



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 396 of 2003

KENYA TEA DEVELOPMENT AUTHORITY..... PLAINTIFF

VERSUS

NAHASHON MWANGI NGANGA..... RESPONDENT

J U D G M E N T

On 2/8/01 the appellant herein, Kenya Tea Development Authority (K.T.D.A.) moved to this court by way of appeal against the Judgment of the Senior Principal Magistrate, Muranga, in PMCC No. 49 of 1999, dated 13/7/01, on the following grounds of appeal;

- 1. The Lower Court erred in holding that the Appellant should pay the Respondent the amount and these were not specifically proved and pleaded.**
- 2. The Learned Senior Principal Magistrate erred in law and in fact in not appreciating that the suit was bad in law and did not reveal any cause of action.**
- 3. The Lower Court, erred in law and fact in not appreciating and finding that the Respondent's suit was bad in law and fatally defective as the Respondent is not entitled to payment in General Damages for wrongful suspension and illegal termination of service as it was not pleaded and proved.**
- 4. The Lower Court erred in law and fact in not appreciating that the Respondent did not prove the claim of false imprisonment and malicious prosecution.**
- 5. The learned Senior Principal Magistrate erred in law and in fact in awarding and giving reliefs that were not sought for by the Respondent and nor were they in the Respondent's claim.**
- 6. The Senior Principal Magistrate erred in law and in fact by failing to appreciate the Appellant's witnesses – evidence.**
- 7. The Learned Senior Principal Magistrate erred in law and fact as she ought to have dismissed the Respondent's case as the Complaint was fatally defective on the description of the appellant.**
- 8. The Judgment of the lower court has occasioned a failure of justice and or resulted in gross miscarriage of justice as the judgment was not supported by any documentary proof or evidence.**

9. The Lower Court erred in law and fact in awarding the Respondent the judgment amounts whilst they were not specifically pleaded and proved in the hearing of the suit.

Reasons wherefore the appellant prays that the judgment of Learned Senior Principal Magistrate be set aside and/or varied and the court be pleased to order that the suit stands dismissed.

I have carefully perused the pleadings and the submission at the lower court in light of the grounds of appeal. I wish to begin by disposing of some of the issues raised in the grounds of appeal which are glaringly without merit and need to be gotten rid off earliest.

In grounds of appeal Nos. 1 and 3, it is averred that the Learned Senior Principal Magistrate erred in granting damages for (reliefs) claims, neither pleaded nor proved. With all due respect, these allegations are not wholly supported by the evidence on record. A quick perusal at the plaint, filed on 23/1/1999, paragraph 9 and the prayers at the end of those pleadings clearly shows that all the claims for which the lower court awarded damages were properly pleaded and prayed for.

Accordingly, I dismiss those aspects of the grounds of appeal as without basis and lacking in merit and substance.

Whether all the claims were proved is a totally different matter. I consider it prudent to deal with each claim separately for reason which are subsumed in this judgment.

The claims, as per paragraph 9 of the plaint are **wrongful** arrest; false imprisonment; malicious prosecution; suspension, and termination. The burden of proving each of these lies squarely on the Respondent/Plaintiff, and it is not enough to merely alleged. Proof must be adduced for each of the above claims.

As was held by the Court of Appeal in JAMES KARUGA KIIRU Vs. JOSEPH WAMBUR, SAMMY HUKO & THE ATTORNEY GENERAL, Civil Appeal no. 171 of 2000, on false imprisonment, there is no offence committed if the Respondent [here the police represented by the A.G] made the arrest on reasonable cause for suspecting that the Respondent [accused at the lower court] had committed an offence.

The facts in the case where this appeal originated show that the police arrested the Respondent upon report and complaint by the Kenya Development Authority (K.T.D.A.) of alleged theft of an injector pump from their store; in which the Respondent, a mechanic employed by the K.T.D.A. was suspected and was held in custody during investigations by interrogation. I find that the confinement during the said period was on reasonable grounds, and there is no evidence on record to show otherwise. That the Respondent was acquitted for “**no case to answer**” does not in any way erode the reasonable case in the arrest and subsequent confinement of the Respondent during the investigation by the police.

On **malicious prosecution** the JAMES KARUGA KIIRU case, *supra*, the Court of Appeal **stated, interalia** that “**to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.**” [the Respondent in this case]

In the present cae, the Respondent did not prove that the prosecution was malicious, as per the above holding, at least as concerned the police and the prosecutor – the Attorney General. In the event, there could be no liability, in tort, for malicious prosecution as against those two offices – the police and the Attorney General.

Turning to the case before me, the appellant – KTDA – has claimed – under ground 3 of the appeal – that the Respondent/Plaintiff in General damages for wrongful suspension and illegal termination of service. I have reviewed the proceedings and the judgment of the trial court. It is worth noting that whereas the Respondent was arrested and held in custody pending criminal trial, in which he was acquitted, the arrest, even if not malicious, was at the instance of the appellant herein. So all the while

during the criminal investigations and the subsequent criminal trial, the appellants knew the whereabouts of the Respondent. Suspension, under the circumstances, is to pave the way for investigations. But suspension is not the same as termination from service. This comes later, and it did in this case. In other words, until the termination, the Respondent remained employee of the appellant and he was entitled to his full salary for all that period. No other proof is required as to how much he should be paid, under this item. The same goes for the salary in lieu of Notice the details of which are common knowledge between the appellant and the Respondent. Accordingly while the Respondent did not prove false imprisonment, and is thus not entitled to general damages. I agree with the Learned Magistrate that the Respondent is entitled to the following:

(a) full salary from the time KTDA – the appellant herein, stopped paying him his full salary to the time he was terminated from his employment, that is 24/9/98.

(b) Two months salary in lieu of Notice.

(c) Special damages of K.Shs.50,000/- being the legal fees paid to the advocate who represented him as well as costs of the suit at the lower court and this appeal.

(d) In the absence of receipts in support of transport costs to and from court in the course of the proceedings both at the lower court and this appeal, it appears to me safe to award special damages under this head of claim, as it may open flood gates. I accordingly disallow this claim under transport as there is no evidence to support the claim for KShs.15,000/-.

All in all, the appeal succeeds, with respect to the grounds of appeal against general damages, but the appeal is dismissed with respect to the special damages itemized herein above.

I further order that the appellant bears the costs of this appeal. The awards herein to be paid with interest at court rate, from the 23rd February 1999, when the suit herein was filed till payment in full.

DATED and delivered in Nairobi, this 30th day November,2005.

O.K. MUTUNGI

JUDGE