



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Appeal 121 of 2001

(from Original Civil Suit No. 688 of 1990: F. A. MABELE P.M

HUGHES LIMITEDAPPELLANT

VERSUS

JOSEPHAT OKELLO SIARARESPONDENT

J U D G M E N T

This is an appeal from the judgment and decree of the Chief Magistrate's court Kisumu in CMCC No.688 of 1990 delivered on 19th July, 2001.

The background facts of this case are that during 1983 Josephat Okelo Siara the respondent was employed by M/s Hughes Limited the appellant at its Kisumu B ranch. It appears that on 15th July, 1983 the respondent was arrested by police on a claim that he had stolen 6 tractor brake discs valued at Kshs.4390/20 belonging to the appellant. The respondent was eventually charged in court with a theft by servant of the said parts in Kisumu RM Criminal Case No.518 of 1983. However the respondent was acquitted on 28th June, 1984. In the meantime the respondents services with the appellant had been terminated on 16th July, 1983. On 9th May, 1985 the respondent filed an action against the appellant at the Chief Magistrate's court Kisumu seeking special damages and general damages for false imprisonment, malicious prosecution and wrongful dismissal. The appellant filed a defence denying the claims made by the respondent. The case was eventually tried before Mr. Mabele Principal Magistrate who in his judgment he awarded the respondent the following:-

- (a) Kshs.180,000/- general damages;**
- (b) Kshs.25,660 special damages;**
- (c) Kshs.1,244/85 for tool box;**
- (d) Costs and interest**

On 15th August, 2001 the appellant filed an appeal against the said Judgment and the resultant decree.

In his submission Mr. Menezes for the appellant contended he would address the court on two issues:-

- (a) whether the termination of respondent's employment was legally justified; and**
- (b) whether the quantum of the damages awarded were justifiable.**

He submitted that the essence of the respondent's case was that the termination of his employment was malicious; that there is no doubt that he was found in possession of the missing parts which led to his arrest; That an investigation by the security personnel disclosed that there were other employees who were prime suspects of the alleged theft/who were, not charged; that it was also a contention of Mr. Menezes that there was no evidence in support of the award of Kshs.1,244/85 and that the award of Kshs.180,000/= general damages was excessive and not based on any evidence that earlier on the respondents counsel had indicated in his submissions that an award of Kshs.100,000/- for general damages was adequate compensation for respondent but the magistrate awarded Kshs.180,000/- without giving reasons for it; that if the appeal against liability is not allowed the quantum of damages should be interfered with.

Mr. Kopot for the respondent opposed the appeal contending that the totality of evidence shows that the magistrate's conclusion was correct and that there is evidence that malicious prosecution false imprisonment and unlawful dismissal had been proved; that the branch manager in his evidence indicated that he was malicious; that the learned magistrate held that there was no evidence that the respondent had been guilty of a misconduct which would have resulted into a summary dismissal; that the respondent was charged with the offence of theft by servant but was acquitted; that the reasons why malice was alleged was because the respondent contended that he had held the spare parts for purposes of investigation and that he did not think that the loss of parts alone was the reasons for his dismissal, that the letter of his dismissal was written a day after the respondents arrest; that it was the Branch Manager of the appellant who set in motion the process of the appellant's arrest and that the prosecution ended in his favour and that the prosecution was without a reasonable cause; that the time the report was made there was already an internal report which absolved the respondent of any wrong doing; that in the case of unlawful dismissal the burden is upon the employer to explain the reasons for its actions; that there are 4 reasons which rendered the prosecution malicious and especially as the reasons given in the letter of dismissal is the failure to report the loss of spare parts; that the decision of the lower court to the effect that the dismissal of the respondent was unfair was correct; that the court did not err in its assessment of both special and general damages.

As this appeal in essence challenges the lower court's exercise of its unfettered discretion in awarding damages I remind myself of the functions of a first appellate court in respect to how and when the discretion of the trial court in respect to awarding damages may be interfered with on appeal. On the finding that the appellant was liable to respondent I have not been shown where the decision of the magistrate was clearly wrong because he misdirection or because he has acted on some matters which he should not have acted and so arrived at a wrong conclusion. In the circumstances I uphold the finding that the appellant is liable to the appellant.

On the award of Kshs.25,680/= special damages which is 50% of Kshs.51,360/= I find no fault in this award. There is a valid support for it.

The trial court awarded Kshs.180,000/= as a general damages for wrongful arrest, malicious prosecution and false imprisonment. There does not appear to be any basis for this amount. There was no authority relied on. The respondents advocates in their written submission had infact indicated that their client would have been satisfied with an award of Kshs.100,000/- under this head, but out of blue the magistrate awarded kshs.180,000/-. The magistrate appears to have misdirected himself on this award. I would therefore reduced this sum to Kshs.100,000/-.

The cost of toolbox which was stated to be Kshs.1,244/85 was included in the special damages awarded to the respondent. I have read exhibit P5 the letter dated 23rd February, 1973 addressed to the Personnel Manager, Hughes Limited Nairobi by the Directorate of Industrial training. There is no evidence on record supporting the award of this sum in favour of the respondent. I think that the magistrate also misdirected himself in awarding the respondent this sum. This sum was clearly included as special damages by the magistrate.

In the result I have reduced the general damages awarded by the trial court to Kshs.100,000/- and have also set aside the sum of Kshs.1,244/85 for toolbox. The special damages of Kshs.25,680/= have not been

affected.

The orders of the trial court are therefore rectified as stated. The parties are to share equally the costs of this appeal. Orders accordingly.

Dated and delivered this 9th day of November, 2005.

B.K. TANUI

J U D G E

In the presence of Menezes for appellant, Ochieng for Kopot for respondent

B. K. TANUI

J U D G E