REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

CIVIL APPEAL 230 OF 2008

BETWEEN

NATIONAL CEREALS AND PRODUCE BOARD…….....……APPELLANT

AND

MARIAMU ABUBAKAR IRERI

KAIMU ABUBAKAR KARWIRUA ***(As Administrators of the Estate of the Deceased)***

ZABLON MWALIMU KADORI…….....……RESPONDENTS

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (Maraga, J) dated 29th July, 2005

in

H.C.C.C. NO. 152 OF 1997)

****

JUDGMENT OF THE COURT

The respondents in this appeal**,** ***MARIAMU ABUBAKAR IRERI*** and ***KAIMU ABUBAKAR KARWIRUA*** are Administrators of the estate ***ZABLON MWALIMU KADORI*** who was the plaintiff in High Court Civil Case NO. 152 of 1997 at Mombasa. He died after the entire hearing of that case had been finalized and judgment delivered by *Maraga J* (as he then was) on 29th July, 2005. The plaint had to be amended and was amended after the judgment in the High Court had been pronounced perhaps to enable the execution to proceed.

The deceased ***ZABLON MWALIMU KADORI*** to whom we shall henceforth refer in this judgment as **the deceased**, was an employee of the appellant ***NATIONAL CEREALS & PRODUCE BOARD*** (herein referred to as **the Board)** having been appointed Stores Clerk vide letter of appointment reference C/ST/ZM dated 24th August, 1982. He worked in that capacity from 1st November, 1982 when

he accepted the appointment till 8th February, 1994 when, vide a letter reference C/ST/2215, addressed to him by the Managing Director of the Defendant Board, he was dismissed with effect from 29th June, 1993, the date the appellant said he was suspended from the services of the board. The main background of the matter leading to his suspension and consequent dismissal was the loss of either 14,500 gunny bags as the proceedings of the High Court state or 14,750 gunny bags as is stated in some of the exhibits on record. Whatever was the number is in our view neither here nor there. Save to say that it was alleged that he was involved in the theft of those gunny bags. He was arrested together with two other colleagues on 12th May, 1993, and charged with the offence of Stealing by Servant contrary to ***Section 281*** of the Penal Code in that being servants of the Board, they jointly stole 14,750 new gunny bags valued at Kshs.645,250 which came in their possession on account of their employment. Before that case could be finalized in court, the appellant served him with a letter of suspension and thereafter dismissed him as we have stated, allegedly on grounds that the appellant felt the deceased was grossly dishonest, negligent and irresponsible in the performance of his duties. The criminal case in the Principal Magistrate's Court took some time and was finalized on 13th August, 1996 when the deceased and his two colleagues were acquitted of the offence and set free with the learned Principal Magistrate remarking in his judgment that:-

"In my view the accused persons have just been sacrificed."

The deceased thereafter moved to the High Court at Mombasa as we have stated vide Civil suit No. 154 of 1997 and sued the appellant pleading that much as he had served the appellant with dedication, earning a salary of Kshs.8,000 per month together with house allowance of Kshs.2,500 per month, medical outpatient for self and family at Kshs.15,000 per year and provident fund for which he contributed together with unpaid overtime amounting to Kshs.16,000, the appellant without any reasonable excuse and acting maliciously did cause his arrest together with others on trumped up charges of stealing by servant and his being charged with the offence in Mombasa Criminal Case No. 2093 of 1993 and further that vide a letter dated 29th June, 1993 and another letter dated 8th February, 1994 respectively, the appellant suspended and dismissed him from the services of the Board which dismissal, he contended was in breach of the Disciplinary Code and was contrary to the rules of natural justice as he was not asked to make representation nor given opportunity to be heard by the Board. He thus alleged wrongful dismissal, set out particulars of the wrongful dismissal, whereas the criminal case brought against him ended in his being acquitted. He claimed to have suffered as a result of the wrongful arrest, prosecution and wrongful dismissal; to have suffered loss and damage which particulars were set out in the plaint as:-

"(a) Loss of livelihood and employment as the plaintiff would have retired at the age of 55 years by losing salary.

(b) Loss of benefits as stated in paragraph 3 hereof.

(c) Loss of pension as at the age of 55 years.

(d) Loss of possible advancement by promotion.

(e) Loss of possible alternative employment in view of the malicious wording of the letter of dismissal by the defendant."

He ended up that plaint by praying for judgment against the appellant for:-

"(a) General damages and interest thereon.

(b) Kshs.16,000 as claimed herein plus interest.

(c) Cost of this suit and interest thereon.

(d) Any further relief this court may deem fit to grant."

Although that plaint was amended later after judgment, the amendments which only introduced the two respondents in place of the deceased and provided for matters that would accommodate that amendment did not alter the material substance of the original plaint.

The appellant responded by way of a Statement of Defence dated 15th August, 1997 which was also later amended by an Amended Statement of Defence dated 9th August, 2007 which was again filed after the judgment and only for the introduction of the two substitutes in place of the deceased. The appellant maintained in that Statement of Defence that the deceased's dismissal was lawful, proper, procedural, and after due notice was issued in compliance with the relevant regulations and law; that the alleged criminal proceedings were instituted by the Attorney General after reasonable cause was established against the deceased and its part in the same was *bona fide* and without malice. It denied some of the allegation in the plaint and said it was a stranger to others. It ended up praying for the dismissal of the suit with costs.

After hearing the deceased and the defence witness and after perusing the exhibits produced in court which included letter of appointment, letter of dismissal, copies of proceedings in the trial court in criminal case No. 2093 of 1993 in which the deceased was the second accused, and the Terms and Conditions of Service for Unionisable Grades, together with written submissions of both counsel, *Maraga, J (as he then was*) in a judgment dated and delivered on 29th July, 2005 gave judgment for the deceased in the sum of Kshs.500,000 being general damages for malicious prosecution, Shs.11,080 being two months' salary in lieu of notice, plaintiff's dues under the provident fund together with any other dues the deceased may have been entitled to had his services been terminated, instead of being dismissed. We reproduce the salient part of that judgment below:-

"It is clear therefore that the plaintiff was dismissed because of theft of the gunny bags which I have found that the plaintiff could not have been able and actually did not steal. The defendant had therefore no reason for dismissing the plaintiff. The dismissal was illegal as he was not given any notice. Pursuant to the collective agreement the plaintiff was entitled to two months notice or two months' salary in lieu of notice. At the time of dismissal the plaintiff's basic salary was Shs.3,730 plus house allowance of Shs.1800 making a total of Shs.5,540. I award him Shs.11,080 being two months' salary in lieu of notice.

As the plaintiff was a member of the Provident Fund, I order that the defendant do work out and pay to him his full provident fund and any other dues that he would have been entitled to have his services been terminated instead of him being dismissed. The clan (sic) for Shs.16000 as overtime is not clear and was not in any case proved. It is dismissed.

There will therefore be judgment for the plaintiff in the sum of Shs.500,000 being general damages for malicious prosecution Sh.11,080 being two months' salary in lieu of notice and the plaintiff's dues under the provident fund as well as any other dues he may have been entitled to had his services been terminated. The plaintiff shall also have costs of the suit."

The appellant was aggrieved by that decision and hence this appeal premised on thirteen grounds of appeal which are in a summary, that the learned Judge erred in holding that Criminal proceedings in the subordinate court were instituted by the appellant; that the learned judge erred in law and fact in holding that the appellant, a corporate entity was capable of forming a malicious intention; that he erred in failing to specify which particular officer of the appellant had formed malicious intention towards the deceased; that he erred in finding that the arrest and prosecution of the deceased was by the appellant; that he failed to apply the proper test for proving the tort of malicious prosecution; that he failed to appreciate that it was the state that arrested, investigated and prosecuted the deceased and not the appellant which did so; that he erred in holding that no reasonable and probable cause existed for instituting the prosecution of the deceased; that he erred in purporting to review the evidence in the criminal proceedings of the subordinate court and upholding findings of the subordinate as if he was hearing an appeal from that court; that he erred in holding that the deceased and his friends were sacrificed to protect the Senior Officers of the defendant who had the keys to the store and must have stolen the subject gunny bags; that

the award of special damages which were neither pleaded nor proved was an error; that he erred in ordering the appellant to work out and pay to the deceased "his full provident fund and any other dues that he would have been entitled to had his services been terminated instead of him being dismissed."; the award of Kshs.500,000 was made in error; and that the judgment was entered for the deceased contrary to the weight of the evidence that was adduced before the learned Judge

Mr. Omondi, the learned counsel for the appellant, in his submissions in support of the above grounds, stated that the evidence that was adduced in court did not support the Judge's holding that the appellant's agents are the ones who instituted the respondent's prosecution. The appellant, he said, merely reported the loss of the gunny bags to the police as was required of them by the law. It is the police who took action after their own investigations. In his view, the state should have been joined in the suit as it was the police, who on being satisfied that the deceased had committed the offence, reported the loss to the police. He submitted further that the learned Judge having identified the test of proving the tort in respect of claim for damages for malicious prosecution, erred in applying that test and finding that the appellant met that test and he specifically erred in finding there was no probable cause for the prosecution of the deceased whereas the deceased admitted that he was Stores Clerk and there was loss from that store despite his taking daily stock. He also felt malice was not pleaded in the plaint pursuant to ***Order 6 Rule 8(1)(b)*** of the Civil Procedure Rules then in force. Further, in his view, the appellant, being a corporate body, could not form intention of being malicious and if its officers were the ones malicious, then there should have been evidence to that effect. He concluded by submitting that the learned Judge considered the matters in the criminal case before the subordinate court as if he was hearing an appeal from that court which was an error, as those proceedings were not before him on appeal. As to special damages, *Mr. Omondi's* take was that special damages were not pleaded so that the amount of Kshs.500,000/- awarded was well beyond what was pleaded and was even above the amounts awarded in the decided cases that were relied on by the respondent. He referred us to three judgments and urged us to allow the appeal.

Mr. Okong'o, the learned counsel for the respondent, opposed the appeal maintaining that the learned Judge's decision was based on sound principles and on the law. In his view, prosecution of the deceased was indeed instituted by the appellant as was given in evidence by the deceased that it was the appellant's area security officer that called the police, and in the criminal proceedings, a police officer also stated that he rearrested the deceased from the appellant's security officers, and as to the issue of whether the state should have been joined as defendants, the appellant never raised it in the trial court and was thus a non issue in that court. He submitted that there was no probable cause for the prosecution and the learned Judge, in his mind set out the required threshold and made a proper conclusion on the issue as the appellants had no cause whatsoever for prosecuting the deceased. Thus, in his view, the prosecution was malicious as in any case, it was the deceased who reported the loss to the security officers of the appellant. He referred us to the record, and observed that malice was pleaded and particulars were also given in the record at paragraph 6 of the amended plaint. He conceded that the appellant, as a corporate body can only act through its officers. In this case, those officers of the appellant acted as agents of the corporation and that being the case their action bound the appellant. As to the treatment given to proceedings in the criminal trial, *Mr. Okong'o* stated that those were produced as exhibits and that being so the learned Judge had a duty to review the same as he would revisit them as other exhibits. He admitted that the award of Khs.11,080 was not based on a pleaded claim but he said there was evidence placed before the Judge on that claim such that the provisions of ***Section 1A*** of the Civil Procedure Act could be invoked to warrant its being awarded in order to do substantive justice. He also admitted that the award of general damages at Kshs.500,000/- was excessive as only Kshs.200,000 was pleaded, but as the court felt that was the award commensurate with the circumstances of the case that was before it, it should stand. He thus urged us to dismiss the appeal.

We have anxiously considered the pleadings, the evidence that was adduced by the deceased and one witness for the appellant, the exhibits, the judgment of the learned Judge by the High Court, the submissions by the court before us and the law. This is a first appeal and that being so the decision of the court as spelt out in the well known case of ***SELLE VS. ASSOCIATED MOTOR BOAT CO. (1968) EA 123*** – is a guide as to our duty. *Sir Clement De Lestony*, VIP stated in that case as follows:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon

which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

The deceased was the only witness who gave evidence on behalf of the respondent. ***Wilson Muthaura Muthiu (DW1),*** Senior Human Resource Officer was the only witness called by the appellant. From their evidence, it was not in dispute that the deceased was an employee of the appellant. The letter of appointment produced as Exh 1, the letter of dismissal Exh 2 were both not disputed. Although the deceased said he never received letter of suspension Exh. D2, that denial cannot be treated seriously as in his own original plaint dated 14th February, 1997 he refers to it at paragraph 7. All these are sufficient proof that the deceased was an employee of the appellant prior to his dismissal on 8th February, 1994. He was employed and worked as Stores Clerk till the date of his suspension on 29th June, 1993. This is also not in dispute. The next issue not in dispute is that gunny bags, the number of which was put at 14,750 in the trial before subordinate court and at 14,500 in the High Court, got lost from that store. That was not in dispute and indeed it was the deceased who allegedly reported the loss. We may also state here that after the loss was known, the appellant's agents reported the loss to Changamwe Police Station and the deceased together with two others were arrested, charged, tried but acquitted of the offence of Stealing by Servant contrary to ***Section 281*** of the Penal Code. That is also not in dispute and lastly, that the deceased was summarily dismissed before the criminal case was finalized, was also not in dispute.

In our view, the issues that we find were disputed, on our perusal of the record before us were, whether the appellant is the one who prosecuted the deceased; whether the prosecution was actuated by malice on behalf of the appellant and/or its agents namely its officers; whether the dismissal of the deceased was wrongful, whether the general damages awarded for malicious prosecution and wrongful dismissal was proper and lastly whether the award for two months' pay in lieu of notice was proper in law. We set out these issues because our reading of the record does not show that the learned judge either framed the issues that were before him or caused parties to frame the issues that were in dispute.

Before we proceed to consider the above issues in relation to the evidence that was tendered in court, we readily accept as did the learned counsel for the appellant the legal position as concerns the requirements of what the deceased was to prove in his claim for damages for malicious prosecution. The learned Judge rightly stated and we quote:-

"In a claim for damages for malicious prosecution like this, it is incumbent upon the plaintiff to prove on a balance of probabilities that the prosecution was instituted by the defendant; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause and that in instituting the prosecution the defendant was actuated by malice."

That is the law. We must now consider whether these requirements were indeed proved by the deceased. First, was the prosecution instituted by the appellant? The learned Judge rejected the appellant's contention that the deceased was prosecuted by the state and felt from the criminal proceedings Exh 3, at page 43 that appellants security officer, *Mr. Kirui,* is the one who arrested the deceased and another and took them to police and that, to the learned Judge, was proof positive that it was the appellant who prosecuted the deceased. In our view and with respect, we think a closer look at the entire record tends to suggest a contrary scenario. The deceased in his evidence in chief does not state who arrested them. All he said was:-

"After the audit team had confirmed the loss I and the stores clerk and the stacker were arrested. We were jointly charged in court with stealing by servant."

However, in cross examination by the appellant's counsel, the deceased stated:-

"I was arrested by urban CID. The police interrogated us and recorded statements. I do not know if they carried out investigations as I was in custody. Subsequently, I was charged in court."

The above demonstrate that the deceased's version was different from that of PW6 in the criminal proceeding, who said in the subordinate court that:-

"On 12.5.93 I was at Changamwe police station as duty office (sic) at 9.00 pm the chief security officer of NCPB Mr. Kirui came with two people and he told me they were required by IP Kemboi for offence of theft by servant. I rearrested these people."

That is the evidence the learned Judge relied on to find that the appellant was shown to have been instrumental in putting the law in force and that *Mr. Kirui* arrested the deceased. In our view, that finding was misplaced, first because PW6 never said *Kirui* arrested the deceased. All he said was that *Kirui* told him that *IP Kemboi* wanted the deceased and the other person. It is clear to us that PW6 was saying that *Mr. Kirui* was merely complying with the requirements of *IP Kemboi*. This explains why PW6 after re-arresting the deceased and his colleague handed them over to *IP Kemboi,* who wanted them. Hear evidence of ***Cpl. James Kiprono (PW2)*** who investigated the case in his statement in the Criminal Case trial. He said:-

"The 1st and 2nd accused were arrested by Changamwe Police. The documents were related to this case. What was stolen was 14,750 gunny bags. I conducted investigations. In cause of investigations 1st and 2nd accused identified were arrested by changamwe police station. We picked the two from Changamwe."

And even more important, in cross-examination he made clear the role of *IP Kemboi* and only *Kirui* had gone with the appellant and colleague to Changamwe Police Station where they met PW6, when he said in cross examination that *IP Kemboi* started the case and later *IP Naragwi* took over the investigations and PW7 was assisting *IP Naragwi* in the investigations. From all these a clear scenario comes to light and that was that the police officers such as *IP Naragwi, IP Kemboi, CPL. James Kiprono* investigated the matter, caused the deceased to be arrested and they charged him. In fact in the subordinate court *Cpl. James Kiprono* in his cross examination said:-

"It is me who decided that the accused be charged."

In our view, the above leaves us with no doubt that the appellant merely complained to the police who after the full audit was carried out and a loss of 14,750 bags of gunny bags was established, caused the deceased to be arrested and therefore decided to and did charge him together with his colleagues. We see no evidence of the appellant in their own decision arrested the deceased and certainly there is no evidence that the appellant charged the deceased. Was their reporting to the police about the loss founded or malicious? The answer to this question appears to us obvious when the facts of the case are considered. The appellant as we have stated lost 14,750 or 14,500 bags. These were apparently stolen from the appellant's store. The appellant had the legal and moral duty to report the loss to police officer who is the main organ charged with the duty of investigating such losses, apprehending those responsible and charging them with the appropriate offence and having them prosecuted. It would be negligence of duty to fail to report such a loss to the police. Nay! It would be irresponsible to fail to do so. The appellant would have even been investigated for another offence of failing to report a felony. In any case the offence of theft of the gunny bags was a cognizable offence such that members of the public could carry out the arrest of suspects. We see no wrong in the appellant reporting the loss to the police.

Once reported, investigation carried out and suspects arrested as happened here, the prosecution was clearly done by police. The appellant's officers who gave evidence were merely witnesses even if they represented the complainant. The record shows that the prosecution was not a private prosecution. It was public prosecution sanctioned by the Attorney General who was the Director of Public Prosecutions. The matter was no longer in the control of the appellant. The appellant could not direct the Attorney General as matters stood then on whether to prosecute the case or not, nor had the appellant the authority to withdraw the charge or complaint at will this being a felony. The Director of Public Prosecutions is the

one who could, within the legal framework take any action as appropriate in this matter including withdrawing the charge. Thus we do not agree with the learned Judge that the mere fact that PW6 said he re-arrested the deceased from *Kirui* amounted to the appellant prosecuting the deceased.

Was the report to the police actuated by malice? We have answered this question above. We cannot read malice in reporting a loss such as occasioned here. But the deceased said he did not have the keys to the store and could not have stolen as there was also security all around all the time. In our mind, the deceased's duty that required him to check and compare daily, the physical stock and the stock on the records kept by the appellant made him a suspect no matter whether another person had the keys for nothing stopped him from manipulating the records in such a way that goods would go out even with the help of those with keys to the store by way of conspiracy. That he was acquitted did not mean he could not have been a suspect. And in any case and of even more importance, the trial court in criminal case in the subordinate court at the close of prosecution case, did find that on the evidence that was before him, the prosecution had established a *prima facie* case against the appellant and put him in his defence. That meant the complainant's case was not frivolous or a hopeless case. To that extent the part of that judgment that made a comment that the accused persons had just been sacrificed did not carry much weight. We see no malice in the report that the appellant made to police which eventually led, after independent investigation by police to prosecution. Thus we are not persuaded that the deceased made a case against the appellant in his claim for malicious prosecution.

What about unlawful dismissal? The deceased was a suspect, whose case was still proceeding in court having been arrested on 12th May, 1993. As we have said he was served with a letter of suspension dated 29th June, 1993, although he denied receipt of it but he cited it in his plaint as one of the offending actions taken against him by the appellant. That letter states at paragraph 3 as follows:-

"You are given 15 days from the date of this letter to show cause why you should not be dismissed."

There is no evidence that he responded to that letter and particularly to that notice. Further under Articles 37.4, 37.5 the appellant could on proper interpretation dismiss the deceased summarily, when the circumstances that were obtaining as on the date of the dismissal letter is considered. In short, we do not accept that the dismissal was unlawful.

Complaint about learned Judges reference to subordinate court proceedings has no merit. The proceedings were produced as exhibit and the court had a duty to refer to it as well. We have also referred to it as it was produced as evidence.

We think we have said enough to indicate that this appeal must be allowed. *Mr. Okong'o* did admit that the amount of Kshs.500,000 awarded as general damages for malicious prosecution was well beyond the damages that was even sought by the deceased. He also admitted that the amount of Kshs.11,080 awarded by the learned Judge as two months' salary in lieu of notice was not pleaded. We agree with him, but we do not agree that in the circumstances of this case, the learned Judge could award whatever he felt proper even if the same was not sought. In this case the two awards above were not canvassed and left to the court to decide as was in the case in ***ODD JOBS VS RUBI (1970) EA 476.*** In any case, from what we have stated as concerns our view on whether or not malicious prosecution and unlawful dismissal were proved, the issue as to whether those awards should stand or not is neither here nor there as the basis upon which they were founded no longer exists. As to deceased's dues under the provident fund, we note that there was no prayer for that and in any case we have found that his summary dismissal was based on sound grounds.

In conclusion, the appeal is allowed. The judgment and decision of the High Court is set aside. The respondent's case in the High Court is dismissed. Costs of the appeal and of the High Court to be paid to the appellant. We understand the amount awarded to the respondent in the High Court had been paid to the respondent's estate. If that be so then same be refunded. Judgment accordingly.

DATED and DELIVERED at MOMBASA this 16th day of MARCH, 2012.

J.W. ONYANGO OTIENO
…….
JUDGE OF APPEAL

ALNASHIR VISRAM
……
JUDGE OF APPEAL

H.M. OKWENGU
……..
JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR