



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 47 of 2007

BOARD OF GOVERNORS, KENYA POLYTECHNIC..APPELLANT

VERSUS

MOSES OKATCH OWOUR RESPONDENT

(Being an appeal from the Judgment and Decree of the Resident Magistrate's court at Nairobi (Milimani) by the Honourable Mrs. D. Toigat delivered on the 11th December, 2006.)

JUDGMENT

1. This is an appeal arising from a suit which was filed in the Chief Magistrate's Court at Nairobi by Moses Okatch Owour hereinafter referred to as the respondent. He had sued The Board of Governors Kenya Polytechnic hereinafter referred to as the appellant, seeking general damages for malicious prosecution and wrongful dismissal.
2. The respondent who was an employee of the appellant claimed that he was wrongfully dismissed from his employment by the appellant on the 18th of November, 1989. The appellant thereafter, without any reasonable cause caused the respondent to be arrested and charged before a criminal court. The respondent averred that his prosecution which was malicious ended in his favour when he was acquitted Under Section 210 of the Criminal Procedure Code. As a result of his dismissal, arrest and prosecution the respondent maintained that he suffered loss and damage.
3. The appellant filed a defence in which it denied the respondent's claim, maintaining that the respondent was in dereliction of duty and or had deserted his work place resulting in his dismissal. The appellant contended that the respondent was paid service gratuity for 22 years. It was further maintained that the respondent was not entitled to salary in lieu of notice, salary or any allowances for the period between 1st October, 1989 and 30th October, 2002.
4. During the hearing of the appeal, the respondent testified that he applied for 20 days annual leave, which was to commence on 18th October, 1999. He produced his leave approval form. The respondent explained that he did not go back to work on 16th November 1999 after his leave ended, because he was

unwell. Instead, the respondent sent a telegram to the appellant asking for extension of his leave by 10 days. The respondent denied having received any letter from the appellant cancelling his leave, and maintained that he was not aware of his leave having been cancelled.

5. The respondent further denied having received the appellant's letter dated 15th November, 1999 dismissing him from service, or the appellant's letter dated 25th October, 1999. The respondent produced a copy of the memorandum of agreement between the Ministry of Education, Science and Technology, and the Kenya Union of Domestic Hotels Educational Institutions, Hospitals and Allied Workers, which governed his employment. The respondent maintained that he was never given any hearing before he was dismissed.

6. Under cross-examination, the respondent explained that the appellant sent Police Officers who arrested him and caused him to be charged. He contended that he was acquitted of the charge and ought to have been reinstated. He produced copies of the charge sheet, proceedings and judgment of the criminal case in evidence.

7. The appellant testified through its senior personnel officer Tom Josiah. The defence witness was not in employment at the time the respondent was dismissed. However using the appellant's record, he explained that the respondent applied for leave which was approved on 14th October, 1999. Some queries arose regarding certain documents which were being handled by the respondent. It was therefore decided that the respondent be recalled from leave, and a registered letter to that effect was sent to the respondent.

8. The respondent did not report back to work. Another letter was sent to the respondent giving him 14 days within which to report back. Since the respondent was absent from duty without cause, the finance officer was requested to stop his salary. The appellant thereafter decided to dismiss the respondent in accordance with regulation 9 of the Terms and Conditions of Service. The witness conceded that the respondent sent a telegram to the appellant requesting for extension of his leave by 10 days. However, the respondent never reported back after the 10 days. The witness explained that the respondent was paid his gratuity for the 22 years which came to Kshs.138,867 net after deductions of liabilities.

9. With regard to the criminal case the witness explained that there was some problems regarding cheques which were being handled by the respondent. He could not state where the complaints originated from. The witness conceded that the respondent was acquitted because no prima facie case was established. He maintained that the documents in the appellant possession did not reveal any evidence of malice. He urged the court to dismiss the appellant's claim as the same lacked merit.

10. In her judgment the trial magistrate found that the appellant could not establish that the letters allegedly sent to the respondent were actually sent or received by the respondent. She noted that it was wrong for the appellant to act on a mere assumption that his letters had been received and to dismiss the respondent without giving him any hearing. The trial Magistrate further noted that the appellant's witness did admit that the respondent was acquitted because there was no prima facie case against him. She therefore entered judgment in favour of the respondent for Kshs. 300, 000 being general damages for malicious prosecution, and Kshs. 150, 000 being general damages for wrongful dismissal.

11. Being aggrieved by that judgment, the appellant has lodged this appeal raising 10 grounds as follows:

i. The learned Magistrate erred in law and fact in finding that the Plaintiff was deserving of an award for malicious prosecution and wrongful dismissal.

- ii. The learned Magistrate erred in law and fact in failing to find the Plaintiff had not discharged the heavy burden placed on him of proving all the ingredients constituting the tort of malicious prosecution.
- iii. The learned Magistrate misdirected herself by failing to consider and appreciate that the Defendant had no control whatsoever over the outcome of the criminal case.
- iv. The learned Magistrate erred in law in failing to take cognizance of the fact that the acquittal of the accused in the criminal case was not tantamount to a lack of reasonable and probable cause for the criminal complaint against the Defendant.
- v. The learned Magistrate erred in law in finding for the Plaintiff when he had laid no evidence of malicious intent on the part of the Defendant before the court.
- vi. The learned magistrate erred in fact in that her award for the claim of malicious prosecution was hinged on the fact that typed proceedings were presented in court to show that there was a criminal trial which element is insufficient justification for an award in damages.
- vii. Despite the Plaintiff not returning to duty even after the expiry of the extension of his leave, the learned Magistrate misdirected herself by not finding that the Plaintiff had absconded/deserted duty in line with Regulation 9 of the relevant Memorandum of Agreement.
- viii. The learned Magistrate erred in fact in failing to find that the Plaintiff was properly dismissed from service.
- ix. The learned Magistrate erred in fact in disregarding the submissions of the Defence in relation to the claims for wrongful dismissal and malicious prosecution.
- x. The learned Magistrate erred in law in adjudging in favour of the Plaintiff when he had not met the required standard of proof on a balance of probabilities.

12. I have carefully considered and evaluated all the evidence which was adduced before the trial court. I have also given due consideration to the pleadings the submissions made in the lower court, and the submissions made before me. The respondent's claim as stated in plaint was a claim for general damages, for malicious prosecution and wrongful dismissal.

13. With regards to the claim for wrong dismissal the evidence was clear that the appellant left his place of work with his employer's approval, his leave having been approved. Although there was an attempt by the employer to cancel the leave, and recall the respondent back to work, no evidence was produced to contradict the respondent's contention that he never received that letter. It cannot therefore be said that the respondent was absent without authority as he was not aware of the cancellation of his leave.

14. Further there was no evidence that the letter addressed to the respondent dated 25th October, 1999 for the defendant to show cause was forwarded or delivered to the respondent. Moreover the appellant action of stopping of stopping the respondent salary on 19th October, 1999 was made hastily without giving the respondent any opportunity to explain. There was no notice given to the respondent, of the date when the board met to discuss his dismissal. In the circumstances the appellant dismissal was unlawful. The question is what damages would the respondent be entitled to?

15. It is now an established principle that an employee who suffers wrongful dismissal is only entitled to the damages which are equivalent to the notice period which he would have been entitled to in accordance with his contract of employment. The respondent's claim for general damages was therefore misconceived. Although in paragraph 10 of the plaint, the

respondent particularized his loss as:

- a) Unpaid salaries, leave and house allowance from 1st October, 1999 to 30th October, 2002.
- b) Salaries in lieu of notice
- c) Service gratuity for 22 years.

16. The respondent did not adduce any evidence to show what his monthly salary or house allowance was or the amount of service gratuity that he was entitled to. The only relevant evidence which was adduced was the memorandum of agreement governing the respondent's employment clause 6 (a) (ii) of which, provided for three months notice or 3 months pay in lieu of notice. With regard to the service gratuity the appellant provided evidence confirming that the respondent was actually paid service gratuity. The respondent did not adduce any evidence to confirm his allegation that he was under paid the service gratuity.

17. In awarding the respondent the sum of Kshs.150,000/= as general damages, the trial magistrate acted on wrong principles as she was under the mistaken belief that the respondent is entitled to general damages for wrongful dismissal. Further in assessing the general damages, the trial magistrate was not guided by relevant factors such as the notice period and the actual monthly salary of the respondent. Accordingly the award of Kshs.150,000/= cannot stand and I would substitute the same with an order for payment of 3 months' salary in lieu of notice, plus salary earned by the respondent during the months of the October/November 1999 prior to respondent's dismissal.

18. With regard to the claim for malicious prosecution, in order to succeed the respondent was required to establish, firstly, that the prosecution was instituted by the appellant or by someone for whose actions the appellant is responsible. Secondly, that the prosecution terminated in the respondent's favour. Thirdly, that the prosecution was instituted without reasonable or probable cause and finally that the prosecution was actuated by malice. In her judgment, the trial magistrate failed to completely address her mind to these ingredients.

19. In his evidence, the respondent did not explain who initiated the criminal proceedings against him nor did he establish that the prosecution was done without any reasonable or probable cause or that it was actuated by malice. All that was relied upon was a copy of the charge sheet and a copy of the ruling of the criminal court in which the respondent was acquitted. Copies of the proceedings were never produced in evidence nor did the respondent refer to any evidence which was adduced against him.

20. In the circumstances there was nothing before the court to show that the prosecution was done without any reasonable or probable cause or that it was actuated by malice. I find that there was no evidence upon which the court could find the appellant liable to the respondent for the tort of malicious prosecution. The award of general damages cannot therefore stand.

21. The upshot of the above is that I set aside the judgment of the lower court and substitute thereof judgment for the respondent in respect of unlawful dismissal. I further order that the appellant shall pay the respondent 3 month's salary in lieu of notice plus salary earned for the Month of October to November, 1999. Each party shall bear its own costs. Those shall be the orders of this court.

Dated and delivered this 8th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Wakyugu for the appellant

M. Owuor for the respondent

Eric, court clerk