



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO.89 OF 2002**

**SECURICOR SECURITY SERVICES LIMITED ..... APPELLANT**

**-VERSUS**

**CHARLES OBINGO ANGUJO..... RESPONDENT**

**(Being an Appeal from the decision of Solomon Wamwayi Esq. Chief Magistrate in  
Eldoret Chief Magistrate's Court Civil Case No.580 of 2001 made on 7th August 2002)**

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**JUDGEMENT**

This is an appeal from the decision of Solomon Wamwayi Esq. Chief Magistrate Eldoret. After full trial, the magistrate gave judgement for the plaintiff, who is now the respondent, and awarded him Kshs.7,256/= as his terminal dues as well as Kshs.30,000/= as general damages for wrongful arrest. He also awarded the respondent costs and interest. The appellant having been aggrieved by the decision of the learned magistrate, has appealed to this court. He listed six grounds of appeal which are: -

- i) The learned trial magistrate erred in law and fact by finding in favour of the respondent generally when the respondent's case had not been proved on the balance of probabilities. (ii) The learned trial magistrate's award of general damages in favour of the respondent allegedly for wrongful arrest was improper and erroneous in law.**
- (iii) The learned trial magistrate erred in law and in fact by not taking the appellant's formidable defence into account.**
- (iv) The learned trial magistrate erred in law and in fact in arriving at his decision.**
- (v) The learned trial magistrate should have found that the respondent's claim for wrongful arrest, if any, lay elsewhere as per the facts of the case and law applicable but that no such cause of action lay against the appellant.**
- (vi) The learned trial magistrate erred on points of fact and law applicable.**

At the hearing of the appeal Mr. Magare for the appellant stated that he would argue ground 1 of the appeal separately, ground 2 to 5 together and ground 6 separately.

He submitted that the respondent's claim was set out in paragraph 5 of the plaint. It was unlawful arrest and detention for one week. However, the respondent stated in evidence that he was released on 13th November 2000 which meant that he was actually released on the same day of the arrest. He could not

therefore have been detained for six days as alleged. The respondent also stated that he was arrested by an askari, which meant that the arrest was by the police and not by the appellant. He claimed in the plaint that he was harassed by the police. However he sued the appellant. In his view, for the claim of unlawful arrest to have succeeded the respondent should have joined the Attorney General as a party.

No false report was made to the police nor was there any report made to the police that was motivated by malice. A claim such as the claim of the respondent should therefore not have succeeded. He sought to rely on the case of **Jediel Nyaga –vs- Silas Mucheke, Nyeri Civil Appeal No.59 of 87 – unreported**. In his view the claim for wrongful arrest was fatal and a non-starter. He submitted that the respondent was employed by the appellant as a guard at Mobil Depot Eldoret. Paraffin got lost when he was on duty as a guard and therefore he was a suspect. There was therefore, no evidence of malice but only evidence of investigation done by the police. The case for unlawful arrest was therefore not proved on the balance of probabilities.

On the issue of summary dismissal, his submissions were that this was connected to the incident of theft of paraffin. The respondent was a suspect. The paraffin was stolen when he was on duty. That was a sufficient ground for summary dismissal in terms of section 17 (c) and (g) of the Employment Act (Cap.226).

The conduct of the respondent amounted to negligence in the performance of his work.

There were a total of three guards on duty and all of them were dismissed. The conduct of the respondent was enough to justify his dismissal from employment. He sought to rely on a book – **Modern Employment Law 8th Edition at page 177**. In his view, the issue was not whether the respondent was or was not charged with a criminal offence, but that he was a suspect. He further submitted that the respondent did not challenge his summary dismissal as he did not seek for orders to declare it unlawful. When an employee was summarily dismissed, he could only be paid for days worked and not terminal dues. The court should not have awarded terminal dues. He sought to rely on section 17 of the Employment Act. It was wrong for the court to have found that the respondent was entitled to one month's salary in lieu of notice. That entitlement was not proved in court.

The respondent was offered money but he refused to accept the same. He was therefore not entitled to interest on the money that he refused. The learned magistrate therefore erred in awarding interest. The court also added an amount of Kshs.2,027/= to the amount that the respondent was originally offered by the appellant, on the ground that the customer's claim was invalid. That was wrong. That issue was not before the court. What was offered to the respondent was what was payable to him under the Employment Act (Cap.226). He submitted that the above arguments also covered ground six of the memorandum of appeal. He asked the court to allow the appeal with costs.

Mr. Otieno for the respondent opposed the appeal. He submitted that the issue as to why the respondent was locked up for one day was covered in the evidence on record. The Officer Commanding Station (OCS) called the manager to record a statement. That meant that the respondent was in the cells. The record was that the manager was the one who went to the police and stated that the matter would be sorted out at the office. It was not true that it was the police who took the respondent to the police station. If the dismissal was based on the evidence of theft, it was malicious. Otherwise DW1 would not have asked the police to let the matter to be sorted out at the office. On the arrest by askaris, he submitted that the askaris were security guards and not the police. The respondent was guarding gas cylinders and not paraffin. There was no proof as to how much paraffin was stolen as there was no court trial held to establish that fact.

The court had jurisdiction to award terminal dues as the summary dismissal was not proper. The respondent had worked with the appellant for about 14 years. He submitted that the case authorities cited by the appellant's counsel were not relevant as those cases were criminal prosecutions. In those cases, there was no contractual relationship. In our present case there was contractual relationship between the appellant and the respondent of employer and employee.

This being a first appeal, I have to evaluate all the evidence on record and come to my own conclusions and also satisfy myself as to whether there was any failure of justice. At the hearing before the learned magistrate, the plaintiff testified and did not call any witness. His evidence was that he had worked for the appellant for 14 years. Initially he was a casual labourer and later he was confirmed on permanent terms. On the 13th November 2000 he was on duty and was arrested by the manager of the company and taken to Eldoret Police Station. That manager was called Mr. S. Maina. He was released on the same 13th November 2000. On the night of 11th-12th November 2000 there was a theft. During that night he was on duty. He was with other people – Joseph Kesinyen and Robert Wekesa. On the 17th November 2000 the OCS telephoned the manager to record a statement and to go to court. The manager stated that he could not record a statement and also said that he would finish the matter at the office. He was released and subsequently given a letter of suspension by the appellant. Then later his services were terminated. He was offered Kshs.5,239.40 which he refused as, in his view, he should have been paid Kshs.62,128/=.

In cross-examination he stated that he was guarding cylinders for Mobil and that he relieved another *askari* whose name he did not know but he knew his work number. That he found that the theft had already occurred. He did not know the amount of paraffin that was missing. He also did not know that the paraffin was stolen. He was arrested by an askari who had proved that the paraffin was missing. He denied that the paraffin was stolen when he was on duty.

The defence called only one witness called Stephen Kimani who was the branch manager of the appellant. He stated that on 12th November 2000 Mr. Mulwa the Depot Manager of Mobil called him on phone and stated that 10 litres of paraffin had gone missing from the 200 litres at the Mobil depot. He went to the scene and confirmed that position. He talked to the respondent after coming from his home who stated that he was not aware of the theft. He confirmed that the respondent was on duty that particular night. Then they handed over the matter to the police for investigation. That the respondent was arrested by the police and that he was not aware whether the respondent was prosecuted. He recommended that the respondent be dismissed due to gross misconduct. Dismissal was effected by a letter dated 29th November 2000. They prepared the respondent's dues which, after deductions, amounted Kshs.5,239.40. The respondent rejected the same.

In cross-examination he stated that the respondent was a permanent employee and that the paraffin lost was worth Kshs.7,500/=. That the respondent was arrested on the customer's instance. The customer was the one who went to call the CID. He did not cause the respondent to be released from the police custody. The respondent did not explain how paraffin was siphoned.

The learned magistrate, on the above evidence, found for the respondent against the appellant and awarded him general damages for wrongful arrest of Kshs.30,000/= as well as terminal dues of Kshs.7,256/=: costs and interest.

In my view, there are two issues that arise in this appeal. Firstly, whether there was sufficient evidence to establish that the appellant unlawfully arrested the respondent, and if so whether the amount of damages awarded by the learned magistrate was proper. The second issue is whether the summary dismissal of the respondent by the appellant was unlawful, and if so whether the amount awarded by the learned magistrate was justified.

On the first issue, was the magistrate right in finding for the respondent and had a case for unlawful arrest been proved by the respondent on the balance of probabilities against the appellant? From the evidence on record, what was before the learned magistrate was the version of one witness against the version of the other. The respondent gave his evidence in person and did not call any witness. The appellant called only one witness who was the branch manager at Eldoret. No other witness was called.

In considering whether a case of unlawful arrest had been established against the appellant, the learned magistrate stated in his judgement -

**“the defendant did not call evidence from the said Mobil Depot and I do find that the plaintiff was arrested wholly the (sic) instance of the defendant. In view of the fact that**

**the plaintiff was not charged with a criminal offence, I do find that there is no basis on the part of the defendant to state that the plaintiff had a hand in the theft of the said paraffin. I find therefore that the arrest of the plaintiff and subsequent incarceration was unlawful. I do find the defendant liable.”**

It is trite that a plaintiff is required to prove his case in a civil suit on the balance of probabilities. From the above holding of the learned magistrate, it is apparent that the learned magistrate actually shifted the burden of proof to the appellant. The learned magistrate was required to consider whether or not the respondent had established a case of unlawful arrest against the appellant, on the evidence tendered before him. The respondent testified that he was taken into police custody. He did not call the police to establish as to who reported the matter to them to justify their putting him in custody.

Nor did he give reasons as to why he did not do so. The burden was on him to establish the ingredients of unlawful arrest. The defence was that it was the customer Mobil who reported to CID. The reference of the respondent in cross-examination to an “askari” as the person who arrested him did not establish whether or not the askari was an employee of the appellant. The term *askari* is a loose term, and in my view, he should have at least said that the *askari* was an employee of the appellant. This he did not do. He also stated in examination in chief that he was arrested by the manager. That was a contradiction.

Therefore it is not clear whether he was arrested by the manager or an askari employed by the appellant or by an *askari* who was a police officer.

The requirements for a successful case for wrongful arrest and false imprisonment were enunciated in the case of **Jadiel Nyaga –vs- Silas Mucheke – Nyeri Civil Appeal No.59 of 1987 – unreported**. This case was cited by counsel for the appellant. In that case the Court of Appeal at page 4 of the judgement held: -

**“It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused is acquitted.... False arrest may also be constituted where the matter of the false report was actuated by malice. In the instant case there was no evidence adduced to show that the report by the appellant about the damage to his crop and trees by the respondent was false..... The police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false.”**

It is clear from the above that for a claim of false arrest or false imprisonment to succeed there must be a report which was false and actuated by malice. The arrest should be attributed to the defendant either because he arrested on that false report or that the police arrested on the basis of his false report.

In my view, on the facts before the learned magistrate, there was no conclusive evidence that the appellant or their employee arrested the respondent. Merely referring to an arrest by an *askari* was enough. The respondent should have been specific and stated whether that *askari* was an employee of the appellant or his agent. Further, there was no evidence to establish whether the report of the theft of paraffin to the police was made by the appellant or that it was false. The appellant’s evidence was that the report to the CID was made by the customer Mobil. In that event, even if it was false blame could not be laid on the appellant. In my view, the respondent should have at least called the police to testify as to who made the report to them precipitating his arrest and as to why they later released him.

In my view, and with due respect, had the learned magistrate taken into account the above considerations, he would not have arrived at the conclusion that he arrived at. He would not have found that a case of unlawful arrest had been established against the appellant. I therefore find that the learned magistrate erred in holding that there was adequate evidence to establish unlawful arrest. Having found that there was no evidence to sustain a finding of unlawful arrest, I also find that the general damages of Kshs.30,000/= awarded by the learned magistrate on that account cannot be sustained. I now turn to the second issue as to whether the dismissal of the respondent was unlawful, and whether the amount awarded by the learned magistrate was proper.

Section 17 of the Employment Act (Cap.226) provides for circumstances in which an employee may be summarily dismissed. The relevant part to the present case is section 17 (c) which provides: -

**“17. Any of the of the following matters may amount to gross misconduct so as to justify summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, constitute justifiable or lawful grounds for the dismissal –**

**(c) if the employee wilfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract, to have performed carefully and properly.”**

From the evidence on record, the allegation against the respondent was negligence. It was loss of paraffin at the Mobil depot Eldoret while on duty which he could not explain.

The respondent testified that he was guarding gas cylinders and not paraffin. Nobody came to court to give particulars about that loss of paraffin, whether in fact that paraffin was actually there and it disappeared. Section 17 of the Employment Act (Cap.226) confers a right on the employer and employee to dispute the facts relating to the misconduct. The appellant appears to have relied on information from Mobil. They tendered no evidence to show whether they put the facts to the respondent and what his response was, before they terminated his services. The magistrate wrote a short judgement but found that the dismissal was unlawful. On the evidence on record he was right and I concur with him. The allegation of loss of paraffin and the involvement of the respondent in that loss was made by the appellant. In terms of section 109 of the Evidence Act (Cap.80) they were bound to establish the same on the balance of probabilities. They did not do so. It is therefore my finding that the dismissal of the respondent by the appellant was unlawful.

From the above, was the magistrate right in making the award that he made? In his judgement the learned magistrate referred to one month's salary in lieu of notice, but did not award that one month's salary. Instead he merely awarded the respondent what he had been offered by the appellant. He merely refused to deduct therefrom an amount of Kshs.2,027/= that was deducted by the appellant from the respondent to pay for the paraffin allegedly lost.

The legal position regarding awards for wrongful dismissal was well stated in the case of **Alfred Githinji –vs- Mumias Sugar Company Limited – Nairobi Civil appeal No.194 of 1991**. In that case the Court of Appeal at page 3 held -

**“Our view is that where a contract of service, unlike that of the appellant, is “for an indefinite period with an element of permanency and degree of security of tenure”, in that it does not provide for its termination by giving of notice or payment of salary in lie thereof, what the employee who is wrongfully dismissed will be entitled to, is that which is reasonable in the circumstances.**

In our present case there is no dispute that the respondent was a permanent employee. There is no evidence that there was an agreed contractual period of termination of service. In those circumstances and since I have found that the respondent was wrongfully dismissed, he is entitled to an award which is reasonable in the circumstances. The appellant's counsel's argument that an employee who is dismissed cannot be paid terminal dues cannot be sustained, if the court finds that such dismissal was wrongful.

Since section 14(5)(iii) of the Employment Act (Cap.226) provides for 28 days notice for termination of contracts of employment where wages are paid at intervals of a month or more. I therefore find that the learned magistrate was correct in concluding that the respondent should be compensated by one month's salary in lieu of notice. There was no error on the part of the learned magistrate. However, the learned magistrate did not actually make that award. So the appellant has nothing to complain about. Since the respondent has not filed a cross-appeal, I let the matter rest at that.

What the learned magistrate did was to award the amount offered by the appellant to the respondent as his earnings for his services up to the date of dismissal. The total amount was Kshs.8,536/40. The appellant had made deductions leaving a net amount of Kshs.5,239/40. The learned magistrate disallowed one deduction of Kshs.2,027/= for the alleged lost paraffin.

In my view, the Employment Act (Cap.226) allows an employer to deduct from an employee an amount that is due to itself as well as the statutory deductions. It does not allow an employer to unilaterally deduct an amount it considers it owes to a third party without the consent of the employee. Though section 6(1) (b) of the Employment Act (Cap.226) allows an employer to make deductions for lost property, in my view, "property" refers to the property of the employer and not property of a third party. Therefore, I concur with the learned magistrate that the amount of Kshs.2,027/= should not have been deducted by the appellant from the respondent's dues. Prudent employers will always have insured against risks such as the alleged loss of paraffin belonging to Mobil. I therefore concur with the learned magistrate on the award of Kshs.7,256/= to the respondent.

In the result therefore, this appeal succeeds in part. I allow the appeal in part and set aside the learned magistrate's award of general damages of Kshs.30,000/= for wrongful arrest. I however, uphold the award of Kshs.7,256/= as made by the learned magistrate.

This is a matter that involves an employer and former employee. I order that each party will bear their own costs of the appeal. The costs in the subordinate court will be as decided by the learned trial magistrate

**Dated and Delivered at Eldoret this 19th Day of May 2005**

**George Dulu**

**Ag. Judge**

**In the Presence of:**