



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 73 OF 2016

BETWEEN

HASSAN MAGIYA KIAGE.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

TOURISM FINANCE CORPORATION.....2ND RESPONDENT

*(An appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nairobi
(Nduma Nderi, J.) delivered on 15th January, 2016*

in

E & LRC CAUSE NO. 1021 OF 2014)

JUDGMENT OF THE COURT

1. **Hassan Magiya Kiage** (the appellant), was employed as Finance Manager by **Tourism Finance Corporation** (the 1st respondent) in August, 2004. According to the appellant, his duties included coordinating the finance department and handling all financial matters. He also doubled up as a member of the tender committee and was the chairman of the Human Resource Advisory Committee.

He also owned a private consultancy firm in the name of **Kiage and Company** which used to offer audit services, which according to him was not in conflict with the terms of his employment with the 2nd respondent.

2. Sometime in the year 2005, in addition to his duties as the Finance Manager, the appellant also acted as the 2nd respondent's Managing Director. It is during this period that a tender for cleaning services was awarded to Magaki cleaning services. In the same year, after the appellant had stopped acting as the Managing Director, Mr. Evans Magaki, the proprietor of Magaki cleaning services, approached him through his private audit firm to audit his business accounts. The appellant declined to do so on the ground of the apparent conflict of interest that would arise in light of the then existing contract between the Magaki cleaning services and the 2nd respondent.

3. However, the appellant referred Mr. Magaki to several audit firms affiliated with his firm of which Mr. Magaki chose Omanwa and Associates. It appears after the audit was completed Mr. Magaki issued a cheque in the name of the appellant's firm for payment of the services rendered. According to the appellant, Mr. Hedrick Omanwa the proprietor of Omanwa and Associates directed him to deposit the cheque and forward the cleared amount thereunder which he did.

Upon the expiry of the cleaning contract, a fresh tender was advertised and once again the same was awarded to Magaki cleaning services. The said award sparked indignation on the part of some of the bidders who believed that the process was not fair. In particular, Lucy Ndunge Mutie, the proprietor of Lupat cleaning services registered her grievance with the 2nd respondent. To her, the tender was simply awarded to Magaki cleaning services because of its existing relationship with the appellant who took an active role in the entire procurement process. Based on the complaint, the tender was cancelled and a fresh process was initiated without involving the appellant.

The 2nd respondent conducted investigations into the matter and cleared the appellant. Be that as it may, the said Lucy Ndunge Mutie lodged her complaint this time around with the then Kenya Anti-Corruption Commission (KACC). KACC conducted investigations which culminated in the recommendation that the appellant be charged with the offence of knowingly holding a private interest in a contract emanating from a public body contrary to **Section 42(3)** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act** as hereunder:-

“Knowingly holding a private interest in a contract emanating from a public body contrary to Section 42(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

Between 22nd day of March, 2006 and 24th day of June, 2008 in the City of Nairobi within Nairobi Area of the Republic of Kenya, being an agent of a public body, to wit, the Finance Manager of Kenya Tourist Development Corporation, knowingly held an indirect private interest in a contract emanating from the said Kenya Tourist Development Corporation which was awarded to Magaki Cleaning Services for the provision of cleaning services for the financial years 2006/2007.”

The appellant pleaded not guilty to the charge and hearing commenced.

4. KACC then wrote to the 2nd then Managing Director to take respondent on 12th January, 2010 and asked the administrative action against the appellant in accordance with **Section 62(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003** (now repealed), pending the conclusion of the criminal case. This meant that the appellant would be suspended from his duties at half pay until the conclusion of the criminal trial. Apparently, the 2nd respondent had already decided to take action and in the 2nd respondent's 234th Board of Directors meeting, the issue of the appellant's interdiction and pending criminal case was discussed. It was resolved that his position would be held by his deputy for a period of six months pending the determination of the criminal proceedings; in the event the proceedings were not completed by the end of the said period, the board would decide on the way forward. The 2nd respondent accordingly invoked **Section 14.5.5. of the Kenya Tourist Development Corporation** terms and conditions of service and interdicted the appellant with effect from 30th December, 2009. This position was supposed to be reviewed after six months, or earlier if the criminal case was concluded within the six months. Unfortunately, the case took a bit longer and so the 2nd respondent's Board of Directors decided at their meeting held on 14th and 15th June 2010 to terminate the appellant's services. This decision was communicated to the appellant on 30th June, 2010. According to the letter, the appellant's services were terminated pursuant to clause **18. 2 (i)** of the 2nd respondent's Terms and Conditions of Service. The 2nd respondent was convinced that was the only available option to ensure its smooth operation. As expected the appellant appealed against the termination by a letter dated 11th July, 2010 which appeal was rejected.

6. Subsequently, on 22nd July, 2010 the appellant was acquitted for lack of evidence. Armed with the ruling in respect of his acquittal, the appellant urged the 2nd respondent to reconsider its position. Nonetheless, the 2nd respondent held its ground and rejected the appellant's request.

The appellant therefore, decided to move to court where he lodged his claim against the Hon. Attorney General (1st respondent), and the 2nd respondent herein. The matter was initially filed before the High Court by way of a plaint dated 2nd March, 2011, later amended on 5th March, 2015. The matter was subsequently transferred to the Employment and Labour Relations Court (ELRC).

7. As against the 1st respondent, the appellant's grievance was that he had caused the appellant to be prosecuted on extraneous reasons and he failed to conduct proper investigations before charging him. He therefore, claimed damages for malicious prosecution and false imprisonment.

The grievance against the 2nd respondent on the other hand was that it had arbitrarily terminated the appellant's employment causing him financial injury; and that the termination was unprocedural, arbitrary and clouded with impunity as the appellant ought to have been reinstated to his former position following his acquittal. He prayed for judgment against both respondents jointly and severally for:-

- (a) Special damages in the sum of Ksh. 39,255,706.55**
- (b) General aggravated damages.**
- (c) General exemplary damages.**
- (d) General damages for malicious prosecution and false imprisonment.**
- (e) Costs of this suit.**
- (f) Interest on (a), (b), (c), (d) and (e) above at court rates.**
- (g) Any other or further relief as the court may deem apt to grant.**

8. The ELRC (Nduma, J.) having heard the matter rendered the judgment now impugned, on 15th January, 2016. In the judgment, the learned Judge found in favour of the appellant and made the following award against the respondents jointly and severally:-

- (i) Equivalent of 12 months gross salary being compensation for the unlawful and unfair termination in the sum of Ksh. 1,693,107.00**
- (ii) Ksh. 564,369.00 being the lost salary during the interdiction period in January 2010 upto June 2010; Total award Ksh. 2,257,476.00**
- (iii) Interest on the award at court rates from the date of filing suit till payment in full.**
- (iv) Costs of the suit.**

9. The claim for malicious prosecution and imprisonment did not succeed. According to the learned Judge, he had no jurisdiction to entertain it for reasons that the employer i.e the 2nd respondent had not participated in the alleged malicious prosecution and false imprisonment. This finding forms the basis of grounds 1, 2 and 3 of the appellant's memorandum of appeal which we shall advert to later.

10. In his memorandum of appeal lodged in this Court on 21st March, 2016, the appellant proffered four grounds of appeal and hereunder:-

1. The learned Judge erred in law and in fact in his finding that the Employment and Labour Relations Court has no jurisdiction to award general damages arising from the Appellant's Claim for Malicious Prosecution and false imprisonment contrary to Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.

2. The learned Judge erred in law in failing to appreciate the wider scope of Jurisdiction of the Employment and Labour Relations Court and confined himself to contractual disputes between employers and employee contrary to sub-Article 165(3) of the Constitution of Kenya, 2010.

3. The learned Judge erred in law and in fact in failing to determine and/or assess the damages payable on account of the malicious prosecution of the appellant.

4. The learned Judge failed in fact and in law to award the appellant the allowances claimed, the loss of pensions and legal fees incurred in defending the criminal case against him which claims the appellant proved on a balance of probability.

The appellant entreats the Court to allow the appeal and grant the following orders:-

1. This Honourable court to assess and award the appellant general damages for malicious prosecution.

2. This Honourable court to assess and award the appellant the allowances lost due to illegal termination, loss of pension and legal fees incurred in defending the criminal case against the appellant as claimed in the pliant.

3. To award interest on (a) and (b) above at court rates.

In our view, the first three grounds of appeal relate to the issue of jurisdiction of the ELRC to deal with the claim of malicious prosecution and false imprisonment. We shall therefore deal with those three grounds together and with ground four separately.

11. When the appeal was presented for case management, directions were given for parties to file written submissions with leave to highlight the same at the plenary hearing. The appellant filed his submissions on 19th April, 2017 while the 1st respondent filed its submissions on 8th May, 2017; and the 2nd respondent on 16th May, 2017.

The gist of the appellant's submission is that the learned Judge erred in finding that he lacked jurisdiction to deal with the matter. **Article 162(2) of the Constitution** and **Section 12 of the ELRC Act – 2012** were cited. The appeal was disposed of by way of written submissions as well as oral highlights by the parties' respective counsel.

12. Ms. Auka who appeared for the appellant relied entirely on the written submission filed on behalf of the appellant. It was submitted that the jurisdiction of the ELRC as delineated under **Article 162 (2)(a)** of the **Constitution** is in respect of all disputes relating to employment and labour relations. In the appellant's view, the dispute need not necessarily be between an employer and employee. Citing **Section 12** of the **ELRC Act**, it was argued that the learned Judge ought to have considered the claim of malicious prosecution since it arose out of the employment relationship between the 2nd respondent and the appellant. In buttressing that line of argument, reference was made to **Stanley Mungai Muchai vs. National Oil Corporation [2012] eKLR** where this Court expressed;

“The jurisdiction of the Employment and Labour Relations Court extends to all disputes relating to employment and labour relations. Personal jurisdiction is no longer confined to employers and employees but to all persons implicated in an employment and labour relations dispute.”

The learned Judge was faulted for not assessing and awarding anticipatory salary and allowances the appellant would have earned up to his retirement in March, 2019.

13. In contrast, Mr. Soita for the 1st respondent contended that the **Section 12** of the **ELRC Act** specifically sets out the circumstances under which the ELRC can assume jurisdiction. A claim for malicious prosecution was not amongst the issues envisioned under the said section. Besides, the claim for malicious prosecution was against the 1st respondent who had no employment relationship with the appellant. Drawing guidance from the Supreme Court's decision in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, it was postulated that the ELRC could not extend its jurisdiction beyond what was stipulated under the law.

14. Taking a similar position as the 1st respondent, Mr. Deya for the 2nd respondent, argued that the claim of malicious prosecution was squarely directed to the 1st respondent and had nothing to do with the 2nd respondent. Furthermore, the relief sought under the said claim had no relation to an employment dispute. For those reasons, the trial court was correct in declining to entertain the same. Placing reliance on **Elizabeth Wakanyi Kibe vs. Telkom Kenya Ltd. [2014] eKLR** Mr. Deya urged that the appellant was not entitled to anticipatory damages.

This being a first appeal, our role as mandated by **Rule 29 (1) a** of the Rules of this Court is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. See also **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212** where this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

15. We have recapitulated the evidence adduced before the ELRC above. What we need to do now is to reconsider that evidence afresh along with the memorandum of appeal, the submissions of learned counsel and the law and make our independent conclusion as to whether the learned Judge's judgment should be upheld or set aside. As stated earlier there are only two issues for determination here, that of jurisdiction and whether anticipatory damages ought to have been awarded.

16. Jurisdiction is the basis upon which a court entertains a matter before it. Without such jurisdiction, a court ought to put down its tools because anything done without jurisdiction is a nullity. **Words and Phrases Legally Defined Vol. 3, at page 113** defines jurisdiction as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

See also **Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350.**

17. The jurisdiction of the ELRC as correctly observed by the parties flows from **Article 162 (2) (a)** of the **Constitution** and **Section 12** of the **ELRC Act**. This Court while discussing the jurisdiction of the court in **Paramount Bank Limited vs. Vaqvi Syed Qamara & Another [2017] eKLR** succinctly stated,

“With those uncontroverted facts we turn to consider the ground on the jurisdiction of the Employment and Labour Relations Court. The preamble to Employment and Labour Relations Court Act states that the court is established to hear and determine disputes relating to “employment and labour relations” and “for connected purposes”. Among its powers under Section 12, the court hears and determines all disputes relating to and arising out employment and labour relations. In the exercise of that jurisdiction the court has the power to award compensation or damages in any circumstances contemplated under the Act or any other written law and to grant any other appropriate relief that it may deem fit.” (emphasis added).

From the foregoing, it is clear to us that the ELRC is clothed with jurisdiction to entertain not only employment and labour disputes but also any incidental issue (s) that may arise or is connected to employment or labour relations. This in turn ensures the economic use of judicial time and resources.

18. Turning to the appeal before us, the complaint which led to the criminal charge against the appellant was in respect of how he undertook his duties under his contract of employment during the procurement process in question. In our view, from what we can decipher from the impugned judgment, the learned Judge did in fact appreciate that the court (ELRC) had jurisdiction to deal with ancillary matters arising from or incidental to a contract of employment. The learned Judge declined to determine that issue because in his view, the employer had nothing to do with the appellant’s arrest or malicious prosecution, and there was therefore no cause of action against the second respondent in respect of that claim. This is what the learned Judge said on that issue:-

“The clear evidence before the court shows that the 2nd respondent did not at all contribute to the arrest and prosecution of the claimant. It is evident that the complainants to Kenya Anti-Corruption Commission were the competitors in the tender process who lost out and were aggrieved. The employer clearly exonerated the claimant in the matter. The prosecution, be it malicious or not was not at the behest of the employer and the court so finds. Whether or not the claimant has a cause of action as against the complainants and the Honourable Attorney General is a matter for the Civil Division at the High Court.”

The learned Judge went on to say;

“The court finds that it has no jurisdiction to deal with it and therefore cannot make any award in respect of the same alleged malicious prosecution and false imprisonment in which the employer did not play any part.

The learned Judge was therefore alive to the fact that the court would have had jurisdiction to entertain the matter if the 2nd respondent was the one who had complained against the appellant.

19. Cases of malicious prosecution usually arise from criminal proceedings in which the complainant therein causes a person to be arrested and charged with a criminal offence, which arrest is subsequently proved to be actuated by malice. In such cases, the person who lodged the malicious complaint and the authority that acted on the complaint are usually named as the respondents in the civil case. It would then fall on the complainant’s shoulders to explain why the complaint was made, whether it was made in good faith, and why S/he should not be held liable to pay damages for malicious prosecution. In this case the complainant in the criminal proceedings was not the 2nd respondent. It is actually common ground that the 2nd respondent carried out its own investigations and cleared the appellant. KACC on whose behalf the 1st respondent was sued acted on complaints made by persons who were not parties in the ELRC. That is what informed the learned Judge to decline to hear the claim on malicious prosecution, as that would have meant making orders against persons who were not parties to the suit and this would have negated the Rules of Natural Justice. Having clarified that issue, we find it necessary to address the issue whether the appellant, in the absence of the complainants in the criminal case would have proved the claim for malicious prosecution against the respondents as named in his suit.

20. The elements to be proved in an action for malicious prosecution are settled.

In **Mbowa vs. East Meno District Administration** [1972] EA 352, the East African Court of Appeal summarised 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, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;**
- 2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;**
- 3) the defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had, “an intent to use legal process in question for some other than its legally appointed and appropriate purpose” Pike v. Waldrum [1952] 1 Lloyd’s Rep. 431 at p. 452; and**
- 4) the criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...”**

Albeit setting out the particulars of malice in his plaint, the appellant, in our view, failed to establish that the criminal proceedings against him were actuated by malice on the part of the respondents. As stated earlier, the employer is not the one who instigated the criminal charges against the appellant but KACC, which is a body totally independent of the respondents herein. As such, the claim would still not have seen the light of day.

The Supreme Court of Canada in *Nelles vs. Ontario* [1989] 2SCR 170 correctly put it:-

“Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”

21. Last but not least, on the issue of anticipatory salary and allowances, this Court in **Elizabeth Wakanyi Kibe vs. Telkom Kenya Ltd.** (supra) approved the sentiments of Rika, J. in **D.K Njagi Marete -vs- Teachers Service Commission-Industrial Cause No. 379 of 2009**, that-

“What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved

employees; they are meant to redress economic injuries in a proportionate way. In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others -vs- Nairobi City Water & Sewerage Company Limited and Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga -vs-Coca Cola East Africa Limited, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round..

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy...”

Moreover, this Court has held before that where a claim is predicated on a contract of employment which can be terminated on Notice, then if the termination process was fair, the damages that are awardable are those equivalent to the period of the Notice provided for in the contract.

22. In this case however, as rightly found by the learned Judge, the appellant had not been fairly treated particularly because he was not found at fault either administratively or by the court that heard the criminal case against him, and there was no good reason for him to lose his job. Those issues were however considered by the learned Judge when awarding the appellant, the maximum amount of damages provided for under section **49(1)(c)** of the Employment Act.

23. For the foregoing reasons, our conclusion is that the learned Judge cannot be faulted, and his decision was firmly predicated on the law. This appeal therefore fails in entirety, and is hereby dismissed.

On the issue of costs, bearing in mind that costs are at the discretion of the court, and considering the financial contrast between the appellant on the one hand and the respondents herein on the other, the order that commends itself to us is that each party bears its own costs of this appeal.

Dated and delivered at Nairobi this 10th day of November, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR