



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 93 OF 2017

BETWEEN

GILBERT OTIENO OKITE.....1ST APPELLANT

WILLIAM OMOLO OKITE.....2ND APPELLANT

AND

KENYA SUGAR RESEARCH FOUNDATION.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu

(H.K Chemitei,J.) dated 30th September, 2016

in

HCCC No. 146 of 2010)

JUDGMENT OF KIAGE, J.A

The 1st appellant herein was employed by the respondent as a Laboratory technician in January 2001. Apart from other benefits that came as a result of the employment, the appellant was allocated staff quarters where he lived together with his family including the 2nd respondent, who is his son.

The 1st appellant averred in a plaint filed in the High Court in Kisumu that on 13th November 2007, he was summoned by one Tom Abuga, the respondent's security officer, who informed him to go and collect a package at the Director's office. Upon collection of the same, the appellant was swiftly arrested by two people, whom he later found out were plain cloth policemen. They took him to Mamboleo police station, where the 2nd respondent was also brought, and they spent the night in jail. The 1st appellant was later transferred to Kondele police station where he was charged with the offence of attempting to extort by threat contrary to **section 300 (1) (c) of the Penal Code**.

The 1st appellant asserted that the complainant in the case was one Raphael Mukhuyu Shiundu and not the respondent. However, the respondent surprisingly facilitated his arrest when according to him, it did not have the constitutional mandate to institute the criminal proceedings against him. Still, a full criminal trial followed and the appellant was found guilty of the offence and sentenced to a 2 year probation and a fine of Kshs. 10,000. He successfully appealed the sentence and was subsequently acquitted of the charges by the High Court. As a result of the said trial, the appellant suffered serious mental anguish and his family suffered; with the 2nd appellant performing dismally in his academic work. Further, the respondent terminated the 1st appellant's employment on grounds of public interest and denied him a certificate of good conduct which made it impossible for him to get formal employment. Therefore, he was unable to fend for his family due to aforementioned malicious prosecution. The appellants sought for various orders which can be summarized as follows;

- a) A declaration that the disciplinary process commenced against the 1st appellant by his purported interdiction which culminated into his retirement due to public interest was void *ab initio*.
- b) A permanent injunction restraining the respondent, its servants, officers and/or agents from effecting the decision that purported to retire the appellant.

- c) A permanent injunction restraining the respondent, its servants, officers and/or agents from interfering with the 1st appellant's occupation and quiet enjoyment of the house assigned to and occupied by him at the respondent's lower staff estate.
- d) Kshs. 534,735.82 being the aggrieved balance due and interest on the entire aggregate of his salary irregularly withheld by the respondent be paid to him.
- e) General, exemplary and aggravated damages for wrongful arrest, false imprisonment and malicious prosecution.
- f) Special damages for wrongful arrest, false imprisonment and malicious prosecution in the aggregate sum of Kshs. 65,235/-.

The respondent confirmed that the indeed the 1st appellant was charged and convicted of a criminal offence. During the pendency of the trial, the appellant was on interdiction hence on half salary. The termination of his employment was based on public interest and was done pursuant to the conviction by the trial court and by the time the High Court acquitted him, on appeal, he had already been fired.

The matter was heard by H.K Chemitei and who considered the pleadings and submissions and wrote a judgment of the court that was delivered on his behalf by Majanja, J. on 30th September 2016. He held that the nature of the suit demanded the presence of the Attorney General and the complainant Raphael Mukhuyu Shiundu, yet the appellants did not join them. Also, some of the prayers sought by the appellant were within the jurisdiction of the Employment and Labour Relations Court and were therefore improperly before him. The suit was on those grounds dismissed.

The appellants were dissatisfied with the judgment and filed the instant appeal containing 5 grounds which, condensed, are that the learned judge erred in law and in fact by;

- a) Failing to find that the appellants' rights under **Article 50** of Constitution were violated by the respondent.
- b) Failing to find that the respondent was in actual control of the police during the arrest of the appellants and confinement and thus liable for all consequences flowing therefrom.
- c) Failing to award the appellants general and aggravated damages, for the wrongful arrest and malicious prosecution that was initiated and directed by the respondent.
- d) Failing to assess the quantum of damages due to the appellants.

During the hearing of the appeal, learned Counsel **Mr Mwesigwa held** brief for Mr. Okero S.C. who was on record for the appellants, while learned Counsel **Mr Qey** appeared for the respondent. Both parties had not filed written submissions and therefore submitted orally before us.

Mr. Mwesiga submitted that the learned judge erred by failing to find that the natural justice rights of the 1st appellant were violated by the respondent's failure to follow its own internal policy code especially on disciplinary proceedings. He also relied on the submissions of the Counsel on record that were filed at the High Court.

Mr. Qey submitted that he concurred with the learned Judge's findings and relied on his submissions that were filed at the High Court. He further contended that the learned Judges properly avoided to handle the employer-employee relationship aspect of the suit as he had no jurisdiction. Since the same belonged to the exclusive jurisdiction of the Employment and Labour Relations Court as provided for in **Article 165 (5)** of the Constitution.

My mandate on a first appeal is echoed in **ROBIN ANGUS PAUL & 2 OTHERS V MIRIAM HEMED KALE [2019] eKLR;**

“As stated earlier, on first appeal this Court is enjoined to re-evaluate, re-assess and re-analyze the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way.”

Before dealing with the issues to be determined in this appeal, I must express my disappointment at and deprecate the callous manner in which Counsel handled this matter. Neither of them filed written submissions as required by the Practice Directions of this Court. Worse still there was a patent want of industry and effort towards it, not persuading but least assisting the Court as ought. Instead they simply left it to the Court to leaf through their High Court submissions and tailor them to fit the issues raised herein. We find this approach to be inimical to the high standards expected of members of such a distinguished profession. Enough said.

From the grounds of appeal raised herein, the 1st appellant is aggrieved by the failure of the court to award him general and aggravated damages for the wrongful arrest and malicious prosecution that was allegedly initiated and directed by the respondent, much as I wish to sympathize with the appellants, I cannot close my eyes to the jurisdictional issue addressed by the learned Judge. The same relates to the jurisdiction of the High Court in relation to labour matters. I think that the jurisdictional hurdle is one that the appellants had to successfully surmount if they hoped to have the substance of their complaints engaged and addressed. Jurisdiction is everything, and questions on it must be raised and addressed at the earliest since without it, the court must down its tools as well-elucidated in the late Nyarangi's dictum in **OWNERS OF THE MOTOR VESSEL “LILLIAN S” V CALTEX OIL (KENYA) LTD [1989] eKLR** where he held;

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided

forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court.”

The learned Judge held that the issues of termination of employment whether unfair and the issues of outstanding dues could only be ventilated at the Labour and Relations Court. He therefore did not determine any question concerning the employer-employee relationship that existed between the 1st appellant and the respondent.

It is clear to me that the learned Judge was correct in holding that the High Court lacked jurisdiction to determine the employment issues raised by the 1st appellant against the respondent. This is by virtue of the promulgation of the current Constitution which set up the Employment and Labour Court as a specialized court under **Article 162(2) (a)**;

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations;

The **Employment and Labour Relations Court Act** which in **Section 4** provides;

“There is established the Employment and Labour Relations Court pursuant to Article 162(2) of the Constitution.”

Beyond creating the specialized court and investing it with jurisdiction in these matters, the Constitution left no room for a concurrence of jurisdiction because it expressly removed the same from the jurisdictional purview of the High Court in the clear and unambiguous exclusionary terms of Article 165(5)(6);

“The High Court shall not have jurisdiction in respect of matters –

(a) ...

(b) Falling within the jurisdiction of the courts contemplated in Article 162(2)”

In effect, the court had no capacity to issue the orders sought, and the learned Judge did not err by arriving at that conclusion. It could not do otherwise for, as the Supreme Court emphasized in **REPUBLIC V KARISA CHENGO & 2 OTHERS [2017] eKLR**;

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

Turning to the issue of malicious prosecution the learned Judge held that in the absence of the Attorney General and Raphael Mukhuyu Shiundu, the initial complainant, the prayers sought by the appellants could not be granted. The claim for malicious prosecution cannot be brought against private individuals or entities, who only lay complaints of a criminal nature to investigative authorities. The decision to prosecute lies with the authorities charged with the mandate to set the law of prosecution in motion, namely the office of the Director of Public Prosecutions. The respondent could not be held responsible for malicious prosecution since it never had legal authority and did not in fact prosecute the appellant.

It follows that this appeal is devoid of merit and I would dismiss it but with no order as to costs.

As Makhandia, JA is of the same view, it is so ordered. This Judgment is rendered under **Rule 32(3)** as Odek, JA sadly expired before it could be delivered.

DATED and delivered at Kisumu this 31st day of January, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF ASIKE-MAKHANDIA, J.A

I have had the benefit of reading in draft the Judgment of Kiage, J.A. I wholly agree and concur with the contents. I have nothing useful to all.

Dated and delivered at Kisumu this 31st day of January, 2020

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.