



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL APPEAL NO. 9 OF 1999  
(From the original Civil Suit SRMCC 2224 of 1996)

EXPRESS KENYA LTD. ....APPELLANT

VERSUS

FAITH MUTHONI MAKUMI .....RESPONDENT

JUDGMENT

The respondent worked for the appellant as a warehousing clerk/cashier from 21st October 1994 to 19th May 1995 when she was summarily dismissed on suspicion that she had released some goods to the wrong customer.

Apart from her dismissal from employment a report of this was made to the police which culminated in her arrest and prosecution but that the court acquitted her of the offences preferred against her. Then after her acquittal she filed a suit in the Court of the Senior Resident Magistrate Nairobi on 1st April, 1996 to claim damages for unlawful dismissal, injurious falsehoods false imprisonment, detention and malicious prosecution.

There was also a prayer for cost of the suit and interest and any other or further relief as the Honourable Court deems fit to grant.

A defence filed to this suit on 4th July 1996 denied these allegations and stated it had dismissed the respondent for misconduct.

The defendant averred in the defence that it reported to the police about goods of its customer collected by a third party but denied that this was done without reasonable or probable cause or that the same was false.

The case was placed before the Ag. Senior Resident Magistrate (P. Ngatia) for hearing on 2nd March 1998, 10th June 1998, 1st July, 13th July 1998, 6th August 1998, 30th September, 1998 and 27th October 1998 when evidence of both parties was adduced and submissions made.

Judgment was delivered on 16th December, 1998 wherein the respondent was awarded Kshs.110,000/= for malicious falsehood and her salary for the month of May 1995 plus costs of the suit and interest.

From this decision the appellant has appealed to this court listing 7 grounds of appeal, namely that the learned magistrate erred in finding that the respondent had proved her case on a balance of probabilities, that he erred in finding that the respondent had proved all the ingredients of malicious falsehoods, that he failed to appreciate that the respondent had not proved that the appellant had made any or any untrue statement to the police regarding the respondent, that he failed to appreciate that the respondent had not

pleaded or proved any special damage arising from the alleged injurious falsehoods, that he erred in holding that the respondent had proved the ingredients of malice, that he erred in awarding the respondent Kshs.110,000/= for injurious falsehoods and that he erred in awarding the respondent salary for May 1995 which award was a special damage which had neither been pleaded nor proved.

The appeal was placed before this court on 30th May 2002 when counsel for the parties either urged or opposed the appeal.

Counsel for the appellant merely urged that the respondent had not shown that any statement had been made and/or that it was false and that there was no plea or proof of special damage for which Kshs.110,000/= was awarded.

Counsel for the respondent replied that there was no better way of establishing special damage than showing one lost a job as the respondent did; and that the statement made to the police which made the respondent be arrested was false and/or malicious.

These are the submissions I have heard and recorded from counsel for both parties for consideration and decision.

It is true that certain allegations were made in paragraphs 4 and 6 of the plaint about a report made to police and particulars of it regarding the respondent.

However, during the hearing of the case, no evidence was adduced as to what particular statement was reported about the respondent to warrant her arrest and prosecution.

No police officer was called to testify as to what report he received or what was recorded in the police Occurrence Book to necessitate the respondent being sought and arrested.

In this case, where the appellant was held liable for malicious falsehoods, it was vital for the court to know what actual words were spoken to the police before making such a finding.

It was also important to know who made those words to the police. Paragraph 6 of the plaint talks of employees, agents, servants and officers but who are these?

Much as civil cases are proved on the preponderance of probabilities, presumptions and assumptions do not meet that standard.

In this case, unfortunately, the learned Acting Senior Resident Magistrate based his decision on presumptions and/or assumptions, otherwise the respondent said nothing to confirm particulars in paragraph 6 of the plaint.

And without giving particulars of the words spoken to judge their falsity, the question of such words being malicious could not arise.

Putting the words allegedly spoken on the plaint is one thing and testifying about them in court to confirm they were uttered is another, and to my mind the latter is most important as proof of the case depends therefrom.

The learned acting Resident Magistrate awarded the respondent Kshs.110,000/= as special damage but he did not say from where this money came from as there was no plea about it in the plaint or proof thereof.

I did not even understand how she was to be paid the May salary in view of the fact that the court held she had resigned from employment in her letter dated 27th April, 1995 and in which she asked for nothing!

I would allow this appeal, and set aside the lower court order with a direction that each party to this appeal and the case below bears her/its own costs thereof.

Delivered this 18th day of June, 2002.

**D.K.S. AGANYANYA**

**JUDGE**