



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 2682 OF 1998

HENRY GIFLEX OMBATIPLAINTIFF

- V E R S U S -

UNIVERSITY OF NAIROBIDEFENDANT

J U D G M E N T

The Plaintiff was employed by the Defendant in 1989. On 9th February, 1996, the Defendant summarily terminated the Plaintiff's employment on the grounds that the Plaintiff and his colleague had caused the Defendant a loss amounting to K.shs. 464,819.60. This included money which had been entrusted to the Plaintiff and the said colleague in the course of their employment. As a result of that loss, the Defendant made a complaint to the police which resulted in the arrest and prosecution of the Plaintiff and his colleague in the subordinate Court on the charge of stealing by a person employed in the Public Service contrary to section 280 of the Penal Code. The Plaintiff and his colleague pleaded not guilty to that charge. At the hearing which lasted for more than two years, the prosecution called five witnesses. Three of these witnesses were employees of the Defendant. The trial magistrate acquitted the Plaintiff and his colleague under section 215 of the Criminal Procedure Code.

In his testimony, the Plaintiff said that he was earning a gross salary of K.shs. 10,000/= which was increased by K.shs. 700/= in January, 1996. He said that he contributed 5% while the Defendant contributed 15% of his gross pay to the pension scheme of which he was entitled to having served with the Defendant for more than five years at an interest of 15% p.a. computed on a six – month basis. He also claimed to be entitled to a three month's notice for termination of employment. He stated that he was not paid any dues upon termination. The Plaintiff testified that as a result of the criminal trial, he suffered mentally and that his reputation was ruined. He produced a receipt which showed that he paid K.shs. 100,000/= as legal fees to his Advocates who represented him in the Criminal case. He also claimed sums he allegedly expended while travelling from Kisii to Kibera Law Courts at Nairobi to attend the criminal hearing. He claimed three months salary and a salary in lieu of leave among others.

Mr. Ndungu wa Munywe, a senior Administrative Assistant with the Defendant testified that the Defendant was not motivated by any malice when it made a report to the Police as it was satisfied that a crime had been committed. He stated further that upon the Plaintiff's summary dismissal, he was only entitled to a return passage home, his contribution of 5%, his pending leave and salary up to 9th February, 1996, which had not been paid to the Plaintiff as he had not gone to clear with the Defendant. Mr. Joshua Mungai Nathaniel Mweha, an internal auditor with the Defendant and one of the prosecution witnesses at the Plaintiff's criminal trial was also called as a witness in this case. He said that upon doing his checking, he found that there was a shortfall of K.shs. 484,819.60 which was not accounted for. He wrote the report which recommended that the Plaintiff and his colleague already referred to be made to account for that shortfall.

This case raises two issues. The first one is whether the Defendant is responsible for any loss sustained by the Plaintiff as a result of his arrest and prosecution for the criminal offence in question and secondly

whether the Defendant is liable to pay the Plaintiff any sums upon termination of his employment and if so, how much.

The answer to the first issue may be found in the following passage by LAW, Ag. V-P (as he then was) in **Egbema v. West Nile District Administration** [1972] E.A. 60 (SIR WILLIAM DUFFUS, P, Himself, & LUTTA, J.A.) at p. 62:-

“The Uganda Police are not servants or agents of the respondent. Unlike Administration Police, which is sufficient to distinguish this case from West Nile District Administration v. Dritto, [1969] E.A. 324. That case is authority for the proposition that a Local Administration is vicariously responsible for the torts of the Administration Police committed in the course of their employment. The wrongful arrest in this case was performed by a constable of the Administration Police, in the course of his employment by the respondent, acting on the orders of a Chief also employed by the respondent. The subsequent detention of the appellant by the Uganda Police was a direct consequence of that wrongful arrest, and the respondent is liable to compensate the appellant for that period of imprisonment. Is the respondent also liable to damages in respect of the abortive prosecution? I do not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servants or agents of the respondent, after investigation. I can see no evidence of malice on the part of the respondent. The appellant was an obvious suspect, as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this court must make its own finding. In my view the circumstances of this case reasonably pointed to the appellant as a suspect, and there was no sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice.”

The Defendant in the present case was not responsible for the confinement of the Plaintiff neither was it responsible for his prosecution. All it did was to make a complaint to the police. It was the police who then decided to confine and prosecute the Plaintiff and not the Defendant. There is no evidence whatsoever that the Defendant was motivated by malice. It had lost money and it made inquiries which suggested that the plaintiff and his colleague were responsible for and consequently made a report to the police. They did what any reasonable person would have done in the circumstances. The police were not its agents and the Defendant did not have control over them once it had reported the matter. This claim could only be made against the Police. In **Jadiel Nyaga v. Silas Mucheke** NYERI C.A. Civil Appeal No. 59 of 1987 (Unreported) (GACHUHI, KWACH & MULI, J.J.A.) the Court of Appeal considered this matter and said as follows:-

“The Respondent’s case as it appears in the Plaintiff was that he claimed damages for false arrest, malicious prosecution and false imprisonment. He did not join the Police in the suit although it was clear that the acts complained of were in fact committed by the Police. The Appellant had made a complaint or the report to the Police and nothing more. What followed had nothing to do with him. The decision to arrest the Respondent was made by the Police who must have found some merit in the report. They decided to, detain, to charge and to prosecute the Respondent. The mere fact that the prosecution aborted for failure of the prosecution witnesses including the Appellant to attend the hearing is no here or there. It was the responsibility of the police to bond possible prosecution witnesses including the Appellant. They did not do that but instead the prosecutor told the Court that he had no witnesses to call instead of applying for an adjournment to try to secure the witnesses. The blame for the abortive prosecution was squarely on the police but not on the Appellant. [T]he Respondent’s suit was a non-starter for failure to join the police who were the main actors on the stage as far as the Respondent’s claim was concerned. It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution is in favour of the accused i.e. in cases where the prosecution is

withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. In the instant case, there was evidence adduced to show that the report by the appellant about the damage to his crop and trees by the respondent was false. He admitted as having made the report. There was evidence that the respondent had erected a stone building on the appellant's land although the dispute was not on the ownership of the land. The Police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false. Police action cannot be attributed to the Respondent who had no authority over them. There was no evidence to suggest that the arrest and Prosecution of the respondent was brought without reasonable or probable cause."

Without more, the Plaintiff's case for unlawful confinement and malicious prosecution against the Defendant cannot lie.

Going to the second question, the Defendant admitted holding K.shs. 10,951/= claimed in paragraph 6(b) of the Amended Pleadings. The Defendant also admits that the Plaintiff is entitled to 5% of his monthly salary contribution to the Pension Plan but averred that the Plaintiff is the one who has omitted to collect the same. In this, I understand that the Defendant has been and is ready to pay out the same to the Plaintiff and it is ordered that the Plaintiff be paid these sums. As regards the claim for payment of three month's salary in lieu of notice, it was argued that as the Plaintiff was summarily dismissed under clause 6(c) of his terms of service with the Defendant, he was not entitled to this claim. Under that clause, the Plaintiff was not entitled to any notice. That clause provides as follows:-

"Notwithstanding the provisions of section 5 above, any member of staff on these Terms may be removed from office without notice by Council if council is of the opinion that the member of staff concerned has: -

(i) Carried out his duties in a manner amounting to gross inefficiency or for failure or inability to perform the duties of his office or to comply with his appointment or....."

There was no evidence whatsoever that the "Council" made any such determination and in view of this and the fact that the Plaintiff was acquitted of the criminal charge, I am of the view that his employment was terminated unlawfully and he is, therefore, entitled to the notice period or salary in lieu of that notice. The claim of K.shs. 31,655.00 being three month's salary in lieu of notice is, therefore, allowed. In the same vein, the Plaintiff is also entitled to 20% of his basic salary per month contribution to the pension plan with 15% interest thereon per annum. The claim for gratuity was not proved and must be rejected. The Plaintiff's claim for passage and baggage allowance was also not proved and is also rejected.

I, therefore, enter judgment for the Plaintiff as follows:-

(a) Three months salary in lieu of notice K.shs. 31,655

(b) Salary for January to 9th February, 1996 K.shs. 10,951

(c) Loss of benefit, that is pension at 20% of basic salary per month plus 15% interest per annum thereon.

The Plaintiff is also awarded the costs of this suit.

DATED and DELIVERED at NAIROBI this 25th June, 2001.

ALNASHIR VISRAM

JUDGE