



**Suleiman v Judicial Service Commission & another (Civil Suit
73 of 2003) [2012] KEHC 2267 (KLR) (7 September 2012) (Judgment)**

PENUEL OMARE SULEIMAN V JUDICIAL SERVICE COMMISSION & ANOTHER [2012] eKLR

Neutral citation: [2012] KEHC 2267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL SUIT 73 OF 2003
RN SITATI, J
SEPTEMBER 7, 2012**

BETWEEN

PENUEL OMARE SULEIMAN PLAINTIFF

AND

JUDICIAL SERVICE COMMISSION 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. The plaintiff herein, Penuel Omare Suleiman commenced this suit by way of a plaint dated 8th May 2003 and filed in court on the same day praying for judgment to be entered against the defendants jointly and severally as follows:-
 - a) A declaration that the plaintiff's dismissal is illegal, null and void and such dismissal offends the rule of natural justice in as much as it offends the rule of law and reinstatement into office with full benefits because dismissal was arbitrary, unilateral and baseless.
 - b) General and special damages for wrongful dismissal and malicious prosecution.
 - c) In the alternative and strictly without prejudice to the foregoing prayers, the defendants do pay the plaintiff retirement benefits and salaries, without undue delay.
 - d) Costs of the suit and interest at court rates.



- e) Any other or alternative relief the honourable court may deem fit and just to grant.
2. The plaintiff's case as set out in the plaint is anchored in an employment contract between himself and the 1st defendant herein wherein at all times material to this suit the plaintiff was an employee of the 1st defendant stationed at Kisii Law Courts as a Higher Clerical Officer Job Group "F" and serving on permanent and pensionable terms. According to the plaint, the plaintiff was employed on 4th May 1981.
3. The plaintiff avers that on or about 8th March 1998, he was arrested and placed in custody on false charges of stealing by a person employed in the public service and later charged in the Homa Bay Court under Criminal Case Number 243 of 1998. Following the arrest, the plaintiff was interdicted from duty on 13th March 1998. The criminal case however ended in favour of the plaintiff.
4. The plaintiff further avers that as a result of the said prosecution, which he alleges was malicious, and without any probable cause, the plaintiff's reputation, character, standing and credit before the right thinking members of society was greatly lowered, interfered with and/or damaged. The plaintiff also contends that the said prosecution was intended to cause him damage and that as a result thereof he has suffered mental anguish, considerable loss and damage for which he holds the defendants jointly and severally liable. The particulars of malice alleged against the 1st defendant are:-
- a) Portraying the plaintiff as a thief.
 - b) Portrayed the plaintiff as a liar who should not be trusted.
 - c) The 1st defendant presented the plaintiff as a fraudulent person who cheats.
 - d) Presenting the plaintiff as an untrustworthy and unreliable.(sic)
 - e) That caused the plaintiff to be charged in Homa bay court for offences he never committed.
 - f) Intentionally subjecting the plaintiff to financial damage, mental and psychological torture.
 - g) Giving false evidence against the plaintiff for the offence, which the court acquitted him.(sic)
 - h) The 1st defendant driven with the aforesaid malice made false reports against the plaintiff at Kisii police station and the police without conducting proper investigations proceeded, arrested the plaintiff and arraigned him before the court at Homa bay and finally the plaintiff was acquitted of the same false charges by the court.
 - i) Applying double standards whereby one employee affected as in the plaintiff's situation was reinstated back to employment after being charged and acquitted specifically employee No. PJ 10160 in Homa bay Criminal case No.1223 of 1998.
5. The plaintiff alleged the following particulars of malice against the 2nd defendant:-
- a) Arresting the plaintiff without proper investigation.



- b) Giving false and contradictory evidence against the plaintiff.
 - c) Confining the plaintiff to police custody for one day where the plaintiff contracted very serious health problems which caused him a lot of financial and mental damage.
 - d) Portraying the plaintiff as a thief and criminal who commits fraud and not to be trusted.
 - e) Conspiring with the 1st defendant to get excuse to dismiss the plaintiff from his employment on unjustifiable grounds.
6. The plaintiff further contends that as a result of the said malice on the part of the 1st defendant, the 1st defendant did, on or about 28th July 2000, without any lawful cause or excuse and in breach of the rules of natural justice, dismiss the plaintiff on grounds of undisclosed gross misconduct, hence these proceedings.
7. The defendants filed a joint statement of defence on the 24th October 2003 and denied the allegations by the plaintiff and in particular denied that the plaintiff was illegally, irregularly and wrongfully dismissed from employment. The defendants also denied all the particulars of malice, defamation, illegality, irregularity and breach against them. The defendants also averred that the plaintiff's suit was time barred by the provisions of the Public Authorities Limitation Act. The defendants urged the court to dismiss the plaintiff's suit with costs to themselves. On the 18th July 2011, the defence was struck out for having been filed out of stipulated time.
8. The plaintiff testified and produced documents giving the history of his employment with the 1st defendant. He told the court that he was arrested on or about 8th March 1998 on allegations that he had stolen Kshs.250/= and on or about 24th March 1998 he was served with an interdiction letter – P. Exhibit 6. He also stated that he was tried in Migori Court in Criminal Case No. 243 of 1998 and was eventually acquitted of the offence – see P. Exhibit 7, being certified copies of proceedings in the lower court. The plaintiff further testified that though his full salary was reinstated in December 1999, after acquittal – P. Exhibit 8, in January 2000, he was paid half salary. On 24th December 1999, he was served with a notice to show cause why he could not be dismissed from service – see P. Exhibit 11. In spite of his reply, P. Exhibit 12, he was dismissed vide a letter dated 20th November 2000 but received on 6th December 2000 – P. Exhibit 13.
9. Upon receipt of the dismissal letter, the plaintiff appealed the decision but the appeal was dismissed and communicated to him vide a letter dated 12th March 2001 – P. Exhibit 15. He then commenced these proceedings by issuing a notice of intention to sue dated 8th March 2002 – P. Exhibit 15. The plaintiff stated that his monthly salary was Kshs.14,000/= inclusive of house allowance. He alleged that his arrest and prosecution were malicious and that his dismissal from the employment of the 1st defendant was wrongful, unlawful, irregular and in breach of the rule of law and natural justice.
10. During cross examination, the plaintiff stated that when he was served with the notice to show cause, he was warned that if he did not comply, he would be dismissed.
11. The defendants did not give any evidence, but both parties filed final submissions and relevant authorities.



12. The parties did not frame and file any agreed issues, but the plaintiff has framed 3 issues for determination:-
- 1) Was the plaintiff's dismissal unlawful and arbitrary? What is the quantum payable?
 - 2) Is the plaintiff entitled to reinstatement and accrued salaries and pension?
 - 3) Was the plaintiff's prosecution malicious? And what is the appropriate quantum?
13. I shall first deal with issue 3 and that is whether in the circumstances of this case, the plaintiff was maliciously prosecuted. The law relating to malicious prosecution was restated in the case of West Nile District Administration –vs- Dritto [1969] EA 324 and Mbowa –vs- East Mengo District Administration [1972] EA 352. In the Mbowa case, the court defined when the cause of action arises in such cases, and that is that the cause of action arises upon termination of the prosecution in favour of the plaintiff as the cause of action means all the facts which the plaintiff must prove in order to succeed. In the West Nile case the court set out the following principles:-
- a) A person instituting legal proceedings is not responsible for the imprisonment, which arises from the court order;
 - b) The plaintiff has to prove spite, ill-will or improper motive;
 - c) Lack of reasonable or probable cause is not in itself malice;
 - d) Four basic elements to be proved in malicious prosecution are:-
 - i) That the police acted as agents of the defendant in instituting the proceedings;
 - ii) That the police officers acted without probable grounds;
 - iii) That the police officers acted maliciously;
 - iv) That the proceedings were terminated in favour of the plaintiff.
14. In the instant case, the plaintiff alleges that the defendants were malicious in prosecuting him vide Migori Cr. Case No. 243 of 1998. Though it is true that that case was decided in favour of the plaintiff, there is no evidence on record to show that there was any spite or ill-will or improper motive in instituting the said criminal case. What is on record is that the plaintiff was suspected of having stolen certain amounts of money on diverse dates from his employer and as a result thereof a report was made to the police and subsequently the plaintiff was arrested and charged. In my humble view, there was reasonable or probable cause for the prosecution and even if the plaintiff proved that there was no such probable or reasonable cause, he would not have proved malice without the ingredients of spite, ill-will or improper motive. So, in this case, I find that no malice was proved by the plaintiff as against the defendants. The plaintiff's claim under this head must therefore fail.
15. Further, this claim must fail because when the plaintiff issued the notice of intention to sue, P. Exhibit 16, he did not notify the defendants that he intended to seek damages for malicious prosecution. What the plaintiff notified the defendants about was that he intended to seek declaration that his dismissal was unlawful, irregular and ought to be declared null and void, that he be reinstated to his job with full salary and benefits and that he be paid general damages for unlawful dismissal, costs and interest



of the suit. I therefore find that since the plaintiff did not intend to sue for malicious prosecution, he could not just spring such a claim upon the defendants.

16. The other issue for determination is whether the plaintiff's dismissal was unlawful, and arbitrary and what is the quantum of damages. The plaintiff produced documents showing the sequence of events leading to his dismissal. It appears from all that evidence that the plaintiff was never given a chance to appear before the disciplinary bodies of the 1st defendant either in person or by advocate to explain his case. It is also clear from the evidence that when the plaintiff served the 1st defendant with the outcome of the proceedings in the criminal case, the 1st defendant reinstated the plaintiff's full salary in December 1999, but then in January 2000, the whole of the said salary was recouped without explanation. In the month of December 1999, the plaintiff was given a letter requiring him to show cause why he should not be dismissed. The plaintiff furnished his explanation vide his letter dated 17th January 2000, which letter was forwarded to the 1st defendant on 18th January 2000. Yet it was not until 20th November 2000 that the 1st defendant wrote back to the plaintiff advising him that he had been dismissed with loss of all benefits with effect from 13th March 1998. In my humble view, the 1st defendant acted in an arbitrary manner first by recouping the plaintiff's December 1999 salary without any explanation whatsoever and secondly by giving no reason for the delay in responding to the plaintiff's explanation as to why he thought he should not be dismissed. The plaintiff's dismissal was thus arbitrary and wrongful and was therefore null and void. The 1st defendant was in breach of the rules of natural justice by denying the plaintiff a fair trial.
17. Should the plaintiff then be reinstated? After carefully considering all the circumstances of this case, including the metamorphosis through which the judiciary has gone since 1998, I am of the view that it may not serve the interests of justice to reinstate the plaintiff to his former job. It is however reasonable as per the alternative prayer by the plaintiff to turn the dismissal into a normal retirement with effect from 13th March, 1998 so that the plaintiff is entitled to retirement benefits from the said date.
18. In the circumstances, I enter judgment for the plaintiff as against the defendants jointly and severally in the following terms:-
 - a) A declaration that the plaintiff's dismissal was illegal, null and void.
 - b) The plaintiff's dismissal be and is hereby converted to normal retirement with full benefits with effect from 13th March 1998.
 - c) The plaintiff shall have costs and interest thereon at court rates.
19. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.
20. It is so ordered.

DATED AND DELIVERED AT KISII THIS 7TH DAY OF SEPTEMBER, 2012

RUTH NEKOYE SITATI

JUDGE.In the presence of: Mr. R. Masese for plaintiff (absent) but plaintiff present in court

Mr. Ombwayo (absent) for Defendants

Mr. Bibu - Court Clerk



RUTH NEKOYE SITATI
JUDGE.

