No. 345

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 190 OF 2008

ABEL OGEGA ONYANGO.....APPELLANT

-VERSUS-

POSTAL CORPRATION OF KENYA .....1st RESPONDENT

ATTORNEY GENERAL.....2nd RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii Hon. C. Mbogo in Kisii

CMCC No. 30 of 2005, delivered on 2nd October, 2008)

This is an appeal from the Judgment and Decree of **Hon. C. Mbogo** then acting Chief Magistrate at Kisii, dated 2nd October, 2008. By an amended plaint dated 19th February, 2007 the appellant claimed as against the respondents interlia:- a declaration that his dismissal from employment by the 1st respondent was wrongful and illegal, general damages for wrongful arrest, confinement, malicious prosecution and character assassination, reinstatement to service and terminal benefits during the period of interdiction. The case for the appellant was that the 1st respondent illegally and wrongfully dismissed him after he had been acquitted of criminal charges of theft by servant and fraud in **Kisii Criminal Case Number 420 of 2000.** Prior to that the 1st respondent had unlawfully interdicted him and instigated the 2nd respondent to arrest and prosecute him on tramped up charges. His said prosecution was thus wrongful and malicious.

The 1st respondent denied all the allegations and averred that the appellant was lawfully interdicted and properly dismissed in accordance with the **Postal Code** and **Postal Corporation Act** on suspicion that he had defrauded it through interference with its franking machines and subsequently issuing customers receipts that did not tally with carbon copies and pocketing the difference between the figures in the said receipts.

The 2nd respondent too also denied the appellant's allegations and averred that the arrest and prosecution of the appellant was procedural and within the legal and constitutional limits of the country. The charges were neither trumped up, wrongful nor malicious.

At the hearing of the suit, the plaintiff testified. The 1st respondent too testified through two witnesses. The 2nd respondent did not appear for the hearing of the case. After the trial and careful consideration of the evidence on record, the learned magistrate dismissed the appellant's suit. That dismissal triggered this appeal. The appellant faulted the learned magistrate decision on 9 grounds to wit:-

"1. The learned trial magistrate erred in both law and fact in his failure to read, appreciate and evaluate the pleadings put forth by the parties before him.

2. The learned trial magistrate erred in law when he failed to comply with the provisions of Order XX Rule 4 read with Order XIV R. 1(5) Civil Procedure Rules with the result that he lost sight of the real points for determination thereby inevitably ending up with an arbitrary decision which was manifestly wrong.

3. The learned trial magistrate erred in law and fact in his failure to find that in line with natural justice and in the event that justice must not only be done but must also be seen to be done.

i. The 1st respondent's omission to include in its letter dismissing the appellant from service a provision advising the appellant that he had a right of appeal, was a fundamental omission which rendered the dismissal null and void, ab-initio.

ii. The 1st respondent's refusal or failure to allow the appellant's request to appear in person at the proceedings of the appeal which he forced (sic) against his dismissal, rendered that dismissal bad in law and malafies.

4. The magistrate erred in fact when he failed to find that the appellant's dismissal was wrongful as it was for charges inclusive of those allegedly committed while the appellant was already serving wrongful interdiction for over then (sic) months.

5. The magistrate misdirected himself when he found that the appellant had committed fraud when:

i. Same was not pleaded as required by law.

ii. Evidence showed that the appellant neither handled nor interfered with the 1st respondent's franking machines.

iii. The appellant's immediate supervisor – the respondent's cashier cleared the appellant unequivocally.

iv. Fraud alleged in the respondent's defence was not proved.

6. The learned trial magistrate misdirected himself in his failure to find that the instances of alleged fraud by the appellant cited by the defence witnesses, related to payments made by cheques drawn in favour of the 1st respondent and same were duly posted in the 1st respondent's books raising no audit query whatsoever.

7. That in the face of plaintiff's Exhibit 10(a) and (b), the learned magistrate misdirected himself when he found that no statutory notice was served upon the 1st respondent.

8. That the magistrate erred in not finding that the appellant's arrest, incarceration and prosecution were, in the circumstances, premised on malice.

9. The learned trial magistrate ought to have found that the appellant deserved compensation as pleaded complete with an assessment of dues accordingly".

When the appeal came up for directions, parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently parties filed and exchanged their respective written submissions which I have carefully read and considered alongside cited authorities.

As a first appellate court, I am required to re-appraise independently the evidence tendered in the trial court and reach my own decision or conclusion.

The decision of the learned magistrate turned on the credibility of the witnesses called in support of and in opposition to the appellant's case. According to the learned magistrate he ***"…found the two witnesses called by the 1st defendant candid and honest witnesses as opposed to the plaintiff who in my view is a liar as is demonstrated by his evidence that he did not know why he was dismissed or arrested and yet in his evidence in cross-examination he concede that he knows the reasons behind his arrest, arraignment in court and dismissal …"***. It is recognized that a trial court has greater advantage than an appellate court in assessing the credibility of witnesses and an appellate court would not therefore interfere with the findings of the trial court on the credibility of the witnesses unless no reasonable tribunal could make such findings. See for instance the case of **Ogol –vs- Mureithi (1985) KLR 359.** I discern no such misgivings.

The foregoing notwithstanding, I am also satisfied that the learned magistrate before he reached his decision carefully considered the pleadings filed by the parties, the evidence tendered and respective written submissions. Contrary to the submissions of the appellant, the learned magistrate carefully applied his legal mind in his evaluation of the pleadings, evidence and the law before he arrived at the decision. It is therefore unfair and without any basis at all to allege that the learned magistrate failed to read and or evaluate the pleadings as claimed by the appellant.

Order XX rule 4 and XIV rule 1 (5) of the **Civil Procedure rules** deals with contents of a judgment. It is the contention of the appellant that the judgment as crafted by the learned magistrate did not satisfy the

above provisions of the law with the result that he lost sight of the real points for determination thereby inevitably ending up with an arbitrary decision that was manifestly wrong. I do not think that this complaint has any merit either. A careful reading of the judgment shows that the learned magistrate gave a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Indeed he even adopted the issues framed by the 1st respondent which were carefully outlined, after considering the pleadings and the evidence on record.

The appellant contends that his dismissal was null and void on the grounds that the letter of dismissal did not include a provision advising him of his right of appeal. As correctly submitted by the respondent, the appellant being an employee of the 1st respondent was well aware of and in possession of the postal code that provided the procedure to be followed in the event of interdiction and or dismissal and hence he need not be advised in writing of the same or at all. In any event, failure to expressly inform an employee whose services have been terminated of his right to appeal where all requirements of natural justice have been met, cannot by any stretch of imagination be said to be a fatal omission. Besides and it is apparent from the record that infact the appellant did appeal against the decision to dismiss him from 1st respondent's employment. There is a letter dated 5th November, 2004 from the 1st respondent clearly stating that the appellant's appeal was accorded due consideration by the appeals committee and found wanting. The appellant also complains that he was not personally allowed to appear before the appeals committee. However there is no evidence on record suggesting that the 1st respondent was under duty to allow the appellant to appear in person during the hearing or consideration of his appeal.

The appellant was interdicted following an investigation report which implicated him in the embezzlement of the 1st respondent's funds. The interdiction letter gave the appellant 48 hours to defend himself of the charges of negligence and misconduct. That, he did by a letter dated 26th January, 2004. His defence was duly considered and rejected. In my view due process was followed before he was dismissed. His dismissal was therefore neither illegal nor unfair. Yes, the appellant may have been acquitted of the criminal charges. However and as stated by **Murungi J.** in **Kenya Reinsurance corporation Ltd –vs- Eliud M. Ndirangu (2006) eKLR**. ***"…The acquittal is not tantamount to the erroneous conclusion, by the lower court, that the respondent was cleansed of the reasonable and sufficient grounds of suspicion of having committed a criminal offence ……. Of even greater force is the legal position that the standard proof in criminal cases is totally different from that required in civil case. An acquittal in a criminal case because the prosecution has not proved its case beyond all reasonable doubt is not the same as a finding of liability on the balance of probabilities required in civil cases …."***. In lodging the complaint with the police regarding the appellant's alleged improprieties, I do not think that the 1st respondent was actuated by malice. The 1st respondent only reported the conduct of the appellant to the police as any complainant would do. In the case of **Socfinaf Kenya Limited –vs- Peter Guchu & Another, NBI HCCC No. 5959 of 2000 (UR)**, **Aganyanya J.** (as he then was) stated ***"….when there is a case of suspected theft the first step is to report the matter to the police, who in their own way find out how to carry out investigations and no issue should arise over such reporting and that, it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against the suspect to warrant such action … the complainant should not be blamed for making such reports to the police. What is of great significance in such a case is whether or not there is reasonable and or probable cause for the arrest and or prosecution of the culprit …"***. This reasoning applies with equal force to the circumstances obtaining in this suit. The fact that the 1st respondent lodged a complaint with the police, who arrested and subsequently arraigned the appellant in court, prosecuted him though he was eventually acquitted is not prima facie evidence of malice or malicious prosecution by the 2nd respondent.

Accordingly, the finding by the learned magistrate that the appellant's dismissal from the 1st respondent was well deserved and prosecution of the appellant following a complaint lodged by the 1st respondent was not actuated by malice or ill will, cannot be faulted or impugned. In the result, this appeal lacks merit and is accordingly dismissed with costs to the 1st respondent.

Judgment dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE