



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 152 of 1997

ZABLON MWALUMA KADORIPLAINTIFF

- Versus -

NATIONAL CEREALS & PRODUCE BOARD.....DEFENDANT

JUDGEMENT

The plaintiff in this case claims general damages for malicious prosecution and wrongful dismissal. In paragraph 6 of his plaint he avers that sometimes in March 1993 the defendant, without any reasonable excuse and while actuated by malice caused him to be arrested and arraigned before the Chief Magistrate's Court at Mombasa on a trumped up charge of stealing by servant. He was, however, after trial acquitted of the charge. He further avers that by its letter of 8th February 1994 the defendant dismissed him from employment for being dishonest, negligent and irresponsible in the performance of his duties.

In its defence the defendant denied that it maliciously prosecuted the plaintiff and stated that the criminal proceedings were instituted against the plaintiff by the Attorney General after reasonable cause was established and that the defendant's role in the matter was bona fide and without malice. The defendant also denied unlawfully dismissing the plaintiff and stated that the "dismissal was lawful, proper and procedural and after due notice was issued in compliance with the relevant regulations and law."

In a claim for damages for malicious prosecution like this, it is incumbent upon the plaintiff to prove on a balance of probabilities that the prosecution was instituted by the defendant; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause and that in instituting the prosecution the defendant was actuated by malice.

Regarding the institution of the prosecution, counsel for the defendant submitted that the arrest and prosecution of the plaintiff was done by the state and that the defendant had nothing to do with it suggesting that the plaintiff is in this case flogging the wrong horse. I cannot accept this argument. The defendant did not have, by its own officers to conduct the prosecution in order to be held as having instituted the proceedings. It is enough if it can be shown that it was actively instrumental in putting the law in force. In this case it is clear from the criminal proceedings Ex. 3 at page 43 the defendant's security officer, one Mr. Kirui, arrested the plaintiff and another for the offence of theft of the gunny bags and took them to police. The defendant cannot therefore be heard to say that it did not institute the prosecution of the plaintiff. I find that it did.

The other thing the plaintiff is required to prove is that the prosecution ended in his favour. He is supposed to prove that he was acquitted or discharged. This he has done. The proceedings Ex. 3 show that he together with the other accused persons in that case were acquitted.

The plaintiff is also required to prove that the prosecution was without reasonable and probable cause.

Hawkins, J, in Hicks – Vs – Fawkner (1878), 8 Q.B.D. 167 at P.171 defined reasonable and probable cause. He said:

“Reasonable and probable cause is an honest belief in the guilty of the Accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

This definition was adopted by Rudd J in Kagane – Vs – Attorney General & Another (1969) EA 643 in which the learned Judge added that:

“...to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

Did the defendant in this case have reasonable and probable cause to institute criminal proceedings against the plaintiff?

The plaintiff testified that he was the Depot Records Clerk at the defendants’ store at Changamwe. His duties included recording the items going in and out of the store. A total of 14,750 gunny bags were stolen from the store during the Easter week-end of 1993. The witnesses who testified on behalf of the defendant in the criminal case as is clear from the proceedings Ex.3 said it was not possible for gunny bags to go out of the store without written authority of the Depot Manager. The watchmen who guarded the store twenty four hours a day would not allow anything to go out of the store without written authority of the Depot Manager. They also said that the gunny bags must have been taken out through the front door of the store and out of the premises through the gate as the store had no windows. That number of gunny bags would fill a court room.

The plaintiff also said, which is confirmed by the criminal proceedings, that the store was not broken into and he did not keep the keys to the store. One set of keys was given to the cashier every evening for safe keeping and the other was with the Depot Manager. Apparently, neither of them was even suspected. The defendant also thought it fit not to even interview the watchmen. It would appear that the Depot Manager was sacked or simply disappeared soon after testifying in the criminal case. The other witnesses did not know where he went.

In these circumstances can it be said that the defendant had reasonable and probable cause in instituting criminal proceedings against the plaintiff? I do not think so. I am satisfied that the defendant knew very well that the plaintiff and the people with whom he was charged in the criminal case could not and did not steal the gunny bags. The defendant knew very well that the person who stole the gunny bags must have been one of those with keys to the store and must have been in cohorts with the watchmen. Even in its letters of suspension and dismissal the defendant did not accuse the plaintiff of theft of the gunny bags. The witness called by the defendant was not there at the time of theft. His evidence does not assist the defendant. Like the trial magistrate in the criminal case I find that the plaintiff and his friends were sacrificed to protect the senior officers of the defendant who had the keys to the store and stole the gunny bags. That to me is clear evidence of malice on the part of the security officer and the other officers of the defendant who decided to charge the plaintiff for which the defendant is vicariously liable to the plaintiff for damages.

Having found that the defendant is liable to the plaintiff for general damages for malicious prosecution, I now wish to consider the quantum of damages the plaintiff is entitled to.

The plaintiff was arrested on the 12th May 1993 and taken to court on 18th May 1993. The criminal case hang over his head until 13th August 1996 when he was acquitted. No doubt he suffered great anxiety for

that whole period.

In the case of **Odongo – Vs – HCCC No. 195 of 97, (1997) LLR 484 (HCK)** Hayanga J as he then was awarded Sh. 150,000/- for malicious prosecution on 27th June 2000. In **Njuguna – Vs – Attorney General & others HCCC No. 2007 of 2001, (2001) LLR 4948 HCK** Ransley J. awarded Sh. 300,000/- for malicious prosecution and Sh. 500,000/- as punitive damages in 2003. There is however no claim for punitive damages in this case and I am therefore not entitled to consider or award it.

Taking the circumstances of this case into account, I consider a sum of Sh. 500,000/- reasonable damages for malicious prosecution.

The plaintiff also claims that he was unlawfully dismissed. In its letter of suspension **Ex. D2** the defendant claimed that the plaintiff had caused it lose 14500 pieces of new gunny bags and in its letter dated 8th February 1994 **Ex.2** dismissing the plaintiff the defendant stated:

“Following your suspension on the 29th day of June 1993 we wish to inform you that the Board has carefully deliberated on your case and without prejudice, has reached the conclusion that you were grossly dishonest, negligent and irresponsible in the performance of your duties. The Board therefore regrets to inform you that it has decided to dismiss you with effect from 29th June 1993 for loss of confidence in you.”

It is clear therefore that the plaintiff was dismissed because of the theft of the gunny bags which I have found that the plaintiff could not have been able and actually did not steal. The defendant had therefore no reason for dismissing the plaintiff. The dismissal was illegal as he was not given any notice. Pursuant to the collective agreement the plaintiff was entitled to two months notice or two months salary in lieu of notice. At the time of dismissal the plaintiff’s basic salary was Sh. 3,730/- plus house allowance of Sh. 1,800/- making a total of Sh. 5,540/-. I award him Sh. 11,080/- being two months’ salary in lieu of notice.

As the plaintiff was a member of the Provident Fund, I order That the defendant do work out and pay to him his full provident fund and any other dues that he would have been entitled to had his services been terminated instead of him being dismissed.

The claim for sh.16000 as overtime is not clear and was not in any case proved it is dismissed.

There will therefore be judgment for the plaintiff in the sum of sh.500,000 being general damages for malicious prosecution sh.11,080 being two months salary in lieu of notice and the plaintiffs dues under the provident fund as well as any other dues he may have been entitled to had his services been terminated.

DATED and delivered this 29th day of July 2005

D. K. MARAGA

JUDGE