REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 1417 OF 1981

JOSEPH KINYUA GACHANGA.....PLAINTIFF

VERSUS

BRITISH AMERICAN TOBACCO (K) LTD.....DEFENDANT

JUDGMENT

May 11, 1989 **Aluoch J** delivered the following Judgment.

By a plaint filed in court on 25th May 1981, the plaintiff Joseph Kinyua, sued his former employer the British American Tobacco (K) Ltd for damages for wrongful termination of services and defamation.

By a defence filed in court on 2nd July 1981 the defendant contended that the plaintiff's services were lawfully terminated. The defendant added further,

> "The defendant has at all times been ready, able and willing to pay the plaintiff the terminal benefits in accordance with the contract of employment, but the plaintiff has unreasonably refused to accept payment of the same."

Otherwise the defendant denied, "each and every allegation as if the same were set out and traversed *seriatim*".

The plaintiff gave evidence in court, giving circumstances which according to him led to the unlawful termination of his services. The incident occurred whilst he and PW2 were on duty on 20th February 1979. The trip had taken them from Moyale to Nyeri, and on the above mentioned date particularly, they were in Nanyuki, where they were to spend the night at Simba Lodge.

The plaintiff was the driver, and that day particularly, he was driving a Landrover, Reg No KVQ 785. On arrival at the lodge PW2, Arunga, the salesman counted the money made from sales that day. This amounted to a total of Kshs 34,679.50. All this was done in PW2's room but in presence of the plaintiff.

The money was put in an envelop and kept under the driver's seat, together with some documents. It was the plaintiff who kept the money but PW 2 (Arunga) was present. The plaintiff then locked both doors, the driver's and the passenger's.

After the money had been kept in the vehicle, Arunga went to his room and did some paper work, and

later went to have a drink at a bar within the hotel, and later went to sleep.

The evidence of the two witnesses differs as to what happened the following morning. According to the plaintiff the two packed luggage in the vehicle, then Arunga opened the front passenger door. The plaintiff said he had the key so he was surprised as to how Arunga opened the vehicle. Nevertheless, he found that the vehicle had been forced open, and all the money was missing.

Arunga, on the other hand, said that the following morning at 7 a.m he saw the driver who went to the vehicle and came back carrying a swordlike knife. That at about 8.10 a.m, he himself went to the vehicle followed by the driver (plaintiff). He tried to open the passenger door, it opened easily and the plaintiff, the driver was surprised and Arunga said, "you were here a few minutes ago, I assume you opened it".

Arunga was surprised to see the plaintiff surprised. He asked him to check where they had kept the money the previous evening. They checked and there was no money, only a hammer. Arunga reported the matter to the Police immediately and also made a report to the Nyeri office of the defendant company. The Police took both the plaintiff and Arunga to the Police Station, where both made statements. Arunga was released, but the plaintiff was charged with the offence of theft by servant, contrary to Section 281 of the Penal Code Cap 63. Eventually, the case was withdrawn under Section 87 (a) Criminal Procedure Code, Cap 75 as fresh Police investigations were ordered by the court. The plaintiff was asked to assist with further Police investigations. The certified copy of proceedings from Nanyuki Court was produced as Ex 4.

During the course of the hearing of this case, the plaintiff introduced into evidence the expenses he incurred in the several court appearances in Nanyuki Court where he was facing a charge of theft by servant, as already stated.

Mr Shimenga, for the defendant, objected to this line of evidence, however, I allowed the plaintiff to proceed with the evidence, as it were and I said the following,

> "At this stage, I will take evidence on that aspect of the case, and if, after consideration I find that I am in agreement with the objection raised, I will disregard that evidence all together."

The objection raised by Mr Shimenga, was grounded on Order VII Rule 6 of the Civil Procedure Rules, Cap 21 which reads in part.

> "Every plaint shall state specifically the relief which the plaintiff claims."

In this case, I note that the plaintiff had itemized particulars of special damages under paragraph 7 (a-e) of the plaint. However, when it comes to his actual prayers it simply reads,

"Wherefore the plaintiff prays for judgment for:-

a) Special damages @ Kshs 1,474/15 p.m from 1st January 1980 until judgment

b) General damages

c) Costs of the suit"

In the plaintiff's prayers therefore he did not include what he had itemized as "cost of defending the criminal suit"

"Food and accommodation to Nanyuki for the case and

Medical Expenses."

Mr Shimenga therefore submitted that these claims were not part of the reliefs sought, so the plaintiff should not be allowed to lead evidence to prove them.

Mr Kamunge for the plaintiff submitted that the items in question had

been pleaded, though they were not specifically prayed for in the reliefs

sought. The defendant was aware of them.

I have read through the defendant's defence filed on 2nd July 1987 paragraph 5 of the defence reads as follows:-

> "The defendant states that it is not liable to pay the special and general damages as set out in para 7 of the plaint or at all and puts the plaintiff to strict proof thereof."

I find that this paragraph clearly shows that the defendant knew and was aware of the plaintiff's claim for special damages, which were infact partuclarized.

Under these circumstances I consider it unfortunate that the plaintiff did not put down, under reliefs sought, the special damages under paras 7 (b), (c), (d) and (e) of the plaint. However, I find that failure to do so was not fatal to the plaintiff's case as no prejudice was caused to the defendant who had denied the claims anyway. The claims had appeared in the pleadings, so the defendant was aware of them. All that he was now doing in court, was to explain how the claims arose. I find that the provisions of Order VII Rule 6 were not breached.

For these reasons I find further that it was quite in order for the plaintiff to adduce the evidence to support his claims for special damages in para 7(b), (c), (d) and (e) of the plaint.

The plaintiff testified finally that the criminal case was finalized on 11th April 1980, whereby he was discharged, as the case was withdrawn. However, the defendant company had earlier suspended him from employment by a letter dated 21st December 1979, and on 16th April 1980, he was served with a letter of termination of services. This letter was Ex 7.

The plaintiff denied having been guilty of "theft" or "fraud". He also denied having been responsible for the property (cash money) which was stolen from the Landrover. He charged that his dismissal was wrongful, as there was no proper reason for it.

After the plaintiff had concluded his evidence his advocate, Mr Kamunge addressed the court saying that the plaintiff was pursuing the claim for "false prosecution, malicious prosecution and wrongful termination" and apparently, not defamation.

Mr Arunga, on the other had, wound up his evidence by answering during cross-examination that he was asked to resign by the defendant company. He assumed that it was due to the case involving the loss of money. He admitted that he was answerable for that money which the 2 of them left locked in the vehicle and the plaintiff, the driver, kept the key for the night. The vehicle was left parked in an open yard parking where there was a watchman. Mr Arunga had spoken to the watchman after they had kept money and locked the vehicle, and told him to guard the vehicle.

Both the plaintiff and Arunga confirmed that they found driver's door of the vehicle having been tampered with.

The defence had also called as a witness, one Michael Mbugua Wanyoike (D.W1), the Personnel Manager, Operations of the defendant company. He identified the plaintiff who was their former employee, having been employed in April 1978, as per Ex A, a letter of appointment. His first salary was Kshs 898.60, and by the time he left employment, his salary should have been Kshs 1,093.50 as per Ex B a letter dated 10th December 1979. This salary was due to be effective from 1st January 1980.

Unfortunately the plaintiff was suspended in December 1979, due to the Nanyuki incident. This coincided with the dates of salary increment, so his was not effected, but nevertheless, his terminal dues would be calculated on the basis of Kshs 1,093.50 p.m.

The witness, prayed on behalf of the company to have the plaintiff's suit dismissed with costs. He explained during questioning that the plaintiff as the driver was responsible for the vehicle and anything kept in it. That drivers such as the plaintiff, have instructions from the company to keep vehicles in Police Stations, or in premises of BAT where there are watchmen. On the plaintiff's dues he answered,

> "According to us, what was due to the plaintiff was his salary from December 1979 to April 1980. This was payable to him plus other terminal benefits."

After recording evidence from the witnesses, the 2 learned counsel gave written submissions which now form part of the proceedings of this case.

Mr Kamunge did delay in submitting his submissions, hence the delay in the preparation and delivery of the judgment.

In this case, the plaintiff is claiming special as well as general damages for,

1) False imprisonment

2) Malicious prosecution

3) Wrongful dismissal

He abandoned his prayer for "defamation", at the conclusion of his evidence in court, just before the start of cross-examination. In the written submissions by his lawyer Mr Kamunge, he said the following:-

> "We however concede that the aspect of defamation in the plaintiff's claim is time barred."

The defendant, through its lawyer Mr Shimenga answered to this for the 1st time in the written submissions when he said the following about the claim for defamation.

> "As we have already prepared / got up for the case, the costs are clearly payable to us. It is not our fault that the plaintiff did understand or know that his claim was time-barred."

I have considered the submissions on "defemation", by the defendant, who in my considered opinion, has not told court the preparations he had undertaken particularly, pertaining to the issue of defamation. As such, I decline to award him getting up fees or costs.

On the claim of false imprisonment, it is clear that the evidence of the plaintiff and Arunga, (D.W2) explain what happened upto the time the 2 went to the Police Station. As rightly pointed out by Mr Shimenga, the evidence of these 2 is to the effect that Arunga at some point asked the plaintiff what they should do (this is the plaintiff's evidence) after the 2 discovered that the money was missing, and the latter readily told Arunga that they should ring Head Office and also the Police. This was how the Police came into this case. There is no evidence that the Headquarters of BAT in Nairobi, or the Nyeri Office gave instructions for the arrest of the plaintiff. It was the plaintiff and Arunga who reported the loss of the money and thereafter the Police went to Simba Lodge and summoned both to the Police Station. They released one, Arunga, but detained the plaintiff whom they charged with the offence of theft. I find that the Police actions were out-side the workings of the defendant company, as such they cannot be penalized for falsely imprisoning the plaintiff. Perhaps that "charge" could have been levied against the Police.

The case of *Peter Kilonzo Nzioki v Mattas Nduva* (H.C. Civil Appeal No 68/75 reported in 1981 11 LSD44,) is relevant here, and I abide by the decision therein.

I do not find the defendant company liable to pay the plaintiff damages for false imprisonment.

On "malicious prosecution" the defendant relied on the High Court decision of *Murunga v The Attorney-General* [1979] KLR p 138, a case which sets out what plaintiff must show in order to succeed in a claim for malicious prosecution. These are:-

1) That the prosecution was instituted by the defendant

or by someone for whose act, he is responsible.

2) That the prosecution terminated in the plaintiff's favour.

3) That the prosecution was instituted without reasonable and probable cause.

4) That it was actuated by malice.

As I have already said, the prosecution of the plaintiff by the Police regarding the Nanyuki incident, was outside the workings of the defendant company. Infact, having recorded statements from plaintiff and Arunga, they decided to release one and charge the other. It is only the Police who know why they acted as they did.

The criminal proceedings against the plaintiff were infact terminated by the court in that the case was withdrawn under Section 87 (a) Criminal Procedure Code and fresh investigations ordered – This order was of course directed at the Police. Infact the plaintiff, who was the accused then was asked to assist the Police.

I am unable to find that there was any malice on the part of the defendant who infact had nothing to do with the plaintiff's arrest and subsequent charge. Since the court discharged him and ordered fresh investigations by the Police, which do not seem to have been carried out as he was never re-arrested, perhaps he could have well been advised at the relevant time to take action against the Police.

I will repeat here again that the prosecution of the plaintiff was instituted by the Police and not the defendant company.

The claim for malicious prosecution has not been proved on a balance of probabilities, and it must fail. The plaintiff's claim or prayer which calls for special scrutiny is the prayer for wrongful termination of services.

Evidence is on record from (D.W1) to the effect that the plaintiff's services were terminated in accordance with his contract of employment. Infact it is called Rules of Service for Grades 1-8. The plaintiff signed such a contract on 24th April 1978 in the presence of a witness. A copy of this document was produced in court as Ex 8. The defendant relied on Rule 39 headed "Discipline". The Rule says in part,

> "Notwithstanding anything contained in (Nature and Duration of Service), an employee shall be eligible to be summarily dismissed under the following broad headings, Disobedience or neglect, misconduct ... theft, fraud or dishonest in connection with the company's business or property .."

The defendant argued that the Nanyuki incident amounted to miscounduct on the part of the plaintiff. That it was the plaintiff who had the key overnight, after money had been locked in the vehicle. That he failed to keep the vehicle at a Police Station as instructed, or at premises of a BAT dealer who had a watchman. That it was a fact that a large sum of money was lost, though he had not been convicted of stealing it. Infact it was that factor which made the company opt to terminate the plaintiff's services as opposed to dismissing him summarily.

The plaintiff on the other hand challenged the dismissal on account that he was not convicted of the offence of theft and the hearing of the criminal case revealed that the vehicle was tampered with somehow, and it was not proved that he was the one who tampered with it.

I have considered all the evidence adduced in this case both by the plaintiff's side and the defendant's side, and I have come to the conclusion that the plaintiff's termination of services fell within the defendant company's Rules of Employment Terms and Conditions of Services for workers in Grades 1-8.

It is true that the plaintiff was not convicted of theft, but the money in question got lost whilst "in custody" of the plaintiff and Arunga so to speak.

In terminating the plaintiff's services the company did not spare Arunga, either. He was asked to resign, and the company gave reasons why they did so.

Because of my finding that the termination of the plaintiff fell within the Company's Rules of Employment, I proceed to find that under the circumstances, the termination was therefore not unlawful, and the plaintiff is not entitled to general damages for such termination.

As far as special damages claimed by the plaintiff are concerned, they all appear to be expenses he incurred in pursuance of the criminal case at Nanyuki.

Because of my earlier findings that the criminal case was neither instituted nor prosecuted by the defendant company, I am unable to find that the said defendant company is liable to pay such special damages.

The sum total of my judgment is that I dismiss the plaintiff's case based on

1) False imprisonment;

2) Malicious prosecution;

3) Wrongful dismissal, with costs to the defendant.

However, the plaintiff is at liberty to collect his terminal benefits from the defendant, as per Ex 7, the letter of termination of service.

Dated and delivered at Nairobi this 11th day of May , 1989.

J. A. ALUOCH

JUDGE