REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 502 of 1999

JOHN NDETO KYALO……..……. PLAINTIFF

- Versus –

KENYA TEA DEVELOPMENT AUTHORITY & ANOTHER…DEFENDANT

JUDGMENT

In this suit the plaintiff claims against both the defendants jointly and severally general damages for false imprisonment and malicious prosecution and against the first defendant alone general damages for wrongful dismissal. The plaintiff also claims special damages of sh. 3,343,289.80 as particularized in paragraph 12 of the amended plant.

In paragraph 12 the plaintiff avers that on or about the 26th March 1977, on false, malicious and unfounded allegations of the first defendant that he had stolen 200 packets of tea valued at Ksh. 1,208,312/-; that he had with others conspired to defraud the first defendant of the 200 packets of tea and that he had committed forgery against the first defendant, he was arrested and incarcerated for six days. The plaintiff further avers that he was in Mombasa Chief Magistrate's Criminal Case No. 981 of 1997 charged with these offences but after trial the charges were found to have had no basis and he was acquitted under section 210 of the Criminal Procedure Code (the CPC).

In their separate defences the defendants denied that the plaintiff was falsely imprisoned or maliciously prosecuted and stated that the prosecution was well founded. As regards the claim for wrongful dismissal the first defendant avers that the same was justified as it was based on the loss of 200 packets of tea which the plaintiff caused the first defendant to suffer.

These claims by the plaintiff for damages for false imprisonment, malicious prosecution and wrongful dismissal are of course based on distinct causes of action and even though the evidence adduced by the plaintiff covers all of them that evidence must be able to prove each of them on a balance of probabilities.

As regards the claim for false imprisonment the cause of action arose on the last day of the period of the alleged imprisonment, which is 1st April 1997. This case was filed on the 10th November 1999. As against the second defendant I agree with Mrs. Umra, learned state counsel's submissions, that the claim is by dint of section 3(i) of the Public Authorities Limitation of Actions Act statute barred. Even if it had not been so barred it could not have succeeded not only as against the second defendant but also against the first defendant. This is because by his own testimony the plaintiff was arrested on the 26th March 1997 and taken to court the following day and was remanded by court at Shimo la Tewa Prison for five days before he was released on bond. Unless it is shown that the arrest of one is in the first place totally unfounded and therefore illegal, one's detention in police custody for a period of 24 hours or less is in my view not unreasonable and cannot therefore be said to amount to false imprisonment. As I have already stated the plaintiff was in police custody for about or less than 24 hours. The other period of incarceration

was as a result of a court order remanding him in custody. The defendants are not liable for magisterial remand orders over which they had no control Katerregga – vs – Attorney General (1973) EA 287 and the magistrate not being a person for whose acts the defendants can be held liable – Kariuki – vs – East African Industries Ltd & Another (1986 KLR 383.

In the circumstances the plaintiff's claim for false imprisonment is hereby dismissed. In a claim for malicious prosecution it is incumbent upon the plaintiff to prove, of course on a balance of probabilities, four essential aspects. Not one, not two, not even three but all four essential aspects. These are that:-

1. The defendants instituted the prosecution against the plaintiff;

2. The prosecution ended in the plaintiff's favour;

3. The prosecution was instituted without reasonable and probable cause; and

4. The prosecution was actuated by malice.

If the plaintiff's case includes a claim for special damages he has not only to specifically plead but also strictly prove it.

As regards the first of the above essentials it is not clear what exact report was made by the first defendant to the police and whether or not it implicated the plaintiff. That report is important as it is the basis upon which the court is to determine who instituted the proceedings. The second defendant did not call any evidence. In the circumstances, I have no other evidence to base my determination on this issue except the evidence of DW2. That witness said that he was told by his Managing Director that company tea had been stolen in Mombasa and he was asked to report the matter to police. He did not himself investigate the matter. He reported the matter to Inspector Weru of CID Headquarters Nairobi. He said "Nobody in KTDA instructed police to investigate or charge the plaintiff." Later Inspector Weru told him that he had charged nine (9) people including the plaintiff.

From this evidence it is clear to me that all that the first defendant reported to the police in Nairobi was that its teas had been stolen from its warehouses in Mombasa. The first defendant did not point an accusing finger at the plaintiff or in any way imply that the plaintiff was the one or was suspected to have been among those who stole the teas. It is the police who on their own decided to charge the plaintiff. In such circumstances where a complainant only reports to the police the commission of an offence without implicating any particular person and the police on their own decide who may have committed the offence and charge him, the complainant cannot be said to have instituted the prosecution against such person. It is the police who are liable to such person for instituting proceedings against him. This is exactly what happened in this case. I therefore hold that it is the police and not the first defendant who instituted the proceedings against the plaintiff in this case.

The plaintiff has proved the second essential that the prosecution ended in his favour. The criminal proceedings in Mombasa Chief Magistrate Criminal case No. 981 of 1997 produced in this case show that the plaintiff was acquitted under section 210 of the Civil Procedure Code. No prima facie was made out to require him to defend himself.

The other essentials are however seriously disputed and I now wish to consider each of them separately. I will start with whether or not there was any reasonable and probable cause for instituting the criminal proceedings against the plaintiff.

The plaintiff did not plead in terms that his prosecution was without reasonable and probable cause. He contented himself with an averment that it was malicious and unfounded.

When is a prosecution without reasonable and probable cause? Hawkins, J. defined reasonable and probable cause in Hicks – Vs – Faulkner (1878), 8 Q.B.D 167 at page 171 in the following terms:

"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 Kagame – vs – Attorney General and 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 constituted of 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."

Going by this definition did the defendants have reasonable and probable cause to institute criminal proceedings against the plaintiff?

It was the plaintiff's case that he received information from one Kahugi of Express Warehouse that he (Kahugi) had seen teas being off-loaded somewhere in town in suspicious circumstances. Apparently after checking the plaintiff discovered that teas had been stolen from their Mbaraki Warehouse using forged documents and reported the matter to his bosses who in turn reported that to police. Obviously after investigations the police instituted the criminal proceedings against the plaintiff and others. And the magistrate who heard the criminal case found that though the first defendant actually lost 200 packets of tea there was no evidence at all connecting the plaintiff with the theft. At the close of the prosecution case in the said criminal case the magistrate stated:

After carefully considering all the evidence and the statement under inquiry I find that no evidence was adduced to show that Mr. John Ndeto Kyalo 3rd accused and Mr. Stephen Kioru Karanja were in any way connected with the theft or documents connected with the theft of the tea. I therefore acute (sic) the two under section 210 of Civil Procedure Code."

The plaintiff testified and it is also clear from the criminal proceedings that no tea could leave any of the first defendant's warehouses without his written authority or that of his assistant. So the first thing the police should have established in this case is the identity of the person who issued the delivery notes that released the stolen tea. Even before sending the delivery notes to the document examiner if the police had been diligent in their investigations they could have found out that the delivery notes that released the teas were issued by the late Mutegi and not the plaintiff. In the circumstances I find that the police had no reasonable and probable cause to institute criminal proceedings against the plaintiff.

The last essential the plaintiff is supposed to prove in his claim for malicious prosecution is that it was actuated by malice. This I am afraid the plaintiff has failed to prove. The only allegation he made in this respect was that the Managing Director of the first defendant wanted him sacked so that he could employ his relative in his place. Challenged in cross-examination he was unable to prove that allegation. Even if he had it could not have helped him as I have already found that it is the police and not the first defendant who instituted proceedings against him. In his testimony the plaintiff did not attempt let alone allege malice against the police. He seems to have assumed that his acquittal was enough to prove his claim for malicious prosecution. As I have already stated plaintiffs in claims based on malicious prosecution have to prove all the four above mentioned essential aspects of the claim against defendants. Though in some cases lack of reasonable and probable cause may be held as proof of malice on the part of the prosecutor it is not always the case.

In this case the police did not even know the plaintiff. There is absolutely no evidence to suggest that the police had any malice against him. In the circumstances, I find that the plaintiff has failed to prove malice against the police and consequently his claim for malicious prosecution fails.

This brings me to the plaintiff's last claim in this suit which is for damages for wrongful dismissal.

By its letter dated 5th April 1995 the first defendant promoted the plaintiff to the position of Assistant Marketing Manager and called upon him to perform his duties with utmost commitment and dedication. In that capacity he was in charge of all the first defendant's warehouses in Mombasa. Even without being told it was, in my view, his duty to set up a system of work that would ensure that none of the first defendant's properties was stolen from the warehouses.

In his testimony DW1 stated that the plaintiff did not keep proper stock records. He also said that the plaintiff without authority, adjusted figures in the stock register to tally with the physical stocks. Asked to explain the differences revealed by the investigation report EX.D1 the plaintiff in his letter dated 23rd January 1998 denied that he wrote-off any stocks without authority and stated that differences were only in "figures which could be termed as clerical errors arising from mispostings." These were differences besides the stolen teas. The plaintiff as I have already found was not liable for the stolen teas but in respect of these other shortages he was clearly liable. This to me is clear evidence that the plaintiff did not perform his duties diligently and as a result the first defendant suffered loss. Having caused his employer loss, that, under section 17 of the Employment Act amounts to gross misconduct and I find that the first defendant was entitled to dismiss the plaintiff summarily. The plaintiff is therefore not entitled to payment of salary in lieu of notice or any damages for wrongful dismissal.

That, however, is not the end of the matter. In paragraph 12 of his amended plaint the plaintiff claimed inter alia full salary plus allowances for the period of suspension from 3rd April 1997 to 6th April 1998, payment for unutilized leave, pension brought forward from his former employer Brooke Bond Liebig Kenya Limited and provident fund as well as contributions to Chai sacco. As the letter of dismissal Ex.7 was not backdated, I think he is entitled to these claims all of which arose before dismissal but limited as stated herein below on the grounds following. Hilary Thomas Wandera, DW1, stated in his testimony that under clause G of the Staff Rules and Regulations – Ex.D3 staff under suspension, as the plaintiff was during the period from 3rd April 1997 to 6th April 1998, are not entitled to payment of salary or unutilized leave. I do not agree with that contention. There is nothing in all the exhibits produced in this case to show that the first defendants Staff Rules and Regulations were incorporated into the contract of employment between the first defendant and the plaintiff. This is usually done by inserting a clause in the letter of appointment to the effect that an employee agrees to be bound by the prevailing staff rules and regulations. As that is lacking in this case, I hold that the plaintiff is entitled to full salary of sh. 172,620/- and house allowance of sh. 47,400/- for the period of suspension. As for the medical cover during that period the plaintiff could only be entitled to reimbursement of the medical expenses. These were not proved and I therefore reject the plaintiff's claim of sh. 30,000/- in that regard.

The plaintiff also claimed sh. 143,850/- for unutilized leave. DW3 admitted that the plaintiff is entitled to 150 days of leave but stated that the correct figure of his entitlement is sh. 141,900/- and not sh. 143,850 as claimed. I allow the admitted figure.

The first defendant did not dispute the plaintiff's claim for sh. 17,600/- being pension brought forward from his former employer. I also allow it. As regards the Provident Fund in its letter of 26th January 1997 (Ex.4) the first defendant advised the plaintiff that:

"With the take-over of the factories, it is considered appropriate that retirement benefits extended to you should be made similar to those extended to other factory management staff." (Emphasis is mine).

The benefits extended to other employees of the first defendant as per the Staff Rules and Regulations excluded payment to an employee of the employer's contribution in case of dismissal. The plaintiff having been dismissed I find that he is only entitled to his contributions amounting to sh. 282,629.30 and not to the employer"s contribution.

The first defendant has nothing to do with the plaintiff's claim of the balance of his contributions to the Chai Sacco. He should claim it from the Sacco.

In the upshot I dismiss the plaintiff's claims for damages for false imprisonment, malicious prosecution and wrongful dismissal. I however enter judgment for the plaintiff against the first defendant for sh.

662,149.30 with interest at court rates from the date of filing this suit made out as follows:-

Full salary for the period between 3rd April 1997

To 6th April 1998 sh. 172,620.00

House allowance for the period between 3rd

April 1997 to 6th April 1998 sh. 47,400.00

Unutilised leave of 150 days sh. 141,900.00

Plaintiff's contributions to Provident Fund sh. 282,629.30

Provident Fund carried forward from Brooke

Bond Liebig sh. 17,600.00

Total sh. 662,149.30

As nearly half of the plaintiff's claims have been dismissed I award him half the costs of this suit against the first defendant. However, as against the second defendant as his suit has been dismissed in its entirely, I order that he pays the second defendant's costs in full. Had I found for the plaintiff I would have awarded him general damages of sh. 500,000/- for malicious prosecution and Sh. 150,000/- being special damages of the fees he paid to counsel who defended him in the criminal case. As I have found the first defendants Staff Rules and Regulations were not incorporated in the contract of employment between the first defendant and the plaintiff. That being so and in the absence of any termination clause in their contract I would have awarded the plaintiff damages for wrongful dismissal equivalent to twelve months' salary if I had found for him. I would not have awarded him salary or any other allowances upto retirement age as claimed but I would have also awarded him the employers contribution of sh. 238,908.70 to the Provident Fund, and of course the costs of the case against both the defendants.

DATED and delivered this 9th day of August 2005.

D. K. MARAGA

JUDGE