.

6. The Defendant filed **defence dated 11th October 2000**. It contended that while it was true that the 1st and 3rd Defendants were sent on compulsory leave, interdicted and dismissed from public service and the 2nd Plaintiff retired, all these acts were done lawfully and in accordance with the **Service Commissions Act, Cap 185** (since repealed) and the **Civil Servants Code of Regulations** (probably **The Public Service Commission Regulations** made under Cap 185). It was further averred that while it was also true that prosecution was instituted against the Plaintiffs, there was no malice on the Ministry's part, and that the prosecution did not at all cause injury to the Plaintiffs' credit, character and reputation as alleged.

7. The three Plaintiffs testified on their own behalf; they called no other witness. The 1st Plaintiff's testimony was as follows. On 6th April 1972 he was employed in the Civil Service of Kenya as an Assistant Secretary/District Officer and was confirmed in the service on 11th September 1974; that he rose through the ranks to attain the position of Deputy Secretary; that his duties as a Deputy Secretary included distributing Authority to Incur Expenditure (AIE) to various AIE holders in the Ministry; that on 19th August 1996, he was served with a letter from the Permanent Secretary (**Exhibit P8**) sending him on compulsory leave; that the letter raised issues regarding some AIEs; that the Permanent Secretary who was new in the Ministry and had had frosty relations with the 1st Plaintiff, summoned him together with the 2nd Plaintiff seeking an explanation regarding issuance of AIEs; and that they had then sought time within which to reply to his queries, but before they could respond he received the compulsory leave letter.

8. The 1st Plaintiff further testified as follows. He proceeded on leave as ordered but six months later on 5th March 1997, he was picked up by three police officers who escorted him to the Ministry's headquarters at Kilimo House where he was served with an interdiction letter (**Exhibit P9**) and placed on half-salary. According to the letter, he was to remain at his duty station (Nairobi) and only leave with permission from the Permanent Secretary. He was later escorted to CID headquarters for investigations for misappropriation of public funds.

9. Later, on 29th September, 1997 the 1st Plaintiff was arrested at his house and taken to CID headquarters where he was charged. He was arraigned in court the following day. He was however not placed in custody. After his plea was taken he was placed in crowded and stuffy court cells before being released on bail in the evening. At some point he was ordered to kneel down; that made him feel belittled and small.

10. The case proceeded to trial and he was eventually acquitted together with the 2nd and 3rd Plaintiffs who had been his co-accused. He stated that the trial took a long time causing him mental anguish. He also had difficulty raising legal fees as he was receiving a half-salary.

11. After his acquittal, he sought the lifting of his interdiction vide a joint note dated 23rd September 1999 (**Exhibit P12**). He did not receive a response. Instead he received a letter dated 26th January 2000 (**Exhibit P13**) dubbed 'notice to show cause' why he should not be surcharged for misappropriated funds, being the AIEs that were subject of the criminal case in which he had been acquitted. He responded vide his letter dated 11th February 2000 in which he showed cause (**Exhibit P14**). As there was no response, he and his co-Plaintiffs wrote numerous reminders (**Exhibit P15**) and visited Kilimo House to see the Senior Deputy Director in charge of personnel matters. There were no positive results.

12. He then instructed his advocates to file suit. They first served a statutory notice (**Exhibit P17**) upon the Defendant. He was thereafter suspended from his duties vide the letter dated 20th April 2000 by the Permanent Secretary (**Exhibit P19**) upon the basis that his explanations with regard to the misappropriation of funds (issuance of AIEs) had been found to be inadequate. His salary and other emoluments were completely stopped. He sent another letter dated 16th May 2000 (**Exhibit P20**) protesting that he had received the letter after expiry of the 14 days he had been given to respond. He received another letter dated 15th August 2000 (**Exhibit P22**) informing him that he had been dismissed from the Public Service with effect from 20th April 2000 upon the ground of gross misconduct and that he had also forfeited all his benefits.

13. He testified further that the criminal case against him was covered by one of the local dailies, the *Kenya Times* of 3rd and 25th October 1997 (**Exhibit P23**), and that he was clearly identified by his names. At the close of his testimony he demonstrated how his family's standard of living changed when his salary was withheld. He also stated that he was then dependent on a working son.

14. In cross-examination, the 1st Plaintiff stated that he was not an AIE holder but was in charge of releasing funds to the various AIE holders; that the complainant in the criminal case was the Permanent Secretary in the Ministry of Agriculture; that there was malice on the part of top officials of the Ministry brought about by professional rivalry and tribalism; that the police officers who investigated the case were just doing their work and he could not impute malice on their part; that whereas he was acquitted of all criminal charges by a court of law he was still dismissed upon the same grounds he had been criminally charged with; that he went through a lot of mental torture which the Constitution forbade; that he was defamed by his employer and the senior officers led by the Permanent Secretary in the Ministry; and that he was never summoned by the Permanent Secretary or by the *Public Service Commission* at all and could not tell how his case was dealt with.

15. In re-examination the 1st Plaintiff confirmed that one IP Okumu, the police officer who investigated his case, indicated to him at the time of trial that he had been under pressure from the Permanent Secretary to charge him.

16. The 2nd Plaintiff (PW2) testified that he was employed as a teacher until 1971 when he became a District Officer. He rose through the ranks to attain the position of Under-Secretary in the Ministry. He further testified that on 19th August, 1996 he and his co-Plaintiffs were served with a letter (**Exhibit P26**) from the Permanent Secretary instructing them to take leave with immediate effect; that prior to receipt of the said letter, he had received another letter informing him that his retirement would commence on 31st December, 1996; that even though he had been instructed to proceed to retirement with effect from 31st December, 1996, his retirement was brought forward to 30th September, 1996 vide the letter dated 23rd September, 1996 (**Exhibit P27**); and that he proceeded to retire but was never paid his retirement benefits.

17. The 2nd Plaintiff also testified that the Permanent Secretary informed him by letter dated 25th May, 1998 (**Exhibit P29**) that his pension had been withheld due to misconduct while in service; that the allegations of misconduct resulted in him and co-Plaintiffs being charged in Nairobi CM Criminal Case No 2458 of 1997 which terminated in their favour; that after the acquittal he demanded payment of his pension and other benefits by letter dated 4th August, 1999 (**Exhibit P30**) but was never paid despite the Attorney-General's recommendation to the Ministry that he be paid his dues; and that subsequently he received a letter dated 27th January, 2000 informing him that he would be surcharged with respect to some AIEs which in fact had been the subject-matter of the criminal charge against him and his co-Plaintiffs.

18. Later, vide a letter dated 20th April, 2000 he was accused of gross misconduct and misappropriation of funds; that the said letter further stated that it would be recommended that he forfeits his retirement benefits in the event he failed to show cause why he should not be surcharged; that he showed cause in

his letter dated 18th May, 2000 (**Exhibit P 35**); and that he then received a letter of dismissal dated 26th September, 2000 notwithstanding that he had already retired.

19. At the end of his testimony, the 2nd Plaintiff stated that he was humiliated by the arrest and prosecution; and that his expectation of a comfortable retirement had been shattered by the withholding of his pension and benefits.

20. In cross-examination he confirmed that the complaint against him was made by the Ministry and that there was no malice on the part of the police. He added that the Permanent Secretary had been unfriendly to the Plaintiffs and that it appeared that there was pressure from the Ministry to charge him and his co-Plaintiffs. He further stated that the Ministry defamed him because his name appeared in the newspaper reports (**Exhibits P23**). He asserted that his dismissal from employment was unlawful.

21. The 3rd Plaintiff on his part testified as follows. He was first employed in the Ministry as a junior clerk on 27th July, 1981; and that he rose through the ranks and was at the material time a Senior Clerical Officer. His duty was to prepare AIEs but that under the regulations his duties did not involve issuance of the AIEs.

22. He further testified that upon being summoned he appeared before the Permanent Secretary on 20th August 1996 who showed him a letter addressed to him; that the letter alleged that he was corrupt; that he denied the allegations; that thereafter the Permanent Secretary and the Deputy Secretary of Administration asked him to falsely testify against the 1st and 2nd Plaintiffs to the effect that they were corrupt; and that he refused to tender false testimony.

23. In November, 1996 he was interrogated by the police, and a year later he was charged vide Nairobi CM Criminal Case No 2467 of 1997 with the offence neglect of official duty. He was tried together with his co-Plaintiffs and acquitted. On 28th October, 1997 he was served with an interdiction letter (**Exhibit P39**) effective from 30th September, 1997 and he was put on half salary. He subsequently received a disciplinary letter dated 26th January, 2000 (**Exhibit P40**) to which he responded, referring to the judgment in the criminal case which had absolved him of any criminal wrongdoing. Despite this explanation, three months later he received a suspension letter dated 20th April, 2000 (**Exhibit P41**) and was subsequently dismissed by a letter dated 15th August, 2000 effective from 20th April, 2000, the date of his suspension.

24. The 3rd Plaintiff further testified that on his arrest on 30th September, 1997 he was placed in the cells at Kilimani Police Station for one night. The next day he was arraigned in court and afterwards taken back to the cells where he stayed up to 6:00 p.m. when he was released on bail. In his view he was defamed when his criminal case was published in the newspapers. He also had difficulties meeting his family's needs after the suspension.

25. In cross-examination, he stated that the Permanent Secretary was malicious to him; that he was never referred to the Public Service Commission for hearing; and that the termination of his employment was unlawful.

26. That was the end of the Plaintiffs' evidence. The Defendant did not call or lead any evidence.

27. Written submissions were filed on behalf of the parties. The Plaintiffs' submissions were filed on 17th September 2010 while those of the Defendant were filed on 11th October 2010. I have considered those submissions, including the cases cited. The delay in preparation of this judgment was caused by my transfer from Nairobi to Machakos and then back to Nairobi again in the course of which the file was apparently misplaced and was only recently placed before me. The delay is regretted.

28. I consider the following to be the main issues for determination in this case –

1. **Whether the Plaintiffs' constitutional rights were breached?**
2. **Whether the Plaintiffs have a good claim in defamation?**
3. **Whether the Plaintiffs' suspension from duty was wrongful?**
4. **Whether the 1st and 3rd Plaintiffs' dismissal from service was wrongful and unlawful?**
5. **Whether the 2nd Plaintiff's retirement from service was wrongful?**
6. **Was the Plaintiffs' prosecution instituted by the Defendant?**
7. **Did the prosecution terminate in the Plaintiffs' favour?**
8. **Was there reasonable and proper cause for the Defendant to prosecute the Plaintiffs?**
9. **Was the prosecution actuated by malice?**
10. **What damages, if any, are due to the Plaintiffs?**

Issue No. 1: Whether the constitutional rights of the Plaintiffs were breached?

29. The Plaintiffs pleaded at paragraph 10 of the amended plaint that they were held in servitude and have suffered financial and mental torture, anguish and degrading treatment contrary to the provisions of **sections 73 and 74 of the Constitution of Kenya** then in place (since repealed and replaced by the **Constitution of Kenya, 2010**). The Plaintiffs have not demonstrated by evidence how the ordinary disciplinary measures of being sent on compulsory leave, interdicted on half pay, then suspended without pay and finally dismissed from their employment amounted to the very serious allegation of being held in servitude, mentally tortured and being subjected to degrading treatment. In the course of their testimonies, they touched on these issues merely in passing. Serious constitutional issues of this nature are usually litigated upon by way of petition filed specifically and exclusively on those issues. The Court will not allow serious constitutional issues to be taken up lightly and apparently only with the intention of buttressing a case otherwise founded on ordinary tort or contract. I find that no constitutional rights of the Plaintiffs were breached sufficient to require the intervention of the Court. The Plaintiffs' claim in that regard is without merit and is hereby dismissed.

Issue No. 2: Whether the Plaintiffs have a good claim in defamation?

30. It is the Plaintiffs' case that the malicious prosecution caused injury to their credit, character and reputation, particularly because it was reported in newspapers. The Plaintiffs also alleged that they suffered considerable pain and mental anguish, trouble, inconvenience, anxiety and unnecessary expense during the trial. It must be borne in mind that this is not a case based on defamation. Defamation arises when false words of someone tending to injure his character and reputation are published. The publication may be oral (slander) or written (libel). The actual words complained of must be pleaded.

31. In the present case, there is no plea of any words published by the Defendant that tended to defame the Plaintiffs. A plea such as is now made with regard to defamation will be germane only when considering what damages to award for malicious prosecution, if it comes to that. The claim *per se* in defamation must therefore fail.

Issue No. 3: Whether the Plaintiffs' suspension from duty was wrongful?

32. The Plaintiff's suspension was to facilitate a criminal investigation of certain AIEs they had issued or caused to be issued. The investigation, independently carried out by the police who, by the Plaintiffs' own admission were not motivated by malice, resulted in their being criminally charged. It matters not that they were eventually acquitted of the criminal charge. The suspension from duty was a normal procedure necessary for the matter then at hand to be investigated. I find that it was not unlawful.

Issue No. 4: Whether the 1st and 3rd Plaintiffs' dismissal from service was wrongful and unlawful?

33. It is not in contention that the Plaintiffs were employed on permanent and pensionable terms, going by the evidence on record. The procedure followed before the 1st and 2nd Plaintiffs were dismissed shows that they were first sent on compulsory leave then interdicted, suspended and finally given a chance to show cause why they should not be dismissed. They showed cause, which cause did not cut any ice with their superiors.

34. In the written submissions made on their behalf by their learned counsel reliance was placed upon **Regulation 25(3)** of The Public Service Commission Regulations (the **Regulations**). That sub-regulation stated –

“25 (3) Where a public officer has been acquitted of a criminal charge such public officer shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, provided that nothing in this regulation shall prevent an authorized officer from dismissing or otherwise punishing, after consultation with the Attorney General, such public officer on any other charge arising out of his conduct in the matter unless the charge raises substantially the same issues as those on which he has been acquitted.”

35. Unfortunately, this legal provision was repealed vide **Legal Notice No. 215 of 1991** without replacement. This was long before the Plaintiffs' cause of action arose. The provision cannot lend support to their case in any way.

36. Without entering into an analysis of the many provisions of Public Service Commission Regulations that deal with discipline of public servants, it does appear from the evidence placed before the court that the right procedures were followed with respect to the 1st and 2nd Plaintiffs. They were sent on compulsory leave to facilitate investigations of a suspected crime allegedly committed in the course of their employment, and they were duly informed of the reason for their compulsory leave; they were then suspended pending determination of their prosecution. Determination of the prosecution in their favour did not mean that they were not liable to further disciplinary action, including in regard to the matters upon which they had been prosecuted. They were then eventually dismissed after being given an opportunity to show cause. Upon the evidence now before the court I do not find that the dismissals of the 1st and 3rd Plaintiffs were unlawful or contrary to law.

Issue No. 5: Whether the 2nd Plaintiff's retirement from service was wrongful?

37. The 2nd Plaintiff was not dismissed. He was due to retire but was retired three months earlier than when he would have retired. That is his complaint. It is also his complaint that he was denied his pension and other benefits that were due to him upon retirement. Regulation 29 of the Regulations provides as follows –

“29. Subject to any law for the time being in force, a public officer who is dismissed shall forfeit all rights or claims to a pension, gratuity, annual allowance or other retiring award, and any rights or claims he enjoys in regard to leave or passages at the public expense.”

38. As already seen, the 2nd Plaintiff was not dismissed. He could not have been denied his pension or other benefits under this provision. He was also not retired in the public interest. He was due to retire anyway; his retirement was brought forward by three months. His letter of retirement (**Exhibit P27**) simply stated that he was being compulsorily retired on age grounds. I can find no justification at all why he was denied his pension and other benefits.

Issues Nos 6 and 7 : Was the Plaintiffs' prosecution instituted by the Defendant and did it

terminate in the Plaintiffs' favour?

39. There is no dispute that the Plaintiffs were prosecuted at the behest of their superiors in the Ministry. The prosecution was actually by the Defendant. There is also no dispute that the prosecution terminated in favour of the Plaintiffs. They were acquitted under section 215 of Cap 75.

Issue No. 8 and 9: Was there reasonable and proper cause for the Defendant to prosecute the Plaintiffs, and was the prosecution actuated by malice?

40. Although the criminal court found the Plaintiffs to have a case to answer, that court observed as follows in its judgment -

“The incomplete investigations, the glaring contradictions and discrepancies in the prosecution evidence, clearly point to the allegations that someone somewhere was malicious and had no patience for normal and orderly investigations. As all agree that the basis of all data relied on and upon which this prosecution was preferred was not laid before me, I have no hesitation in coming to the considered conclusion that the material ingredients of all the charges have not been proved beyond all reasonable doubt.”

41. The impression I get from the totality of all the evidence before the court is that whereas there may have been serious lapses, deliberate or otherwise, on the part of the Plaintiffs in the performance of their duties with regard to issuance of the AIEs concerned, there was really no criminality involved. Imputation of criminality in what were clearly work-discipline issues was a clear manifestation of malice on the part of their superiors who decided to criminally prosecute them.

42. The criminal court which had the opportunity to observe the demeanour of the witnesses who testified for the prosecution had no doubt in its mind that the Plaintiffs were maliciously prosecuted. The Defendant has not bothered to call or lead evidence that would tend to show otherwise. At the very least the Permanent Secretary concerned who made the decision to call in the police, and the police investigator who ultimately decided that there was a criminal case worth taking to court, should have been called to testify. They were not, and no reason was given why they could not testify. I am thus satisfied upon a balance of probabilities, that there was no reasonable or proper cause to prosecute the Plaintiffs, and that their prosecution was actuated by malice on the part of their superiors.

Issue No. 10: What damages, if any, are due to the Plaintiffs?

43. It must be borne in mind that this is not a case based on defamation. But the Court will certainly take into account such proved damage to the Plaintiffs' characters, prospects or fortunes on account of the malicious prosecution. It is to be expected that any malicious prosecution will cause a certain amount of anxiety and distress to the person prosecuted. There will be attendant trouble and inconvenience. But if a plaintiff claims that the malicious prosecution has damaged his character and reputation, he must provide some evidence tending to prove such damage. The same applies to any alleged damage to his prospects or fortunes.

44. Apart from their say so, the Plaintiffs did not lead or call evidence regarding damage to their character and reputation or to their prospects or fortunes. They did not call any family member or friend or professional colleague to testify to give credence to their testimonies in this regard.

45. I have taken into account that the prosecution of the Plaintiffs took about two years to complete. I also note that each of them spent some hours in custody before their bail was processed. I am also mindful of the anxiety, annoyance and other inconvenience that must have attended the prosecution. Doing the best that I can I will award each Plaintiff KShs. 800,000/00 as general damages for malicious prosecution.

46. Are the Plaintiffs entitled to any other awards? They have claimed lost income, but they have not

particularized their respective claims in the plaint. They have simply given cumulative figures without explanation either in the plaint or in their testimonies as to how these figures were arrived at. A claim for lost income is a claim in special damages. The law demands that it must be particularly pleaded and strictly proved. It has not been the case here. These claims for lost income must fail, and I hereby dismiss them.

47. With regard to the 2nd Plaintiff's claim for pension and other benefits, what he seeks is not any specific amount of money in respect thereto. He has simply sought declarations that he is entitled to release of his pension dues and emoluments withheld upon his retirement. I will grant him those declarations.

48. In summary, I will enter judgment for each Plaintiff for the sum of KShs 800,000/00 as general damages for malicious prosecution. These damages shall carry interest at court rates from the date of delivery of this judgment. The 2nd Plaintiff will also have declarations that he is entitled to his pension and any other emoluments that were due to him upon retirement. All the other claims of the Plaintiffs are hereby dismissed. The Plaintiffs shall have costs of this suit.

49. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 6TH DAY OF SEPTEMBER 2013

H P G WAWERU

JUDGE