IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 52 OF 2016

BETWEEN

ANTHONY SHIVEKA ALIELO..... APPELLANT

VERSUS

KENYA POST OFFICE SAVINGS BANK.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal against the judgment and decree of the High Court of Kenya at Nairobi, (Hon. Justice Sergon, J.) dated 20th February 2015

in

HCCA No. 468 OF 2013)

****

JUDGMENT OF THE COURT

Background

[1] This is a second appeal from the judgment of the High Court (Sergon J). **Anthony Shiveka Alielo** (the appellant) seeks to set aside the judgment of the High Court and reinstate that of the trial court which had awarded him Kshs. 3,623,620/= as damages for unlawful dismissal, general damages for unlawful and malicious prosecution, special damages and costs and interest.

[2] The brief facts leading to the appeal, are that the appellant was employed by **Kenya Post Office Savings Bank** (the 1st Respondent) from 1st November, 1992 until 11th December, 2000. The 1st respondent carried out investigations and found, *inter alia*, that Kshs.3,167,287/= which had been in the appellant's custody was missing and remained unaccounted for. Consequently, the 1st respondent filed a complaint with the Banks Anti-Fraud Unit and reported the matter to the police. The appellant was arrested from his place of work by the 1st respondent's Security Officers who detained him and later called in the police. The police re-arrested the appellant on 12th December, 2000.

[3] The appellant was charged before the Chief Magistrate's Court Nairobi in Criminal Case No. 2773 of 2000 with stealing by servant contrary to section 281 of the Penal Code and two counts in respect of the offence of destroying evidence contrary to section 116 of the Penal Code. On 15th December, 2004, the trial court (Hon. Nyakundi) acquitted the appellant of all charges under section 210 of the Criminal Procedure Code on the ground that the prosecution had failed to establish a *prima facie* case against the appellant to warrant placing him on his defence. While the proceedings were still ongoing the appellant was suspended from duty on 18th December, 2009 and on 12th March, 2001, he was dismissed from employment by the 1st respondent.

[4] The appellant filed a suit before the Ag. Chief Magistrate (Hon. Obulutsa) claiming damages for wrongful confinement and for malicious prosecution. By a judgment delivered on 22nd August, 2013, the learned Ag. Chief Magistrate found in favour of the appellant and concluded as follows;-

> "***Judgment will be entered as follows as against 1st defendant***

a. Unlawful dismissal 1,291,620.00

Against the defendants jointly and severally

b. general damages for unlawful confinement and malicious prosecution 2,000,000.00

c. special damages 332,000.00

3,623,620.00

The plaintiff will have costs of the suit and interest."

[5] Aggrieved by that decision, the 1st respondent filed an appeal in the High Court on the grounds, *inter alia*, that the learned magistrate erred in fact and in law; in awarding the appellant Kshs.3,623,620/= together with costs and interest; in complete disregard to the evidence; in failing to appreciate that the 1st respondent could not be held liable for unlawful confinement and malicious prosecution since institution of prosecution is the duty of the 2nd respondent; by awarding the appellant Kshs.2 million as general damages for unlawful confinement and malicious prosecution; in awarding of Kshs.2 million to the appellant as general damages which amount is excessive and inordinately high in the circumstances of his case, in holding that the appellant had been dismissed by the 1st respondent; in holding that the appellant was entitled to more than 1 month's salary; in holding that the appellant was entitled to a salary after the date of dismissal and or termination from employment and in awarding special damages of Kshs.332,000.00 to the appellant whereas the appellant had not provided any evidence to prove the same to entitle him to such an award.

[6] At the hearing of the 1st appeal the appellant raised a Preliminary Objection to the effect that the High Court had no jurisdiction to hear and determine the appeal by dint of Article 162 (2)(a) of the Constitution.

The High Court dismissed the Preliminary Objection holding that:-

"this Court has jurisdiction to hear and determine the appeal.

5. This dispute was not purely a labour and employment dispute. This is a mixed grill suit which this Court can ably determine. The suit which gave rise to the decision now being sought to be impugned was filed partly under the Employment Act (now repealed). At that time appeals arising from the labour Court went straight to the High Court. The fact that the proceedings giving rise to the decision now being challenged on appeal were instituted before the promulgation of the 2010 Constitution and before the enactment of the Industrial Court Act, 2011, it is sufficient to state that this Court has jurisdiction to entertain the Appeal. I do not intend to consider the ground of estoppel, since this ground alone is sufficient to dispose of the Preliminary objection. I overrule the objection."

[7] Having disposed of the Preliminary Objection the learned judge proceeded to determine the substantive appeal, allowed the appeal, set aside the judgment and decree of the trial court, and substituted it with orders. That the suit against the 1st respondent is dismissed with costs; that costs of the appeal is awarded to the 1st respondent payable by the appellant; that the appellant was wrongfully confined by the 2nd respondent's officers for 3 days and the appellant is therefore entitled to be paid by the 2nd respondent a sum of Kshs.50,000/= as damages for wrongful confinement and that costs based on damages awarded to the appellant for wrongful confinement in the sum of Kshs.50,000/= be payable by the 2nd respondent.

[8] Aggrieved by that decision, the appellant filed this 2nd appeal *Inter alia* on the following grounds; that the learned Judge erred in law and fact in finding that; the High Court had jurisdiction to hear and determine the 1st appeal; in finding that the appellant was wrongfully and illegally confined yet proceeded to disturb the trial court's award; in finding that fraud was not proved; in finding that the ingredients of malicious prosecution had not been proved; and in finding that the award of damages by the trial court was high and excessive.

[9] The appellant seeks the following orders;-

"1. That the Appellant's appeal be allowed.

2. That the High Court's judgment delivered on 20 th February, 2015 HCCA 468 of 2013 be set aside in its entirety.

3. That the judgment at the trial Court (Obulutsa, Acting Chief Magistrate) Civil Suit 13495 of 2005 Milimani Commercial Courts be reinstated.

4. A declaration that the dismissal letter by the first respondent dated 12th March, 2001 over the same issues pending determination by a court of law contravened the appellant's right of presumption of innocence until proven guilty. Quash the aforesaid letter and uphold the trial magistrate's finding that the dismissal was an error. And Order Reinstatement and compensation accordingly.

5. That costs of this Appeal and in the High Court be granted to the appellant.

6. The Honourable Court do issue such orders and give such directions as it may consider appropriate to meet the ends of justice."

Submissions

[10] When the appeal was heard before us, both parties had filed written submissions and relied on the same. The appellant appeared in person while learned counsel, **Mr Edwin Abuya** represented the 1st respondent. The 2nd respondent had filed written submissions.

The appellant relied on his written submissions and submitted that there was no termination notice served on him; that the High Court did not have jurisdiction to hear and determine the issue of wrongful dismissal as that is exclusively the preserve of the Industrial Court (now the Employment and Labour Relations Court) pursuant to Article 165(5) of the Constitution; that the learned Judge erred in determining this matter which could only be determined by the Employment and Labour Relations Court as provided for by Article 162 (2) of the Constitution; that the 2nd respondent entered a *nolle prosequi* as there was no evidence to charge the appellant; that the learned Judge found that the appellant was illegally confined but set aside the award of damages awarded by the trial court; that damages awarded should be increased to Kshs.12 million. The appellant urged us to allow the appeal with costs.

[11] On the question of summary dismissal, it was the appellant's submission that the 1st respondent did not issue him with a notice to show cause why he should not be dismissed; that the summary dismissal was done against the rules of natural justice, the Constitution of Kenya and provisions of the Employment Act and the learned Judge therefore erred in finding that the appellant's dismissal was justified and lawful.

[12] Further, the appellant urged the Court to find that his prosecution for the offence of stealing by servant in the lower Court was actuated by malice and the trial Court was correct in awarding him damages on this head; that the High Court erred in finding that he was not tortured; that since he was illegally confined by the 1st respondent before being handed to the 2nd respondent, the form of torture he suffered was psychological in nature; that his prosecution for the offence of stealing by servant in the lower Court was actuated by malice and that the trial Court was correct in awarding him damages of Kshs.2,000,000/= for malicious prosecution; that the learned Judge erred in finding that there was no malice, and in awarding damages for Kshs. 50,000/= for wrongful confinement, whereas the High Court agreed with the trial Court that there was wrongful confinement. The appellant urged us to allow his appeal.

[13] Submitting in opposition to the appeal, **Mr. Abuya**, argued that despite various amendments in regard to employment law, the jurisdiction of the Employment and Labour Relations Court is to determine Employment and Labour related disputes. Counsel cited the case of **Omari Khamisi Kombo v Abdulrazak Khalsfin (2013) eKLR** and **Eldoret Steel Mills v Gilbert Nyanchoka Mogoi (2014) eKLR** where the High Court held that the Industrial Court (now the Employment and Labour Relations Court) lacked jurisdiction to entertain matters that are not solely labour related as the High Court is the proper forum to determine such claims as per the provisions of Article 23 of the Constitution.

[14] The 1st respondent further submitted that the claim based on malicious prosecution was not proved as the well-known elements were not satisfied as the appellant failed to prove that the claim was instituted by the 1st respondent, without a reasonable cause and that the claim was actuated by malice against the appellant; that the appellant's acquittal of a criminal charge was not sufficient basis to support a suit for malicious prosecution. On the award of damages, the 1st respondent argued that the learned Judge did not err in varying the award of the trial court as the High Court exercised its jurisdiction in varying the award and finding that the appellant was not entitled to special damages of Kshs.332,000/=; that the appellant's termination was justified and lawfully effected as the appellant was given notice and a letter to show cause; that gross misconduct is one of the grounds upon which an employer may summarily dismiss an employee as per the provisions of section 17 of the Employment Act (repealed). Counsel urged us to dismiss this appeal.

[15] The 2nd respondent conceded that the appellant's confinement was unconstitutional but maintained that the award of Kshs.50,000/= provided by the learned Judge in the High Court was adequate compensation. The 2nd respondent relied on the case of **Butt vs Khan (1981) eKLR** to support their claim that there was no evidence that the learned Judge proceeded on wrong principles or misapprehended the evidence or that the damages awarded were inordinately low; that the learned Judge did not err in holding that the appellant's prosecution was justified as there was no evidence tendered to prove that the criminal case against the appellant was instituted without reasonable and probable cause; that there was genuine belief that the appellant was guilty of culpable conduct; that having found that the appellant's prosecution was justified, it was not proper for the trial Court to award the appellant special damages and the learned Judge of the High court was right to disregard these claims.

Determination

[16] We have considered the Memorandum of Appeal with its fourteen grounds of appeal, submissions of both counsel and the Record of Appeal. This being a second appeal, we are confined to consider matters of law as stated by this Court in the case of ***Kenya Breweries Ltd. vs Godfrey Odoyo, Civil Appeal No. 127 of 2007:-***

"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

[17] The issues for determination in this appeal are;-

i. Whether the High Court had jurisdiction to entertain the appeal from the lower court;

ii. Whether High Court was proper in holding that the tort of malicious prosecution and illegal confinement was not established;

iii. Whether the appellant was wrongfully and unlawfully dismissed by the 1st respondent and whether the High Court judge was proper in reversing the finding of the trial court.

[18] On the issue whether the High Court had jurisdiction to entertain an appeal on wrongful termination; the plaint filed by the appellant in the trial Court raised several causes of action including wrongful arrest and confinement, malicious prosecution and wrongful termination. It is also evident that the dispute between the appellant and the 1st respondent was presented as a dispute arising from an employee/employer relationship, where the 1st respondent accused the appellant of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal.

[19] In our view the claim for damages for unfair termination, the claim relating to general damages for malicious prosecution and defamation, flowed directly from the dismissal, was within the jurisdiction of the High court. In the exercise of its powers under **Article 165 of the Constitution** the High Court had jurisdiction to entertain the dispute in all its aspects and award damages appropriately. This ground therefore fails.

[20] On the issue of malicious prosecution and torture, the elements to be proved in an action for malicious prosecution is well settled. In **Mbowa v. East Mengo District Administration [1972] EA 352**, the East African Court of Appeal summarized the law as follows:

> ***"The action for damages for malicious prosecution is part of the common law of England... The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit.... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:***
>
> > ***(1) the criminal proceedings must have been instituted by the defendant,***
> >
> > ***(2) the criminal proceedings must have been terminated in the plaintiff's favour,***
>
> ***The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action..."***

[21] In the case of **Gitau v. Attorney General (1990) KLR 13,** it was held that if the person making a complaint or the police officer to whom the complaint is made genuinely believed the facts and acted upon them, being satisfied that a probable crime has been established, then the arrest and subsequent prosecution would be justified.

[22] Further, to prove malicious prosecution the appellant was required to show that, by bringing criminal proceedings against him the 1st respondent acted without reasonable or probable cause. What amounts to "reasonable and probable cause" for the purpose of proving malicious prosecution was explained in **Kagame & Others v. AG & Another (1969) EA 643** as follows;

> ***"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed..."***

[23] It is not in dispute that the appellant was acquitted of the criminal proceedings under the provisions of section 215 of the Criminal Procedure Code due to the prosecution failing to present the original documents showing that the amount of Kshs. 3,167,287/- could not be accounted for while in the custody of the appellant.

[24] On the question whether the prosecution was malicious and whether the prosecution against the appellant brought recklessly and indifferently, in **Jediel Nyaga vs Silas Mucheke (Civil Appeal No. 59 of 1987 (Nyeri) (UR)** this court stated:-

> ***"It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice."***

[25] In the instant appeal there is no evidence that the 1st respondent made a "false" report, or that it was actuated by "malice", or that the appellant's prosecution was brought "without reasonable or probable cause". The fact is that money under the custody of the appellant was found missing and the appellant failed to account for it; that the police investigated and charged the appellant. In the case of **Egbema vs West Nile District Administration (1972) E. A**. Law, Ag. V. P. as he then was, said:

> ***"Is the respondent also liable in damages in respect of the abortive prosecution" I do not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servant or agents of the respondents after investigation. I can see no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the***

respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court must make its own finding. In my view the circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice."

[26] On the question of wrongful termination; the appellant based the decision to summarily dismiss the 1st respondent under the provisions of section 17 (g) of the Employment Act, Cap 226 (repealed) which provided that:-

17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal –

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

[27] Section 44 of the Employment Act (Cap 226) (repealed), provided that summary dismissal would take place when an employer terminates the employment of an employee without notice or with less notice period than that to which the employee is entitled to by any statutory provision or contractual term. Sub- section (3) thereof enabled an employer to dismiss an employee summarily for gross misconduct. From the record, the resolution to dismiss the appellant was in compliance with the contractual terms of employment. Further section 17 of the Employment Act (repealed) which was the law in force at the time of the appellant's termination listed gross misconduct as one of the grounds upon which an employer could summarily dismiss an employee.

As per the provisions of the Bank regulations Post Code J.3 (iii) e, the above irregularities are categorized as serious offences and calls for automatic dismissal from service. We find that the 1st respondent followed due process in terminating the appellant's services.

[28] On the question whether the learned Judge erred in varying the award of the trial Court, it was the 2nd respondent's contention that the learned Judge correctly arrived at a figure of Kshs.50,000/= as damages for the appellants confinement at the police station for 3 days.

In the case of **Butt v Khan (Supra)** it was stated as follows;-

"An appellate court will not disturb an award of damages unless it is so high or low as to represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

See **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A. M. Lubia and Olive Lubia (1982 – 88).**

No evidence was adduced to prove that the learned Judge proceeded on wrong principles or misapprehended evidence or that the figure was inordinately low; or that the Judge took into account an irrelevant factor or failed to consider a relevant one.

[29] The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 8th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR