



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, O’KUBASU & DEVERELL, J.J.A.)

CIVIL APPEAL NO. 37 OF 2002

BETWEEN

WILSON NDUATI NJOROGE.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF PRISONS.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of

Kenya at Nairobi (Justice Ang’awa) dated 5th July, 2000

in

H.C.C.C. NO. 2754 OF 1988)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Ang’awa, J) delivered at Nairobi on *5th July, 2000* in which the learned Judge dismissed the appellant’s suit.

The appellant herein, **Wilson Nduati Njoro**, sued the respondents in the superior court seeking judgment against the respondents. The relevant paragraphs of the plaint filed in the superior court by the appellant were as follows:-

“4. THE Plaintiff was a Prison Officer and has served as such officer since 1954 and held the rank of a corporal at the time of his interdiction and his service number was 1402 (Prison Department).

5. ON 22nd of June 1987, the officer in charge of G.K Prison Kamiti main exercising his powers as conferred to him by section 131(1) of the Prison Rules Cap 90 1967 as revised unjustifiably wrote an interdiction letter to me operative as at 12th of June 1987, for an alleged trafficking offence with a prisoner. subsequently on June 10th 1987. I was informed of my dismissal from the service after an alleged investigation into my work and conduct, which accordingly declared me as a person unlikely to become an efficient prisons

officer.

6. THE officer in charge without lawful cause or excuse and without justification caused me to be falsely imprisoned and to make periodical reports at specified times to the duty officer within Kamiti Prison.

7. ON such wrongful dismissal, I forfeited all rights and claims to retirement benefits of which I am lawfully and rightfully entitled having given faithful service since 1954.

8. THE cause of action arose at Nairobi within the jurisdiction of this Honourable Court.”

REASONS WHEREFORE the plaintiff prays for judgment against the defendants jointly and generally for:-

(a) General damages for wrongful dismissal and unlawful imprisonment.

(b) Special damages.

(c) Cost of the suit.

(d) Any other relief as the Court may deem fit.

The respondents filed a statement of defence in which they denied the appellants claim and prayed for the dismissal of the suit.

The hearing of the suit commenced before Ang’awa, J. on 3rd July 2000 when agreed issues were framed as follows:-

“1. Whether the plaintiff was wrongfully interdicted by the letter dated 22nd June, 1987. If so,

2. Whether the plaintiff is entitled to his benefits

3. Whether the plaintiff is entitled to general damages.”

In his opening address, the advocate for the appellant is recorded to have stated as follows:-

“This is a case where the plaintiff was wrongfully dismissed by a letter dated 12th June, 1987. My case is based on wrongful dismissal. I am going to prove the same as not justified. After the dismissal no appeal was lodged with the Public Service Commission. I have no case law.”

After the opening address, the appellant took the witness stand. He testified how he was taken to Nyati House on 12th June 2000, stayed there until 6th July, 2000 and then taken to Kamiti. Then in June 1987, he was given dismissal letter. He told the superior court that he did not know why he was dismissed. He therefore asked the superior court to grant him the reliefs sought in the plaint.

Charles Gituma, a Prison Officer based at the Prisons Headquarters gave evidence on behalf of the respondents. He narrated to the superior court how and when the appellant joined Prisons Department. This is what Mr. Gituma said in his evidence as regards the appellant: -

“He was employed as a Prison Officer Warder at around 1960. He became a corporal after promotion. He was lance corporal. The rank was abolished in prison. He was promoted to corporal. His duties was a prison officer. He was supposed to control prisoners. He would take prisoners to courts, hospitals and transfers.

He also supervises other warders. There would be normal to the security. The Prisons Act has many rules as to what is to be done. The plaintiff in this case was interdicted when he was arrested by police for trafficking. The police gave me documents. I then interdicted him. I was duty bound to do so. I received the result together with his statement that he had committed the offence.

I informed the plaintiff by submitting the reports to the Commissioner of Prisons for guidance. The police recommended strongly that he would not be a good officer. It is up to the Commissioner.

The plaintiff was subsequently dismissed as it was fairly serious. Commissioner may given (sic) a lighter sentence. The others were imprisoned. He was just dismissed as per the Commissioner. He was a fairly old man.

We have a security maximum prison. We were keeping the prisoners who were involved in Mwakanya. One prisoner, Maina wa Kinyatti was escorted to Kenyatta National Hospital. They allowed him to receive house items from outsiders including the prisoner's wife. They were in breach of Prisons Act in so doing”.

The learned Judge considered the evidence adduced, the submission by counsel appearing for the parties and in the course of the judgment the learned Judge said: -

“DW1 stated, when the police had arrested the plaintiff and others he took action and complied with the rules which he then used to interdict the plaintiff. The rules permitted him to do so and this was only pending the investigations.

When the investigation was complete the plaintiff was duly dismissed from his employment. The question arises whether this dismissal may have been discriminatory that the prisoner was “Mwakanya”.

Having so stated the learned Judge proceeded to dismiss the appellant's case with costs.

Being dissatisfied with the dismissal of his suit in the superior court the appellant, through his learned counsel, filed this appeal citing the following 13 grounds of appeal: -

“1. The learned trial Judge erred in admitting secondary evidence of inadmissible documents.

2. The learned trial Judge erred in admitting and acting on hearsay pertaining to the alleged trafficking.

3. The learned trial Judge erred in permitting DW 1 to testify on what allegedly happened when one, Maina Kinyatti, was allegedly escorted to Kenyatta Hospital by the appellant.

4. The learned trial Judge erred in permitting DW 1 to testify on a report on the alleged misconduct of the appellant prepared for him by the Special Branch following arrest of the appellant and subsequently being held in Nyati House.

5. The learned trial Judge erred in admitting in evidence a report prepared by police officers who were not called to give evidence on the alleged permitting of unauthorized persons to communicate with prisoners in the course of his employment.

6. The learned trial Judge erred in acting on recommendations of police officers who were not called by the defendants to give evidence.

7. The learned trial Judge erred in holding that there was trafficking despite the fact that

no witness was called to testify on what happened on the alleged day of trafficking.

8. The learned trial Judge erred in hearing the case despite the fact that she had known the key and only witness for the respondent for fifteen (15) to seven (17) years.

9. The learned trial judge erred in admitting in evidence documents which were not produced by their makers.

10. The learned trial Judge erred in not holding that before his suspension and subsequent dismissal, the appellant was not given a chance to know and answer the allegations and the basis upon which the special branch officers recommended the suspension and dismissal.

11. The learned trial judge erred in holding that the appellant had, in the circumstances of the case, compromised the security of the state.

12. The appellant was not given a fair trial.

13. The judgment was based on inadmissible evidence.”

When the appeal came up for hearing before us on 26th May, 2005, Miss Mungai, the learned counsel for the appellant, decided to argue all the grounds of appeal together save for ground 8 which she argued separately. It was her submission that the learned Judge relied on the evidence of Charles Gituma, the officer who interdicted the appellant. She contended that the evidence of Mr. Gituma was hearsay. She took issue with the fact that the learned Judge knew Mr. Gituma and hence there was element of bias.

Mr. Bitta, for the respondents, reminded us that the learned Judge had told the parties that she knew the witness Gituma and that none of the parties objected to her hearing the suit. Mr. Bitta, submitted that the evidence on record consisted of documents which were admitted by consent of the parties and that these documents were, indeed, produced by the appellant. It was further submitted that the respondents gave reasons for interdiction and dismissal. Hence, Mr. Bitta asked us to dismiss this appeal with costs.

This being a first appeal, we are bound to re-evaluate the evidence, assess it and make appropriate conclusions about it, remembering that we have not seen or heard the witnesses and making due allowance for this – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123 and WILLIAMSON DIAMONDS LTD V. BROWN [1970] E.A.**

The appellant's complaint in the superior court was that he was wrongfully dismissed from employment, and also appears to have thought that there was element of what he called “*unlawful imprisonment*”. This aspect of his claim as regards “*unlawful imprisonment*” appears to have been abandoned. Hence the main issue for determination was his dismissal from employment. From the evidence on record, the appellant was a Prisons Officer or more specifically a prisons warder whose duties included control of prisoners whether at the prison or while in transit to courts, hospitals and other prisons. His trouble started when he was arrested by police officers for what was described as “*trafficking*”. From the evidence of **Mr. Charles Gituma**, (DW1), this meant the appellant together with his colleagues allowed a prisoner by the name of Maina wa Kinyatti to receive items from outsiders. This was in breach of Prisons Act and the Regulations made under the Act. When the matter was reported to the appellant's supervisors, he was interdicted from duty, by a letter dated 22nd June 1987. Subsequent to that letter, it would appear that investigations were carried out and the appellant was dismissed from service by a letter dated 10th July, 1987 in which it was stated inter alia: -

***“Dear Sir, DISMISSAL FROM THE SERVICE After a careful consideration of your work and conduct in the Kenya Prisons Service, the Commissioner of Prisons was satisfied that you had ceased to be and were unlikely to become an efficient prisons officer. It was therefore decided that you should be dismissed from the service with effect from 7th July, 1987. Your last day of duty was 6th July, 1987 the date upto and including which you will be paid after recovery of all known government liabilities.*”**

On dismissal, you forfeited all rights and claims to retirement benefits in furnish this office with your future contact address for further action.”

We have now considered what has been argued before us in this appeal and it would appear that the appellant’s dismissal was triggered by his own conduct when he was arrested for what was described as trafficking. It was his duty to escort and control the prisoners but he instead allowed the prisoners to receive items from their relatives. This was in breach of the regulations under Prisons Act. It is to be observed that according to the evidence of Mr. Gituma, the appellant was lucky for having been dismissed unlike his colleagues who were not only dismissed but also imprisoned. In the superior court, the appellant challenged his interdiction from duty and subsequent dismissal from service. The circumstances leading to his dismissal were explained to the satisfaction of the court and the superior court was satisfied that the appellant’s claim against the respondents lacked merits. We have considered the appellant’s complaint in the superior court, the grounds of appeal as articulated by his counsel, and like the superior court, we have come to the conclusion that the appellant was properly dismissed. Consequently, we find no merit in this appeal and we order that the same be and is hereby dismissed. Each party will bear its own costs. Those shall be our orders.

Dated and delivered at Nairobi this 10th day of June, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.