



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 156 of 1997**

Joseph Mujibi Ouma.....APPLICANT

Versus

National Cereals & Produce Board,

Gerald Kirima Kiruritu

Attorney General.....RESPONDENTS

JUDGMENT

The foundation of this dispute is a plaint dated 26th May 1997 in which Joseph Mujibi Ouma, the plaintiff herein sue National Cereals and Produce Board, Gerald Kirimi Kiruritu and The Attorney General, being the 1st, 2nd and 3rd defendants respectively claiming for interalia special and general damages for wrongful dismissal and malicious prosecutions. A joint defence was filed by the 1st and 2nd defendants in which the plaintiffs claim was specifically denied.

The plaintiff's evidence was heard by Mr Justice Waki (as he then was). The defence evidence was heard by the late G Omwitsa, the then commissioner of Assize. Pursuant to order XVII rule 10 of the Civil Procedure Rules, this court directed this suit to proceed for hearing from where the late G Omwitsa Commissioner of Assize left. When this suit came up for a further defence hearing on 8th March 2006, the defence case was ordered closed when the defendants failed to bring witnesses to testify. Learned advocates on both sides were granted to a chance to make their oral submissions. Mr Odongo advocate for the plaintiff and Mr Osundwa for the 1st and 2nd defendants sought and were granted leave to file and rely on written submissions. The leaned counsels were further allowed to make brief oral submissions.

The recorded evidence shows that the plaintiff, Joseph Mujibi Ouma testified before Justice Waki without calling for the evidence of an independent witness. He produced a letter of appointment dated 14th October 1989 as an exhibit in evidence to show that he was employed by National Cereals & Produce Board, the 1st defendant herein, with effect from 1st December 1989 as a Stacker based at Changamwe Depot. The plaintiff said he worked at Changamwe with Gerald Kirima Kiruritu the 2nd defendant as the deputy Manager until 14th May 1993 when it was reported that 14,750 new gunny bags had been stolen. He said on the same date that the 2nd defendant took the plaintiff to urban police station to record a statement. From there, the plaintiff said he was taken to Central Police station where he was booked in for 4 days as the suspected thief of the gunny bags after which he was arraigned before the Principal Magistrate's court on a charge of stealing by servant contrary to section 281 of the Penal Code. The plaintiff said he underwent a full trial and at the end he was acquitted of the charge on the 7th day of august 1996. the plaintiff produced in evidence certified copies of the proceedings in respect of the Criminal proceedings. He said he was suspended and later dismissed by the 1st and 2nd defendants. The

plaintiff said that at time of the loss of gunny bag, he was at his place of work and that is when the 1st defendant found out that some gunny bags were found missing. The plaintiff said he was under suspension between 1st July 1993 and April 1994 when he was dismissed and in that period he used to report to work daily without pay.

He said he used to receive a monthly pay of Kshs 3,200/-. The plaintiff claimed that he should not have been arrested alone but the others who worked with him should too have been arrested. The plaintiff was categorical that the criminal proceedings preferred against him were malicious and a frame up. The plaintiff claimed that he was not in charge of the store where he was arranging the stacks and that there were many employees. On cross-examination the plaintiff admitted that it was not him alone who was charged with a criminal. He said a clerk and another employee were also charged. He said the duo were arrested earlier than him. The plaintiff names his co-accused as Zablon and Christopher who were a record and a store clerk respectively. The plaintiff claimed that he was entitled to House allowance of Kshs 1,200/- for 12 months thus making total claim of Kshs 14,400/- and a gross salary pay of Kshs 3,200/- for 5 months from January to May 1993.

The only available evidence in support of evidence is that of Alfred Cheruiyot Rotich (D W1). D W 1 said he was the 1st defendant's area auditor covering Eastern and North Eastern for 8 years. He said he saw an audit touching on the 1st defendant's Coastal area which showed that there was a loss of 14,500 empty gunny bags. He said the report recommended for the investigation of the plaintiff and two other employees namely Zablon Mwalumba and Christopher Kiema. D W 1 said that the plaintiff was a stacker in charge of receiving all gunnies and putting them in the stacks.

Upon receiving the evidence, learned advocates on both sides submitted both written and oral submissions. It is the submission of Mr Osundwa that the plaintiff's claim was not proved. It was argued that there was no proof of malice on the part of the 1st and 2nd defendants and that there was no evidence that the trial was not fair. It was the view of the 1st and 2nd defendants that the plaintiff's employer had a right to dismiss him.

At the end of the evidence and the submissions, there is no dispute that the plaintiff was dismissed by the 1st defendant on the grounds that he was grossly dishonest, negligent and irresponsible in the performance of his duties. It is also not denied that the plaintiff was arrested and prosecuted at the instance of the 1st and 2nd defendants for theft. The following issues arose for my decision:

First, whether or not malice was established on the part of the defendants. I agree with the submissions of Mr Osundwa advocate for the 1st and 2nd defendants that the plaintiff did not tender credible evidence to establish malice on the part of his employer. The fact that criminal charges were preferred against him did not connote malice on the part of the defendants. Malice was not manifested by the conduct of the defendants because it is agreed that gunny bags owned by the 1st defendant were stolen or lost at the time when the plaintiff was present and working for the 1st defendant in the premises where the goods got lost. It is in my humble view that the plaintiff's acquittal per se does not absolve him from civil liability. He has failed to prove malice or ill will on the part of the defendants on a balance of probability.

The second issue which arose is whether or not the plaintiff is entitled to the special damages arising out of the Criminal case which faced him. I have already said that the plaintiff has not proved malice on the part of the defendants. Even if malice had been proved, I do not case because he has not specifically pleaded for payment of damages for false arrest and malicious prosecutions. The law requires that particulars of such allegations must be given.

The third issue is whether the plaintiff is entitled to damages for mental anguish and distress. This issue can easily be disposed of by referring to the decision of the court of appeal in the case of Kenya Ports Authority vs Edward Otieno C A No 120 of 1997 where the court of appeal said:

"In the leading case of Addis vs Gramophone Co [1909] A C 488 the House of Lords decisively

rejected such a claim. The plaintiff there had been dismissed in a harsh and humiliating manner, and it was held that the manner of dismissal could in no way affect the damages....

We think that the same position must apply in Kenya, as we can find nothing in our Employment Act Cap 226 which would abrogate or modify these general principles in respect of the law relating to the contract of employment.”

I am bound by the decision of the court of Appeal. Let me restate that the plaintiff’s mental anguish or distress or injury has no place for consideration when assessing general damages. Consequently I see no merit in that prayer hence I will not attempt to make any award.

The fourth issue, is whether or not the plaintiff is entitled to reinstatement. The evidence on record shows that the plaintiff was dismissed for gross misconduct. The 1st and 2nd defendants had expressed the view that they had lost faith and confidence on him. In our legal system, it is a well established fact that courts have been reluctant to make orders for reinstatement because such relationships are purely contractual hence if an order is made in that direction it would be like imposing a contract on another which is not the function of courts of law. The court of appeal settled the legal position over this matter in the case of Dalmas B Ogoye =vs= KNTC CA No 125 of 1995 in which the court of appeal said:

“that courts do not order reinstatement in such cases because such an order would be difficult to enforce besides it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer.”

The final issue is whether or not the plaintiff is entitled to damages for wrongful dismissal. It is the submission of the defendants that they were entitled to dismiss the plaintiff for gross misconduct and for wilful negligence. On his part the plaintiff has said that he was not in charge of the stores hence he did not breach any of the rules of employment. I agree with the defendant’s counsel that the plaintiff did not plead for damages for wrongful dismissal. It is correct to state that an employee’s service is governed by the contract of employment. The contract is sustained or terminated according to that contract. If non-existent then the relationship is governed by the provisions of the Employment Act. In a nutshell there is no room for damages because the remedies are clearly marked out in the Employment Act or by the contract creating the Employee – Employer relationship.

In conclusion, I am satisfied that the plaintiff has failed to prove his action on a balance of probabilities.

Consequently, the action is dismissed with costs tot he 1st and 2nd defendants.

June 16, 2006

Sergon, J