



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 332 OF 2018**

**JACOB KITHIMBA MUTISO.....CLAIMANT**

**VERSUS**

**SWAN CARRIERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was filed on 16<sup>th</sup> March, 2018 by the claimant praying for:-

- (i) 12 months compensation for unlawful and unfair termination of employment.
- (ii) Payment in lieu of one month notice – Kshs12,075
- (iii) Payment in lieu of leave days not taken Kshs 12,075.
- (iv) Damages for unlawful arrest and detention.
- (v) Costs of future earnings for 19 years to retirement.
- (vi) Certificate of Service.
- (vii) Costs of the suit.

2. The claimant testified that he was employed by the respondent on 9<sup>th</sup> December, 2015 as a Turn boy earning Kshs 12,075 per month. That he worked diligently and continuously until 25<sup>th</sup> July, 2016, when he was arrested at the behest of the respondent and was charged for stealing goods in Transit contrary to Section 279(c) of the Penal Code. That he was remanded for one year before the case was heard and determined on 21<sup>st</sup> July, 2017, when the claimant was acquitted under Section 215 of the Civil Procedure Code and discharged of any liability.

3. That the job ended on 25<sup>th</sup> July, 2016, when the claimant was arrested. The claimant states that the termination was unlawful and unfair and prays for the reliefs sought.

4. The claimant set out the particulars of malice under paragraph 16 of the Statement of Claim that the respondent falsely accused him of stealing goods worth 2.7 million. That the respondent adduced false evidence before the Magistrate Court which evidence was rejected by the Court. That the claimant suffered defamation of character as a result.

5. The claimant also set out particulars of breach of contract under paragraph 16 of the Statement of Claim including terminating the employment of claimant without a valid reason and without according him a hearing and/or a notice to show cause.

6. That the respondent also failed to pay terminal dues. The claimant adduced documents including letter of demand, judgment of the magistrate Court delivered on 21<sup>st</sup> July, 2017 and letter of employment dated 9<sup>th</sup> December, 2015.

7. The claimant also produced the charge sheet dated 26<sup>th</sup> July, 2016 upon which he was remanded in custody before being granted bail later on. The claimant was charged together with one Leonard Mulinge Vaati for jointly with others not before Court stealing 600 cartons of 250mls x 36 of Napoleon wine valued at Kshs.2.7 million, the property of the London Distillers Limited, to whom the respondent was

delivering the drinks.

8. The claimant prays to be awarded accordingly.

9. The claimant stated he was released on 1<sup>st</sup> July, 2017 and on 25<sup>th</sup> July, 2017 he returned to work. That at the gate he was told to write a note to the boss stating that he had returned. After one hour, he was told to go away. The claimant testified that they were hijacked on the way to Kisumu. That they were tied in the forest. That they reported the case to the police but were wrongly charged. That he was on bond of 2.4 million and he stayed in custody for one year since he could not raise the bond. That Manraj Singh, the Transport Manager of the respondent testified for prosecution against the claimant. The claimant stated that he was at the time a turn boy of motor vehicle KCE 360Y and was employed on permanent basis. The claimant said he had never seen any fixed term contract and denied signing any such contract with the respondent. The claimant said he did not get any letter of termination.

10. R.W.1, Ole Mwanunga Joseph testified for the Respondent. He said that he was the Human Resource Officer of the respondent. He produced a contract of employment dated 30<sup>th</sup> August, 2015. That he was employed by the respondent in the year 2017 after the claimant had left employment. R.W.1 testified that he did not know the claimant. He said the employment contract was not signed by the employer.

11. He also said he was not the author of the purported contract. R.W.1 stated that the claimant was employed as a turn boy around December, 2015. That the claimant was arrested and charged of theft upon investigations by police. That the claimant never returned to work upon his arrest. That the respondent did not terminate the employment of the claimant. That the claimant failed to return to work without giving any reasons. That the claimant is not entitled to the reliefs sought.

12. The respondent prays the suit be dismissed with costs.

13. The parties filed submissions which the Court has duly considered together with the evidence adduced before Court. The issues for determination are:-

***(a) Whether the claimant was unlawfully dismissed from employment.***

***(b) Whether the claimant has proved a case for malicious prosecution and false imprisonment against the respondent.***

***(c) Whether the claimant is entitled to the reliefs sought.***

14. The claimant had faithfully worked for the respondent as a turn boy from 5<sup>th</sup> December, 2015 to 25<sup>th</sup> July, 2016. The facts of the case are that the claimant and one Leonard Mulinge Vaati were on transit to Kisumu to deliver wine on behalf of the respondent when the truck they were in was hijacked by robbers and the two were tied in a nearby forest.

15. That upon the two reporting to the police, the two were charged with theft of Kshs 2.7 million.

16. The claimant testified that he did not steal but was incarcerated for a whole year while awaiting trial since he could not afford to pay bail.

17. In the criminal trial before the Chief Magistrate's Court, Criminal Case No. 1097 of 2016, the Magistrate summarized the evidence before him thus:- That the manager of the respondent Mannaj Singh Matharua testified for the prosecution. He testified that on 25<sup>th</sup> July, 2016, he received a call from Officer Commanding Police Station (OCPD) Gilgil, one Madam Sarah who informed him that the vehicle KCE 360Y had been seized and it seemed to have been a robbery. One Shabbir Saffer Ali was sent to visit Gilgil Police Station to identify the vehicle which he did. Inside the vehicle were 376 cartons of wine. The inventory of the remaining stock was taken in the presence of the claimant and his driver.

18. The Court found that the claimant and his colleague presented themselves at Gilgil Police Station to report the robbery. The two were then booked in the cells and after recovery of the vehicle they were charged with the offence of theft.

19. The claimant and his driver denied the offences. They said at around 8.30 p.m. while at Gilgil, a Canter overtook them and blocked them. The driver of the truck swerved to avoid an accident but he lost control and veered off the road. Shortly two men arrived with rifles and ordered the driver to open the door. The driver hesitated and the gunman smashed the window and pulled the driver out of the vehicle. The driver was hit with a gun butt and was pulled into the forest. The two were taken to the forest and guarded by 3 men. They were searched. Kshs 75 and phone was taken from the driver. The gunmen bound the two with ropes and covered them with leaves. At around 6.00 a.m. they screamed for help. The robbers left at 5.00 a.m. People responded and untied the two and a bus driver directed them to the nearest police station.

20. The learned magistrate upon evaluating the evidence found:-

***“The prosecution case is largely based on suspicion. P.W.5 suspects that the accused persons were the thieves. She never traced their phone numbers, neither did she seek to investigate their claims that they had been carjacked.”***

21. P.W.5 was Alice Malasi, the Police Investigating officer.

22. The Court also found that the driver, who was the 1<sup>st</sup> accused had injuries.

23. The magistrate stated:-

***“The accused persons in defence narrated how they were carjacked and how they reported the matter to the police. They also explained in detail what transpired. They awaited medical evidence as proof of injuries during the carjacking incident. Their defence was not an afterthought. They raised the issue of the carjacking during cross-examination of witness.”***

24. The magistrate concluded,

***“I am not satisfied that the accused persons committed the offence. I find their defence believable and I accept it.”***

25. Clearly, the police investigating this case, did not bother to conduct proper and genuine investigations to establish the truth about the robbery but maliciously took a short cut of incarcerating the claimant and his driver on mere suspicion and without an iota of evidence that the two had faked the robbery and were in fact the thieves of the employer's property.

26. Sadly, the claimant did not join the Attorney General to this suit. The employer did not instigate the arrest, charge and false imprisonment of the claimant. The police were solely to blame for this misadventure. Had the Attorney General been joined to this suit the Court would have found him liable for the malicious prosecution and false imprisonment committed by the police. This claim therefore fails as against the respondent.

### **Unlawful Dismissal**

27. The claimant presented himself to the employer for re-engagement one year from the date of arrest. The respondent did not allow him to enter the premises but simply directed him to go away since his services were not required.

28. The question that the Court must answer is whether the claimant was still in employment one (1) year down the line having been in custody all this time.

29. In terms of Section 47(5)

***“for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee.”***

30. In the present case, the claimant bears the burden of proving that his employment relationship with the respondent persisted despite his incarceration and therefore away from the work place for a period of one year.

31. The respondent did not issue the claimant with a letter of termination but the claimant has testified that the fact of stopping the claimant from returning to his workplace amounted to unlawful and unfair termination of employment.

32. The unlawful arrest and imprisonment by the police, which was not the making of the respondent from the evidence before Court caused a supervening impossibility of performance of the contract of employment between the claimant and the respondent.

33. Definition of supervening impossibility as per Wikipedia Dictionary <https://www.dictionary.com> is as follows:-

***(1) “Supervening impossibility occurs when performance of contractual obligations become objectively impossible and unavoidable events which are not the fault of any party to the contract. “***

34. It is the Court's considered decision that as at the date the claimant attempted to return to work, the substratum of the employment between the claimant and the respondent did not exist by fact of the claimant's prolonged absence without authority of the Employer.

35. The Court finds that the claimant has therefore failed to prove that his employment with the respondent was unlawfully and unfairly terminated by the respondent. The claim for compensation for the unlawful termination and payment of one month salary in lieu of notice cannot be sustained.

36. However, with regard to the claims for unpaid terminal benefits including payment in lieu of untaken leave in the sum of Kshs 12,075; and arrear salary for the month of July, 2016 in the sum of Ksh. 12,075 have been proved by the claimant on a balance of probability and the Court awards the claimant accordingly.

37. In the final analysis, following the finding by the Court that the respondent did not unlawfully and unfairly terminate the employment of the claimant, the claim for award of salary for loss of future earnings to retirement date is also not sustainable and is dismissed.

38. Equally, the claimant having not sued the State that maliciously arrested him, charged him and falsely imprisoned him, the claim for damages in respect thereof is dismissed.

39. The claimant is entitled to a Certificate of Service for the period he served the respondent.

40. Accordingly, judgment is entered in favour of the claimant for a sum of Kshs. 24,150 with interest at Court rates from date of filing suit

till payment in full. The claimant is also entitled to the costs of the suit. The respondent to provide the claimant with a certificate of service within 30 days of this judgment.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of February, 2022.**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Mollo for Claimant

Mr. Muriuki for Respondent

Ekale – Court Assistant