



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 348 OF 2007

**KENYA AEROTECH LTD APPELLANT/ ORIGINAL 1ST
DEFENDANT**

VERSUS

**NELSON KHAMALISHI LUSIRI 1ST RESPONDENT/ORIGINAL 1ST
PLAINTIFF**

**HABEL OMUSIKISYO SHITAKAYA 2ND RESPONDENT/ORIGINAL 2ND
PLAINTIFF**

**HON. ATTORNEY GENERAL 3RD RESPONDENT/ORIGINAL 2ND
DEFENDANT**

*(Being an appeal arising from the judgment of Hon. D. Toigat Senior Resident Magistrate in Civil Case
No. 6022 of 2004 dated 26th April 2007 at*

Milimani Commercial Courts)

J U D G M E N T

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I. REPRESENTATION

1. This is a malicious prosecution and false imprisonment case that had originally been filed in the magistrate's court, Milimani Commercial Courts.

1.1 The original plaintiff No. 1 and respondent No. 1 in this appeal is Nelson Khamalishi Lusiri

1.2 The original plaintiff No. 2 and respondent No. 2 in this appeal is Habel Omusikiyo Shitakaya

1.3 The original defendant No. 1 and appellant in this case is

M/s Kenya Aerotech Limited represented by M/s Waruhiu & Gatheru Advocates.

2. The relationship between the parties is that the appellant is employer to the 1st and 2nd respondents herein referred to as the employees. The third respondent, the Attorney General had been sued as the representative of the Commissioner of Police.

3. A brief background of this matter is as follows:

II BACKGROUND

4. The 1st employee had been a loader and later promoted to be a driver in the appellant company. He worked diligently in his employment until the 31st March 2003, when he would proceed to his regular leave for a few weeks. On return to work sometime in May, he was transferred to work at the Airport at Eldoret. He was then summoned back and found himself in a room of 14 people. They were all accused of having stolen and or suspected of having stolen a container. It was after several days in and out of police stations (Embakasi, Mombasa Road, Eldoret police stations) and being travelled to his rural area that the employee No. 1 was charged with one count:

i) **Stealing goods in transit**

Contrary to Section 279(c) of the Penal Code.

He was charged together with the employee No. 2, whom he did not know but came to know him later as a security officer. The said employee No. 2 was charged with an alternative count of

ii) **Handling stolen property**

contrary to Section 322(2) of the Penal Code.

5. It transpired during the trial that the employer were notified of the loss of a container from their premises 7 days later. The loss by the concerned airline had not been immediately reported for investigations to begin at once.

6. After trial, the criminal court case magistrate, acquitted the

employee No. 1 under Section 210 of the Criminal Procedure Code on grounds that the said evidence by the prosecution above was not sufficient to find employee No. 1 guilty to be put on his defence.

7. The employee No. 2 was placed on his defence and was able to explain that watches found at his home, belonged to his wife and mother. It was not part of the consignment of container. He was acquitted

under Section 215 – Criminal Procedure Code, on the grounds that the said evidence was not sufficient to sustain a conviction against him.

8. Being aggrieved, the two employees filed suit in the magistrate's court on the 4th of June 2004. (The cause of action and or charge/arrest was on 11th June 2001. They appeared in court on 21st June 2001).

9. The law permitted them to file a civil suit which is on time. (see the case law of

i) **Katerregga – Vs – Attorney General**

(1973) EA 287
(Mead J).

ii) **Mbowa – Vs – East Menga Administration**

(1972) EA 353
Cutta JA

10. The employee No. 2/original plaintiff No.2 did not appear for his trial. The trial was basically that of employee No. 1.

11. The Hon. Trial Magistrate held that the employer and the Attorney General were liable for the malicious prosecution at a liability of 50%:50% rate. She awarded damages of Ksh. 300,000/= to the

1st employee/respondent No. 1.

12. Being dissatisfied with this decision, the employer filed appeal on

23rd May 2007, against the said judgment of 26th April 2007.

III **APPEAL**

13. The appeal filed on 23rd May 2007 from the judgment delivered on

26th April 2007 stated that the Hon. Magistrate erred in fact and law:

13.1 ... by apportioning liability on the basis of 50%:50% against the defendant, when no contribution had been alleged by any party.

13.2 ... by attributing 50% blame on the 1st appellant when the appellant was not the instigator of the criminal proceedings and cannot be said to have been motivated by malice when it reported incident of loss.

13.3 ... awarding 1st respondent general damages far too in excess of the penalty award.

13.4 The appellant prayed the judgment of the subordinate court be set aside and suit against the appellant dismissed.

13.5 Costs

13.6 Any further orders.

13.7 prayed appeal be allowed, set aside and case dismissed.

14. The appellant prayed that the judgment of the subordinate court be set aside and the suit against the appellant be dismissed. He prayed for costs of the appeal and any other further orders of the court would wish to grant.

IV SUBMISSIONS

By appellant

15. The gist of the appellant's submission is that they reported a loss to the rightful authority, being the police. The police investigated the case and prosecuted the respondent employee. It was therefore not their responsibility that they should be held liable and at all for the said malicious prosecution. They should not be made liable for any contribution.

16. The Hon. Trial Magistrate erred as they were never the investigators of the criminal proceedings and cannot be said to have been motivated by malice.

17. They also took issues with the award. That this was too high and in excessive.

18. They prayed that the judgment of the subordinate court be set aside and the suit against them be set aside.

19. Their arguments has been elaborated in their written submissions.

By the Attorney General

20. The Attorney General never appealed against the judgment. Nonetheless support for the appeal was shown in which the said Attorney General submitted that there were four essential injunctions required to be proved to file a suit for malicious prosecution. This being:

20.1 *The four being that the police ... as agents of the appellant had instituted the criminal proceedings against the plaintiff.*

20.2 *... must show the police acted without reasonable or punishable cause.*

20.3 *... acted maliciously*

20.4 *... criminal proceedings terminated in favor of the original plaintiff.*

21. Whereas this had not been proved, the judgment in favour of the respondent No. 1 should not stand.

By the Respondent No. 1

22. The advocate for the employee No. 1 stated that there was no evidence sufficient to sustain a conviction in the criminal matter. The Hon. Trial Magistrate findings in the civil matter had basis. The four required to prove malicious prosecution was established. The advocate proceeded to numerate this in his written submissions.

23. The advocate for respondent No. 1 prayed that the award of Ksh. 300,000/= be sustained and the liability of 50%:50% ratio should be upheld and confirmed by this court.

IV OPINION

24. There are in effect two issues herein. What the prosecution against the respondent/employee malicious? Secondly was the award of

Ksh. 300,000/- in excessive.

25. Having taken into consideration, the said submission written by the parties, I find that there are certain aspects in this case that requires to be noted.

26. The respondent No. 1/employee, was indeed working for the appellant. He was even promoted from a loader to a driver. It would beg the question as to how an employee who has worked for so long becomes a thief without noting his past character. It was the normal habit for the said employee to go on annual leave on the 31st March of each year? Was this unusual?

27. The aspect of motive arises when the employee returns from leave and is transferred within 2 – 3 days to Eldoret without cause or reasons, then summoned to Nairobi where he and others are taken as suspects.

28. There would have been a letter and more professional way of handling the investigations and arrest.

29. The appellants provided their vehicles to ferry their own staff to the other areas, in which the police wanted them to. They were involved and did participate in the process. Due diligence should have been taken. An employer would know their employee after several years of work. The police would not know the fact of an honest employee or not.

30. I find that the Hon. Trial Magistrate came to the correct decision. On the issue of liability for instance the two defendants should have issued each other with a notice under Order 1 r 21 Civil Procedure Rules (former rules) to state that they will be claiming the other party for the liability. In this case, no such notice was shown to have been issued on the file. The correct orders by the trial magistrate would have been that the two be made liable jointly and severally at 100%. Apportionment would only occur upon the notice under Order 1 r 21 Civil Procedure Rules.

31. To that extent, I would allow the appeal to read “liability at 100% jointly and severally against both original defendants No. 1 & 2.”

32. As to the quantum for general damages, I would not interfere with this. The award to my mind was low. As the respondent No. 1/original plaintiff No. 2 was satisfied with this, I would also not interfere with this.

IN CONCLUSION

33. This appeal be and is hereby dismissed with costs to the Respondent

No. 1/original plaintiff No. 1 in this appeal and costs in the subordinate court to be paid by the appellant original defendant No. 1 in this appeal. The costs in the subordinate court is to be paid jointly and severally by the appellant and respondent No.2 original defendant No.2.

34. The interest at court’s rates on Ksh. 300,000/= would run from

26th April 2007, when the subordinate court case gave its judgment.

DATED THIS 20TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

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Advocates :

- i) *B M Kairaria instructed by M/s Gitonga Kamiti, Kairaria & Co Advocates for appellant/original 2nd defendant*

- ii) *B M Kamau instructed by Mwaura Kamau & Co Advocates for respondent/original plaintiff*