REPUBLIC OF KENYA

COURT OF APPEAL

AT MALINDI

CIVIL APPEAL 163 OF 2007
BETWEEN

LEONARD ODINDI.....APPELLANT

AND

KENYA PORTS AUTHORITY.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Mwera, J)

dated 13th July, 2006 and delivered on 4th September, 2006

in

H.C.C.C. NO. 418 OF 2002)
****

JUDGMENT OF THE COURT

This is an appeal from the judgment of Mwera J, delivered on 4th September, 2006 in the High Court of Kenya at Mombasa. The suit that was before the learned Judge was initiated by ***LEONARD ODINDI*** (appellant) whose claim against the ***KENYA PORTS AUTHORITY*** [respondent], was for special and general damages. This claim is based on allegations that the appellant was wrongfully arrested and confined in police cells at the instigation of the respondent. As a result of the illegal confinement and malicious prosecution, the appellant suffered damages.

The appellant complained that he was charged with the offence of attempted robbery with violence contrary to ***Section 297 (2) of the Penal Code*** and being in possession of a firearm contrary to ***Section 4 (2) (e) of the Firearms Act Cap 144 of the Penal Code***. The appellant was charged in **Criminal Case No 2036 of 1999**, but was acquitted under ***Section 210 of the Criminal Procedure Code***. The appellant blamed the respondent for the malicious prosecution. The appellant's other claim was for unpaid salaries for a period of twenty four [24] months when he was in custody. That suit was dismissed with costs by Mwera, J, and being aggrieved by that decision, the appellant who represented himself has appealed on the following grounds:

"1. The learned trial judge erred in law and fact by failing to appraise the fact and circumstances surrounding the Appellant's case before dismissing it with costs to the Respondent.

2. The learned trial judge erred in law and fact by failing to consider the fact that it was the Defendant/Respondent's agent one GEORGE RANDU the cashier who reported the matter to the CID (Criminal Investigations Department) Urban Police that on 18th June, 1999 there was attempted robbery with violence that took place at Shimanzi within the Defendant's place of business and as a result the Plaintiff/Appellant was arrested and charged with an offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code under Criminal Case No. 2036 of 1999.

3. The learned trial judge erred in law and fact by stating that there was no proof of service of Notice of intention to sue as per paragraph 10 of the Defendant/Respondent's Defence the issue of which had already been dealt with and finalized by the court on 10th June 2003 when the preliminary objection raised by the Defendant/Respondent was dismissed with costs.

4. The learned trial judge erred in law in failing to consider the fact that the Plaintiff/Appellant's evidence stands uncontraverted and indeed the evidence on record proves the Plaintiff/Appellant's claim to the required standard."

This being a first appeal, we are mandated by law to re-evaluate the entire evidence before the trial court and arrive at our own independent conclusion on whether or not to allow the appeal. This is with the usual caveat that we did not see or hear the witnesses testify and give due allowance for that. Briefly summarized, the appellant was employed by the respondent from September 1974 as a senior clerical assistant. On 19th June, 1999, while the appellant was still in the employment of the respondent, he was arrested and charged before the Senior Resident Magistrate, Mombasa, with criminal offences. The appellant was jointly charged and tried with another. During the trial, three employees of the respondent gave evidence. However, the evidence of those witnesses did not implicate the appellant with the offence. After the prosecution closed its case, the appellant was found to have no case to answer and was acquitted.

The appellant was held in custody during the hearing of the case, he was also suspended from duty. After he was discharged, he provided the court proceedings and the ruling of the court to the respondent and he was reinstated back to work with effect from 19th December, 2001. However, the appellant was not paid the salary for the period he was under suspension and in custody. He was finally retired from employment on 28th October, 2002, on medical grounds. The period the appellant was on suspension and in custody was not computed when he was paid his terminal benefits. That is the justification for the claim for unpaid salaries for 24 months and legal fees incurred in the criminal case of KShs.90,000/-. The appellant used to earn KShs.27,850/- as per the pay slip.

The appellant's claim was denied by the respondent. Michael Ngugi, the Assistant Security Officer testified before the trial court and denied that the respondent was the originator of the complaint against the appellant. He claimed that the appellant was implicated by other suspects. Further defence evidence was given by Paul Kipkotim Cheruiyot who explained the steps taken under the respondent's staff regulations, when an employee is charged with a criminal offence and is held in custody. After considering the entire evidence, the learned trial Judge found that the appellant had not proved his case. On page 6 of that judgment, the learned Judge opined that:

"In this Court's view the short determination of this case is that the plaintiff has not proved his case against the defendant and it must thus fail. He pleaded:

"4. On or about 19th June, 1999, while the plaintiff was in his place of residence at Ganjoni, the defendant's agents falsely and maliciously and without any reasonable cause whatsoever accused the plaintiff that he was a thief.

5. The said defendant's agents reported the matter to the CID Urban Police and set the machinery of justice in motion against the plaintiff ...",

who was then arrested, questioned, detained and later charged only to be acquitted.

In evidence the plaintiff said:

"Police told me that they had been sent by Kenya Ports Authority to arrest me."

Those police officers who disclosed such information to the plaintiff did not testify in this matter. The defence witnesses however told the court that the defendant did not complain to the police that the plaintiff was involved in the attempted robbery on its labour offices. It was not involved in the arrest, detention, charging and later the trial of the plaintiff. One is inclined to believe the defendant when it gleaned from the ruling in the lower court that:

"the 2nd accused was arrested after purportedly being implicated by the 1st accused during investigations."

The end accused is the present plaintiff. The 1st accused was one John Opis Siteri. With all the above it cannot be said that the plaintiff's circumstances were precipitated by the defendant. Had the defendant been found to have been the author of the plaintiff's situation then of course he would have been bound to prove that malice, and no reasonable and probable cause was behind it all.

This determination will not be concluded without touching on the subject of notice to sue. The plaintiff pleaded that he had served such a notice (paragraph 10 plaint). The defence denied it (paragraph 10). In evidence the plaintiff did not prove his claim of the service in question. In which case his suit is incompetent in law and ought to be dismissed on that account also.

However had the plaintiff proved his case this court would have considered the claim for special damages and viewed special damages as falling between Sh.400,000/- and 600,000/-."

This appeal was opposed by the respondent. Mr Shah, learned counsel for the respondent submitted that under ***section 66 of the Kenya Ports Authority Act***, it is provided that a legal action shall not be commenced against the Authority until a notice of one month is issued containing the particulars of the claim. He argued that the purported notice that was dated 20th May, 2001, was never served upon the respondent nor did the appellant prove that there was service at the trial. Moreover, the notice did not contain the particulars of the claim.

Further, Mr Shah submitted that the claim under the tort of malicious prosecution was also not proved; that the evidence was clear from both prosecution and defence witnesses that the arrest was instigated by the police after the appellant's name was mentioned by other suspects; that the record of proceedings shows that the respondent was not even aware the appellant had been arrested; and that he was absent from duty for a long time and if the prosecution had been instigated by the respondent, they would not have inquired of his whereabouts. Mr. Shah urged us to dismiss the appeal.

We have carefully considered the entire record and the sequence of events that led to the arrest of the appellant, as well as the proceedings in the criminal case. Firstly, the learned Judge who heard and saw the witness was satisfied that the appellant did not prove a claim based on the tort of malicious prosecution. He believed the defence evidence that the respondent did not instigate or cause the prosecution against the appellant.

This finding is indeed, borne out of the evidence that goes back to the criminal trial. The only evidence that connected the appellant with the offence he was charged with was the evidence by a police officer by the name of; ***Daniel Mutesi***. To quote his evidence, he said:

"I brought accused to my office and enquired about the letter. he recorded a statement explaining how learned writer could be found. He led us to arrest the 2nd accused at his house in Ganjoni."

This evidence is well captured by the ruling of the trial magistrate when he stated:

"According to PW 5 the 1st accused said this letter exhibit No 2 B was written by the 2nd accused. The same was forwarded to document examiner together with samples of 2nd accused handwriting and his known handwriting. After comparison, the document examiner arrived at an opinion that the letter was not written by him. Document examiner report was produced and marked exhibit B. Effectively leave no evidence to implicate the 2nd accused with the offence."

From the above ruling, although we agree the prosecution of the appellant was without probable cause, there is no evidence to show it was the respondent who instigated the criminal case. There is no evidence also, to show the proceedings were actuated by spite, ill will or improper motives on the part of the respondent.

We have carefully reviewed the entire record of the criminal proceedings before the magistrate's court who conducted the trial and there is nothing to show that the respondent was the mover of the prosecution. The prosecution was apparently instigated by the police who were not parties to the suit. We agree with the learned trial Judge that the claim of tort for malicious prosecution was not proved.

We now deal with the second claim of unpaid salaries for twenty four [24] months when the appellant was under suspension while he was in police custody. The respondent countered this claim with two arguments which we find valid. Firstly it was submitted that not only was the claim not proved but the appellant failed to issue the requisite notice as provided for under ***Section 66 of the Act***. Even if we were to be persuaded that the appellant issued the notice dated 20th March, 2001, the particulars of the claim stated therein is only in respect of the claim for malicious prosecution. There are no particulars stated in the letter in respect of the claim for unpaid salaries.

We have considered this issue further on whether the appellant should have been paid for the twenty four [24] months while he was held in custody. Unfortunately, under the provisions of ***Section 18 (6) of the Act***, the respondent cannot pay salaries to an employee who is held in custody. The Act provides:

"No wages shall be payable to an employee in respect of a period during which the employer is detained in custody or is serving a sentence of imprisonment imposed under any law."

In view of the foregoing, we are satisfied that the learned Judge correctly analyzed the evidence and the law in reaching at his conclusion. Much as we sympathize with the appellant, we find no grounds to interfere with the judgment of the learned Judge.

For the foregoing reasons, we find no merit in this appeal. We order that the same be and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 16th day of March, 2012.

E. O. O'KUBASU
.....

JUDGE OF APPEAL

M. K. KOOME
.....

JUDGE OF APPEAL

H. M. OKWENGU
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR