IN THE COURT OF APPEAL

AT KISUMU

(CORAM: Platt, Apaloo JJA & Masime Ag. JA)

CIVIL APPEAL NO. 7 OF 1987

BETWEEN

NZOIA SUGAR COMPANY LIMITED.....APPELLANT

AND

FUNGUTUTI.....RESPONDENT

JUDGMENT

(Appeal from the Judgments of the High Court at Kakamega, Gicheru & Aganyanya JJ)

July 29, 1988, **Apaloo JA** delivered the following Judgment.

The appellant is a limited liability Company and as its name implies, is in the business of manufacturing or processing sugar. It employs a number of staff. In April 1979, one of the employees in the appellant's payroll, was the respondent. He was an administrative clerk. The appellant also had on its staff, a man called Maurice Kisaka. He was employed as a security officer.

At 5.15 p.m. on the 20th April 1979, Kisaka called at the Webuye police station and lodged a complaint about the disappearance of a gas cooker. He said it belonged to the company and was part of furniture supplied to deceased employee of the appellant. Acccording to Kisaka's report, the respondent took the cooker to his house and when questioned about it, was unable to give any explanation for this. Although he did not in terms say so, Kisaka implied that the respondent dishonestly appropriated it.

After apparently investigating the complaint, the police on the 23rd April, 1979, preferred a charge of "stealing by servant" against the respondent.

He was arrested on that day and kept in custody overnight. On the following day, that is 24th April 1979, he was put before the Webuye Magistrate's Court. He pleaded not guilty to the charge of stealing and was granted bail. The case was fixed for hearing on the 13th June 1979. On that day, hearing took place. Three witnesses gave evidence for the prosecution. After the close of the prosecution's case, the Magistrate ruled that the

> "Accused has no case to answer and is discharged under section 210 of the Criminal Procedure Code".

It is possible that as a result of this case, the respondent lost his job with the appellant company. It is however unclear whether the Company dismissed him or whether he left of his own accord. This is

because the respondent admitted in cross-examination that as a result of some differences he had with the Personnel Manager, he tendered his resignation from the Company and the letter of resignation was dated the 19th April 1979. The only relevance of this matter, is that damages were awarded to him mainly on the basis of wrongful dismissal.

On the 3rd September 1980, the respondent casued to be issued against the appellant company a plaint in the High Court for damages. His precise cause of action was not clearly spelt out in the plaint and the uncertainty about his real grievance, is reflected in the unsatisfactory basis on which he was awarded damages. In paragraph 3 of the plaint, it was averred that:

> " ..The Defendant through its agent/or servant maliciously and without reasonable or probable cause reported to the police station at Webuye that the plaintiff has stolen one gas cooker and one cylinder ... an upon such charge, the plaintiff was arrested by the police and produced before Court on the 24th April 1979."

Then followed the avermanent of the plaintiff's trial and acquittal. In paragraph 5 of the plaint, it was averred that

> "By reason of the premises, the plaintiff has been injured in his reputation and suffered pain of body and mind and was dismissed by the defendant from the employment".

The respondent's cause of action seems to have been founded on defamation, wrongful dismissal and malicious prosecution. The pleadings contain expressions applicable to each cause of action. But the damages awarded in his favour, appears to have been based, erroneously I think, on wrongful dismissal.

The suit was heard by Gicheru J who found that "there was no reasonable or probable cause for making the said report" (ie Kisaka's). The Judge said that report "led to the plaintiff's prosecution" and "the said prosecution arising from the defendant's report as aforesaid was malicious." There will therefore be judgment for the plaintiff, against the defendant with costs of the suit."

I think on a fair reading of the learned Judge's conclusion, what he found proved, was the tort of malicious prosecution and had he there and then assessed damages, there is little doubt that that is the wrong for which he could have condemned the appellant in damages. The learned Judge was however not able to assess the damages on the 3rd February 1984 – the date he pronounced judgment. He therefore left it to be assessed on a date mutually agreed upon by the parties. He seems to have been transferred out of Kakamega. It hus fell to his successor, Aganyanya J, to assess the damages. He fixed it on the 25th July, 1985, in the toal sum of Shs 97,399.

The learned Judge fully appreciated that he was called upon to assess damages in favour of the respondent for malicious prosecution. Indeed he prefaced his judgment with the following sentence.

> "This was an assessment of damages the plaintiff having succeeded in his claim against the defendant for general damages for malicious prosecution."

But the actual sum awarded, was based on wrongful dismissal. The learned Judge split this as follows: Shs 95,000/= being loss of earnings from the date of dismissal to the date of judgment and medical expenses of Shs 2,399/=The medical expenses were incurred, because the respondent appeared to have told the judge, that one consequence of his dismissal from his employment was "that he developed high blood pressure for which he was treated". It is clear that the Judge did not award the respondent any damages for the actual tort which he allegedly proved, namely, malicious prosecution.

It is plain the damages awarded to the respondent on the basis that he established a case of wrongful dismissal cannot be supported. The respondent did not give any clear evidence that the appellant company dismissed him from its employment. Were he founding a claim on wrongful dismissal, he would have led evidence to show the terms of his employment, what reason was given for his dismissal and what length of notice he was entitled to be given before his employment could be terminated. Not only was no

evidence given of any of these but on the contrary, there is evidence that the respondent tendered his resignation to the appellant before his arrest and prosecution. Before us, Counsel for the respondent did not seek to support the damages awarded on the basis of wrongful dismissal and the consequential development of high blood pressure. That award will go.

The tort of malicious prosecution has some affinity with that of defamation. It was pleaded, *inter alia*, that by reason of the false complaint of theft made against him to the police by the appellant's agent, "he has been injured in his reputation and suffered pain of body and mind". That pleading snugly fits a defamation suit. But the Judge did not hold that the respondent has been defamed and did not profess to award him damages for that wrong. In any event, the Judge could not lawfully have done so because an action in defamation was barred 12 months after the cause of action arose by section 20 of the Defamation Act (Cap 36). On the facts, the respondent's casue of action arose on the 20th February 1979. The action was brought on the 3rd September 1980 – approsimately 19 months from the date the cause of action accrued.

Had Gicheru J been right in his conclusion that on the evidence the respondent established the tort of malicious prosecution against the appellant, one would have given consideration to the question whether damages should now be awarded him here for that tort or whether the suit should be remitted to the court below for such assessment.

But the Judge's holding that the respondent established a case of malicious prosecution was seriously disputed before us. It was submitted that on the facts, there was no sound reason for holding that the appellant had no reasonable or probable cause for making the complaint to the police and that at all events, there was no evidence of malice and that the learned Judge's contrary holding was wrong.

On the evidence, the complaint to the police was made by the appellant's security officer. If there is loss or theft of the company's property, he is the one person who would be expected to report this either to the police or to his employer. It was not suggested that the gas cooker was not in fact lost. The basis of the respondent's acquittal was that the evidence was contradictory and did not implicate him. The reason for this seems to have been that Kisaka, the author of the report, was not called as a witness. Whether he was available but was not called or was not available, is difficult to say. But as there is no evidence of previous bad blood between Kisaka and the respondent, it si highly improbable that he would invent the story of the loss of the gas cooker and the respondent's connection with its disappearance. On that account, I would find great difficulty in sharing the Judge's conclusion that there was no reasonable or probable cause for the report.

But in my opinion, the case of malicious prosecution must founder on the absence of proof of malice or ill-will. The only reason why the respondent claimed he was maliciously prosecuted, was because the prosecution terminated in his acquittal. As he put it in evidence:

> "I was acquitted under section 210 of the Criminal Procedure Code and in view of this, I am claiming damages from the defendant company because since my acquittal, I have not been employed because I have been treated as a thief as a result of this case."

It is trite learning that acquittal, per se, on a criminal case charge is notsufficient basis to ground a suit for malicious prosecution. Spite or illwill must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Cmpany. The respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him.

It is true the respondent said he had some unspecified differences with the Personnel Manager Mr Langat, but the only part he played in this matter, on the respondent's own showing, was that when the police picked him up at work, they took him to the office of the Personnel Manager and he was then told he was under arrest for theft of company property. It would be entirely fanciful to suggest that this evidence justifies a finding that Mr Langat who made no report to the police, was actuated by ill-will in allowing

the respondent to be informed of the reason for his arrest in his office.

So, whichever way the respondent's case is looked at, whether as a cliam in defamation, wrongful dismissal, or malicious prosecution, it is plain that the damages awarded in his favour cannot be supported.

It follows, that I would allow the appeal and set aside both the judgments which adjudged the appellant liable to the respondent in the tort of malicious prosecution and the one which awarded damages in his favour.

In lieu of them, I would dismiss the respondent's claim and enter judgment for the appellant Company. I would also order that the damages and costs, if paid should be refunded to the appellant with costs here and in the Court below.

Masime Ag JA. This appeal arises from the judgments of Gicheru and Aganyanya JJ, the one giving judgment on liability and the other assessing and awarding damages. Both the judgments and the award of damages are challenged in the appeal.

The plaint claimed damages for injury to the plaintiff's reputation allegedly arising from an unlawful arrest and malicious prosecution. The action was however filed out of period set by section 20 of the Defamation Act cap 36 and section 4(2)(d) of the Limitation of Actions Act cap 22. This was apparently not noticed by the learned trial judges because the evidence led during the hearing was directed to matters that were not pleaded namely unlawful dismissal and bodily pain and suffering.

The unsatisfactory state of the pleadings was conceded by the respondent. Order 6 rules 6 and 7 of the Civil Procedure Rules were not complied with and the plaint did not set out the specific reliefs sought. Consequently the learned judge went on to assess damages for unlawful dismissal and bodily injury merely because these were suggested in the evidence.

I therefore agree with Apaloo JA whose judgement I have read in draft that this appeal should be allowed and the judgments of the lower court be set aside and substituted with a judgment dismissing the plaintiff's suit with costs.

The damages already paid to the respondent are to be repaid by him to the appellant together with the costs of this appeal.

Platt JA. I agree with the judgment of Apaloo JA and Masime Ag JA. It follows that the appeal is allowed, the judgment of the High Court is set aside on liability (Gicheru J) and on assessment of damages (Aganyanya J) and there will be substituted therefor one judgment dismissing the plaintiff's claim with costs to the defendant.

The defendant will have the costs of this appeal.

Datedand delivered at Kisumu this 29th day of July , 1988

H.G PLATT

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JUDGE OF APPPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR