



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO 2552 OF 1987

JAMES MUTULU OKUNNE PLAINTIFF

VERSUS

NZOIA SUGAR COMPANY LTD & ANOTHER.....DEFENDANTS

JUDGMENT

This is a suit for general damages for wrongful dismissal and malicious prosecution. The plaintiff is James Mutulu Okunne, while the defendant is Nzoia Sugar Company Ltd.

The plaintiff was taken up by the defendant on 1st February, 1977, as a mechanic supervisor. He was summarily dismissed. On 4th April, 1984, due *inter alia*, to negligence in the performance of his work. The background facts are brief and straightforward.

On 23rd March, 1984, he was instructed by his immediate superior officer to drive a company bus registration No KSG 608, to Bungoma town. It was to be fitted with a windscreen. It was part of his duties to drive the defendant's motor vehicles to various destinations on designated duties or purposes. He drove the bus out of the defendant's compound, reached Bungoma town at the garage where the windscreen would be fixed. Later it was discovered that one of the tyres of the bus had been changed and replaced with an older one, more worn out and of the type the defendant was not using.

The plaintiff was required to explain that discrepancy, which he did. His explanation was that upon arrival at the garage he found one of the rear wheels punctured. When he sought to change it he found he had forgotten back at the defendant's compound, the key to the bus booth where the spare wheel was. So he decided to go to a petrol station nearby, asked puncture repairers there to go to the garage, remove the punctured wheel, take it to their place of work, repair the puncture and refix it on the bus. They came and removed the wheel and went with it. The plaintiff remained at the garage to assist in the fixation of the windscreen. It took sometime. Later he was informed that the wrong tyre had been substituted for the correct one. He denied responsibility.

The defendant thought the plaintiff had stolen the tyre either alone or in conjunction with other people. So they contacted the police at Bungoma, who after investigations arrested and charged the plaintiff with the offence of stealing by servant contrary to s 281 of the Penal Code. He was tried but was acquitted for lack of sufficient evidence.

Before the trial the plaintiff was summarily dismissed on account of the loss of that tyre.

It is the plaintiff's case that his prosecution was malicious and his dismissal wrongful. His conclusion was

based on the fact that he was acquitted by a Court of competent jurisdiction of the offence of theft of the tyre and was therefore completely exonerated from blame. That the defendant summarily dismissed him before his trial was concluded was evidence of malice.

Two matters must be established before the tort of malicious prosecution can be sustained. Firstly, it must be shown that there was either a legal reason for instituting criminal proceedings nor was the prosecution for public benefit but rather for personal and spiteful reasons. Secondly, that the prosecution terminated in an acquittal.

The plaintiff called evidence to show that the charge of theft by servant was determined in his favour. He was acquitted of the charge. The Court held that the plaintiff was not guilty of theft but had been negligent in his conduct with regard to the tyre. The Court did not elaborate on that.

The plaintiff did not, however, call evidence to show that the criminal proceedings were ill motivated. The circumstances leading to the loss of the tyre excited suspicion against him as the thief. They portray him as a natural suspect. Moreover, the decision to charge him was not that of the defendant. The police conducted independent investigations and decided to charge the plaintiff. That in effect means that independent of the complaint made by the defendant against the plaintiff, the police considered that there existed circumstances which made the appellant a natural suspect there is no evidence that the prosecution was spiteful. The mere fact of an acquittal is not evidence of malice. In the above circumstances I am not satisfied that the tort of malicious prosecution has been proved.

With regard to wrongful dismissal, every employee in every employment except one expressly excluded by statute has the right not to be unfairly dismissed by his employer. The plaintiff here alleges that the defendant unfairly dismissed him. To justify summary dismissal it must be shown that the employee was guilty of conduct which was incompatible with the due or faithful discharge of his duty to his employer.

The conduct need not be dishonest. It must, however, be conduct of a grave and weighty nature as to amount to a breach of the confidential relationship between employer and employee.

The plaintiff was assigned a specific duty – to take a bus to Bungoma for the sole purpose of having a windscreen fitted. It was fitted. However while the bus was in the custody of the plaintiff a tyre was stolen and replaced with a more worn out one and one of a different and apparently inferior quality. He was duty bound to account to his employer, the defendant, for the missing tyre. His explanation was unsatisfactory to his employer as it is to this Court. The plaintiff's conduct with regard to the tyre excites suspicion that he was privy to its loss. There is evidence on record that previously he had been found in circumstances which raised suspicion that he had engaged in shady deals against the defendant. So that the circumstances leading to the loss of the tyre coupled with the plaintiff's conduct previous to that entitled the defendant to dismiss him as it did.

In the event that I am wrong in the conclusions I have come to above, had the plaintiff become successful I would have assessed damages at Kshs 50,000 for malicious prosecution considering that the prosecution was conducted in a small town and was conducted within 15 months; there was no obvious personal benefit to the defendant arising from the prosecution; and considering that the plaintiff's previous character was suspect and he had been informed as much, but never raised any complaint in that regard.

As for wrongful dismissal the normal measure of damages is the amount an employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in other employment. The plaintiff's contract of employment does not contain a clause with regard to termination of employment. In the circumstances the Court has to consider what would have been a reasonable notice to give for the termination to be lawful. Such notice has to be decided considering the length of service of the employee and the level at which he was functioning. The plaintiff had worked for about 8 years for the defendant. For such period a reasonable period of notice would be three months. I would assess damages for wrongful dismissal in the sum equivalent to three months salary. The plaintiff was earning Kshs 2,355/= gross. The total for three months will come to Kshs 6,765/= , less tax and other statutory deductions if any, payable to the tax and

other authorities to which they are payable.

Dated at Nairobi this 16th day of February, 1993

S.E.O. BOSIRE

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JUDGE