



REPUBLIC OF KENYA



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**Gathira v Rwathia Suppliers Ltd & 2 others (Cause E363 of 2021)
[2024] KEELRC 1969 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1969 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E363 OF 2021**

**SC RUTTO, J
JULY 26, 2024**

BETWEEN

ELIJAH MWANGI GATHIRA CLAIMANT

AND

RWATHIA SUPPLIERS LTD 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim which was amended on 7th August 2023, the Claimant avers that he was employed by the 1st Respondent as a Senior Stock Clerk on or around 6th June 2017 until he was summarily dismissed on or around 14th September 2018. According to him, he worked with loyalty, diligence and dedication until his termination from employment. His claim against the Respondent is as follows;
 - a. A declaration that the termination herein was unfair and unlawful.
 - b. An order that the Respondent do issue a Certificate of Service to the Claimant as per the legal requirement.
 - c. Damages for unfair, unlawful and wrongful termination equivalent to twelve (12) months' salary Kshs.441,600/-
 - d. One month's salary in lieu of notice Kshs 36,800/-
 - e. Kshs 36,800/-Salary for the month of August 2018.
 - f. Kshs 17,173/-Salary for the month of September 2018 for the 14 days the Claimant worked.



- g. Kshs 36,800/-being payment of the accrued leave days pursuant to clause 9 of the employment contract.
 - h. Special damages of Kshs 138,000/=.
 - i. Damages for the malicious false report, malicious prosecution, false arrest and confinement and mental agony.
 - j. Costs and interest of the Claim.
 - k. Any other relief that this Honorable Court may deem fit and just to grant under the circumstances.
2. Opposing the Memorandum of Claim, the Respondent denies that the Claimant was summarily dismissed. According to the Respondent, the Claimant did not report back to work after being released from police custody. It is the Respondent's contention that the Claimant absconded duty. Accordingly, the Respondent has asked the Court to dismiss the Claimant's Claim with costs.
 3. The 2nd and the 3rd Respondents did not enter appearance and did not participate in the proceedings herein.
 4. During the trial, which took place on 17th April 2024, the Claimant and the 1st Respondent called oral evidence.

Claimant's Case

5. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement and list and bundle of documents to constitute his evidence in chief.
6. It was the Claimant's evidence that on or around July 2018, he realized that there was a stock variance. He informed the Human Resource Manager about the issue but nothing was done until on or around 14th September 2018 when the Respondent reported the matter to the police.
7. On 14th September 2018, the Respondent claimed that he had stolen stock worth Kshs 467,676/= and he was arrested.
8. The Claimant further averred that the Respondent refused to pay his August 2018 salary claiming that he had stolen the stock.
9. That he was released on 16th September 2018 after payment of a police bond and he reported to work on 17th September 2018 where he was informed by the sales manager that he was no longer an employee of the 1st Respondent due to stealing.
10. He was later charged in Criminal Case No. 332 of 2019 at the City Court for allegedly stealing by servant contrary to Section 281 of the Penal Code. The criminal case was finalized and he was acquitted.
11. The Claimant contended that the 1st Respondent falsely and maliciously made a false report to Kamukunji Police Station to the extent that he had stolen stock. Arising out of a false and malicious report, he was unlawfully arrested and further maliciously prosecuted. In the premises, he claims damages against the Respondents for malicious false report, malicious prosecution and mental agony.
12. He further averred that he was not subjected to either the disciplinary procedure set out in Section 41 of the *Employment Act*, 2007 or the 1st Respondent's internal disciplinary procedural rules. It was the Claimant's case that he was not accorded an opportunity to defend himself.



Respondent's Case

13. The 1st Respondent called oral evidence through its Managing Director, Mr. Maina Gikonyo, who testified as RW1. Similarly, he adopted his witness statement and the list and bundle of documents filed on behalf of the 1st Respondent to constitute his evidence in chief.
14. RW1 stated that the Claimant being a Senior Stock Clerk meant that the buck always fell on him when it came to accounting for any stock that was brought in or taken out.
15. He further averred that at the end of every month, the 1st Respondent conducts a stock take to ascertain the company's physical stock against those recorded in the system.
16. That towards the end of 31st July 2018, the 1st Respondent established that there was a stock discrepancy. The Claimant being the Senior Stock Clerk and three other employees of the 1st Respondent were informed of the stock variance by the 1st Respondent and asked to account for the discrepancy before August 2018.
17. In the month of August 2018 during the stock-taking exercise, the 1st Respondent while conducting the stock-take, once again unearthed that there were stock variances which cumulatively at the time tallied to Kshs. 467,676/=.
18. The Claimant and the other three employees of the 1st Respondent, were once again given two weeks to explain the stock variances. However, they did not account for the same at the lapse of the said period. This necessitated the 1st Respondent to file a formal complaint with the police on 14th September 2018 so that investigations could be conducted into the disappearance of the stock.
19. Upon the police conducting investigations, there was evidence linking the Claimant and three of the 1st Respondent's employees to the stock variance. Subsequently, the Claimant and the said employees were arrested and charged.
20. The Claimant was released on 16th September 2018 upon him paying a police bond.
21. RW1 was categorical that contrary to the Claimant's assertions, he failed to report to work upon being released from police custody.
22. He contended that the Claimant on his own volition absconded duty without giving any reasons thereto and has never returned to work up to date.
23. RW1 further averred that pursuant to the Claimant neglecting his duties, the 1st Respondent wrote to the County Labour Officer informing the office of the Claimant's actions.
24. In RW1's view, the Claimant's conduct of neglecting his duties upon being released from police custody is a clear indication that he has something to hide.
25. That the Claimant cannot then claim that the 1st Respondent unfairly, unlawfully and wrongfully terminated him from employment and is therefore not entitled to any of the amounts and reliefs sought in the claim.
26. As stated herein, the 2nd and 3rd Respondents did not participate in the proceedings hence upon close of the 1st Respondent's case, the parties took directions on filing of written submissions.



Submissions

27. The Claimant submitted that the 1st Respondent has failed to prove that he absconded his duties and that they commenced disciplinary proceedings or contacted him. It was his position that he did not abscond his duties but was dismissed from employment.
28. Citing the case of *Naqvi Syed Qmar v Paramount Bank Limited & another* (2015), the Claimant further submitted that he was singled out to carry the cross on behalf of others and to act as proof that the police did their investigative work. The Claimant maintained that shoddy investigations were carried out as no witness stated that he stole the stock. It was his contention that no evidence was found against him but he was prosecuted nevertheless. That this clearly shows that even a reasonable man would come to a conclusion that he did not commit any offence.
29. The Respondent on its part, submitted that an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer.
30. It was the Respondent's position that a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. That while an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair. To buttress this position, the Respondent sought to rely on the case of *Attorney General & another v Andrew Maina Gitthinji & another* (2016) eKLR.
31. The Respondent further submitted that the Claimant was not terminated but rather absconded work. That having failed to locate the Claimant, it went a step further and notified the labour office through a letter dated 24th September 2018 that four of its employees had absconded duty.
32. According to the Respondent, in the prevailing circumstances, writing to the labour office was the most feasible thing to do. The Respondent argued that the Claimant's submission that he was not subjected to a disciplinary process collapses since he could not be traced to be subjected to the said process.

Analysis and Determination

33. Flowing from the pleadings on record, the evidentiary material placed before Court as well as the rival submissions, the Court isolates the following issues for determination: -
 - a. Whether the Claimant absconded duty or was unfairly terminated from employment;
 - b. Whether the Claimant's prosecution was malicious;
 - c. Is the Claimant entitled to the reliefs sought?

Whether the Claimant absconded duty or was unfairly terminated from employment.

34. Both parties have presented different versions with regards to this issue. On his part, the Claimant avers that upon being released from police custody, he reported to work on 17th September 2018 but was informed by the Sales Manager that he was no longer an employee of the 1st Respondent.
35. On the other hand, the 1st Respondent denies the Claimant's assertions that he was terminated from employment. According to the 1st Respondent, the Claimant absconded duty as he never returned to work following his release from police custody. The 1st Respondent further averred that it reported the Claimant's abscondment of duty to the County Labour office.



36. What appears to be common cause is that the employment relationship started to go downhill on 14th September 2018 when the Claimant was arrested on account of stock variance.
37. In support of its case, the 1st Respondent exhibited a copy of a letter dated 24th September 2018 addressed to the County Labour Office, notifying the said office that the Claimant and three others had absconded duty. As a parting shot, the 1st Respondent notified the County Labour Office that the said employees were no longer in their employ due to the abscondment of duty.
38. It is worth noting that besides notifying the County Labour Office of the Claimant's alleged abscondment of duty, the 1st Respondent did not indicate, let alone suggest that upon noting that the Claimant had absconded duty, it attempted to establish his whereabouts. In an employment context, it is expected that where an employee deserts duty, an employer would take reasonable steps to ascertain his or her whereabouts.
39. On this issue, my thinking aligns with the determination of the Court (Radido J) in the case of *Mary Mumbi Kariuki v Director, Pamoja Women Development Programme* [2015] eKLR, where it was held that: -
- “...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.
- (24) In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
40. Further to the foregoing, Sections 43(1) and 45 (2) (a) and (b) of the *Employment Act*, places the burden on the employer to prove the reasons for termination and where the employer fails to do so, such termination is rendered unfair.
41. What this means is that the 1st Respondent was bound to establish that indeed, the Claimant absconded work and that it took reasonable steps to establish his whereabouts.
42. In addition to notifying the County Labour Office that the Claimant had absconded duty, the 1st Respondent had a duty as the employer in this case to establish his whereabouts and put him on notice that it was considering terminating his employment on account of absconding duty.
43. This is further noting that absence from work without permission constitutes one of the grounds for summary dismissal under Section 44(4) (a) of the *Employment Act*. Hence, if indeed the Claimant was absent from work without permission, why didn't the Respondent exercise this option under the *Employment Act* and put him on notice that his employment was bound to be terminated if he failed to show cause for absconding duty?
44. The bottom line is that it was not sufficient for the Respondent to allege that the Claimant absconded duty without proving his absence or demonstrating the steps it had undertaken to ascertain his whereabouts and requiring him to explain his absence from work.
45. Further the parting shot in the 1st Respondent's letter that the Claimant and the other three employees were no longer in its employ due to abscondment of duty is quite telling.
46. All in all, taking into consideration the totality of the circumstances herein, I cannot help but find that the Respondent has failed to prove that the Claimant absconded duty. Having failed to prove as



much, it is more than probable that the Claimant was unfairly terminated from employment within the meaning of Sections 41, 43 and 45 of the Employment Act.

Whether the Claimant's prosecution was malicious

47. The Claimant has alleged that the 1st Respondent falsely and maliciously made a false report at the Kamukunji Police Station to the extent that he stole stock worth Kshs 467,676/=. That arising out of the false and malicious report, he was unlawfully arrested and maliciously prosecuted wherein he was eventually acquitted.
48. The elements which must be proved in a claim of malicious prosecution were stipulated as follows in the case of George Masinde Murunga v Attorney General [1979] eKLR: -
- “As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.”
49. In a nutshell, the Claimant must prove that: -
- a. there was a prosecution by the Respondents;
 - b. the proceedings complained of were terminated in his favour;
 - c. the prosecution was instituted without reasonable and probable cause and that it was actuated by malice; and
 - d. the prosecution was instituted or carried on maliciously.
50. In this case, there is no dispute with respect to the 1st and 2nd elements aforementioned.
51. What is in contention is whether the Claimant's prosecution was instituted without reasonable and probable cause and whether it was actuated by malice.
52. As regards the element of malice, the Claimant is required to prove that the prosecution was motivated by something more than a sincere desire to vindicate justice. This is as per the determination in the case of Kagane & Others v The Attorney General & Another (*supra*).
53. I am also mindful that an acquittal does not automatically translate to malice as was held in Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399, thus: -
- “Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”
54. What I gather from the Judgment of the Criminal Court is that the prosecution did not advance sufficient reason to sustain the criminal charges against the Claimant.
55. It is common ground that there was a stock variance at the 1st Respondent company. Indeed, the Claimant has conceded as much as he stated in his evidence before this Court that he reported the issue to the Sales Manager. In this regard, the 1st Respondent had probable and reasonable cause to lodge a complaint with the police.



56. It is also not in dispute that the Claimant's position in the 1st Respondent company was that of Senior Stock Clerk hence was in one way or the other responsible for the stock. On his part, the Claimant gave no evidence from which it can be reasonably inferred that the report to the police by the 1st Respondent was on account of hatred or spite they had for him.
57. This being the case, it is my view that the charges against the Claimant were not brought maliciously but on account of his role at the 1st Respondent company.
58. Granted, the Claimant may have been charged without sufficient evidence but this does not in my view impute malice or spite on the part of the 1st Respondent's employees who reported the matter to the police.
59. To this end, I am led to conclude that the Claimant has not established all the ingredients necessary to establish a case of malicious prosecution.

Appropriate Reliefs

60. As the Court has found that the Claimant's termination was unfair, he is awarded one (1) months salary in lieu of notice and compensatory damages equivalent to five (5) months of his gross salary. This award has considered the length of the employment relationship as well as the circumstances leading to the termination of the Claimant's exit from employment.
61. The Claimant is further awarded salary for the month of August 2018 as RW1 confirmed during his testimony that the salary was not paid due to the stock variance. Similarly, the Claimant is entitled to salary for 14 days worked in the month of September 2014.
62. The Claimant is further awarded leave pay for eight (8) months with respect to 2018 as the 1st Respondent failed to avail his leave records in line with its obligation under Section 74(1) (f) of the [Employment Act](#).
63. As the Court has found that the Claimant's prosecution was not malicious, the claim for special damages of Kshs 138,000/= and general damages is declined.

Orders

64. It is against this background that the Court enters Judgment in favour of the Claimant in the following manner: -
 - a. A declaration that the termination of the Claimant's employment was unfair and unlawful.
 - b. The Claimant is awarded one month's salary in lieu of notice being the sum of Kshs 36,800/=.
 - c. The Claimant is awarded the sum of Kshs 36,800/= being salary for the month of August 2018.
 - d. The Claimant is awarded the sum of Kshs 17,173/= being salary for September 2018.
 - e. The Claimant is awarded compensatory damages in the sum of Kshs 184,000.00 being equivalent to five (5) months of his gross salary.
 - f. The Claimant is awarded the sum of Kshs 17, 173/= being leave pay earned for eight (8) months in 2018.
 - g. The total award is Kshs 291,946.00.
 - h. Interest on the amount in (g) at court rates from the date of Judgment until payment in full.



i. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Muritu

For the Respondent Mr. Kofuna

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

