



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 858 OF 2017

KENNETH MUHENYE OGONGO.....CLAIMANT

- VERSUS -

TEA WAREHOUSE LIMITED.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd December, 2021)

JUDGMENT

The claimant filed the statement of claim on 13.11.2017 through M/s Njoroge & Katisya Advocates. He filed the amended statement of claim on 21.09.2018. It is not in dispute that the respondent employed the claimant initially as a Casual Warehouse Clerk effective 2007 at the 1st respondent's Shimanzi Warehouses. He worked until 2013 when he received a written contract of service. He continued serving on fixed term contracts renewed one after the other. Parties concluded a fixed term contract dated 10.07.2016 for fixed term of 3 years running from 01.06.2016 to 31.05.2019. The claimant was engaged as Warehouse Clerk at basic monthly salary of Kshs.16, 155.00 and monthly house allowance of Kshs. 4, 600.00. On 31.05.2016 he was transferred to respondent's Jomvu Warehouse as the Warehouse Clerk. On 03.09.2016 it was discovered that several teas were missing from the Warehouse. Stack taking was conducted on 05.09.2016 and reconciliation done dated 07.09.2016 and 200 packages of teas were found missing. The investigations internally by the respondent and externally by the Changamwe Police Station revealed that the warehouse doors had been tampered with. The investigations did not reveal or conclude when, who or how the teas were removed from the Jomvu Warehouses or the manner in which they went missing. The warehouse had 10 employees including the claimant with Titus Wabwile being the person in-charge of the warehouse since 27.08.2016 The warehouse was guarded and secured by S.G.A Security Guards hired by the 1st respondent. The warehouse was also secured within the yard belonging to Road Tainers (Msa) who also had their own security arrangements.

The claimant worked during the day and his case is that he was not responsible for the warehouse security at night. He was given a letter to show cause dated 08.09.2016 referring to the missing 200 packages of teas. The letter stated that as the Clerk at the Warehouse it was under his supervision and custody and nothing should leave the Warehouse without his consent or authority. The letter stated that the act committed by the claimant amounted to gross misconduct which once proved would lead to disciplinary action against the claimant. He was to explain in 48 hours. The claimant replied by his letter dated 02.09.2016 explaining that it was true that there had been discovery of the missing 200 packages of teas and a further discovery that a stopper of the door to the warehouse had been tampered with.

He was suspended on 09.09.2016 until 26.09.2016 pending investigations and because his explanation had been found unsatisfactory. The letter stated that it was unacceptable that the claimant as the Clerk in-charge was not aware of how the 200 packages left the warehouse without his tallying and recording the same in his daily stack sheet. The letter stated that the matter was serious and may result in summary dismissal but the respondent was being lenient to place the claimant on 14-days suspension with pay pending investigations. He was to report back on 26.09.2016. From 26.09.2016 to 07.10.2016 the claimant reported at work but was not assigned work except reporting to Human Resource Manager one Salim Joha. The respondent required the claimant to admit liability for the loss of the teas and when he refused he was not paid salary effective August 2016.

On 19.10.2016 Salim Joha asked the claimant to report at the Changamwe Police Station to record a statement about the missing 200 bags of teas. The claimant reported at the station on 20.10.2016 and he was detained at the police cells. On 21.10.2016 he was charged in CMCC No. 2033 of 2016. The offence was stealing by servant contrary to section 281 of the penal and the particulars were that the claimant and his workmate one Hamisi Juma Shaban on diverse dates between 20.07.2016 and 23.08.2016 at tea warehouse in Jomvu of Chanagamwe sub-county within Mombasa county, jointly with others not before court stole 360 bags of tea all valued at Kshs. 5, 115, 089.00 being the property of the respondent herein. The complainant was recorded as Salim Hassan Joha C/O Tea Warehouse, Mombasa and the same Salim Hassan Joha as the prosecution witness. The claimant was subsequently discharged on 27.02.2017 under section 87(a) of the Criminal Procedure Code and he had been custody for 130 days. On 09.03.2017 he wrote to the respondent about his work because the criminal case

had been terminated in his favour. He received a termination letter by way of summary dismissal purportedly written on 07.10.2016 bearing postal marks of 10.03.2017.

He was invited for a disciplinary hearing on 30.09.2016 as per the letter of invitation dated 26.09.2016. The claimant's case is that he attended the disciplinary hearing of 30.10.2016 and noticed the same was more of fact finding process to how the teas had got lost. His case is that the decision to dismiss him was malicious and suspicious and executed in the dark without involving him.

The claimant claimed against the 1st respondent as follows:

- a) Salary for September 2016 Kshs. 20, 755.00.
- b) Unpaid salary from 01.10.2016 to 09.03.2017 Kshs. 110, 959.40.
- c) Balance of fixed term contract Kshs. 307, 333.70.
- d) 40 days of leave Kshs. 33, 208.00.
- e) Leave allowance Kshs. 5, 465.00.
- f) 12 months' salaries compensation Kshs. 249, 060.00.
- g) Total Kshs. 726, 781.10.

The claimant's further case is that the report to the police and his subsequent prosecution was malicious as he was falsely accused and he remained in custody from 20.10.2016 for 130 days having been unable to meet the bail terms set by the court. He pleaded particulars of malice including:

- a) Respondent's human resource manager one Salim Joha instigated the arrest and arrest was not based on police investigations.
- b) Police never carried out credible investigations.
- c) All available evidence showed the claimant was innocent.
- d) There was no evidence of the loss of 360 bags of teas in the charge.
- e) There existed no particulars to support the charge. The respondent's audit revealed a loss different from that in the charge.
- f) It was unlikely the teas were stolen during the claimant's day shift and he never worked on night shift.
- g) The claimant did not benefit from the theft or loss.
- h) The theft was discovered on 03.09.2016 when the claimant had barely worked at Jomvu warehouse. The exact date of the loss was not known.
- i) The warehouse had 10 employees but the claimant and one other employee were singled out.
- j) The premises were properly secured and 200 packages of teas are 12, 000 to 14, 000 Kg and therefore requiring a truck to be transported.
- k) The loaders and security guards on day shift were not interrogated.
- l) After the claimant was charged, the 1st respondent's directors never followed the case on how the teas were lost.
- m) Self-recorded statement by investigating officer Joyce Maluk on 29.10.2016 did not implicate the claimant.
- n) The arrest and prosecution was malicious because the purported witness Salim Joha never testified against the claimant.
- o) The claimant was charged with loss of the teas between 20.07.2016 and 23.08.2016 without reason and justification.
- p) The claimant as warehouse clerk had done nothing to render him culpable in criminal liability. No evidence linked him to the theft.
- q) By reason of the arrest and malicious prosecution the claimant states that he suffered injury to reputation, unfairly lost liberty, his family deserted him, he suffered loss and damage. He therefore claimed for general damages for the malicious prosecution.

The claimant prayed for judgment against the respondents jointly and severally for:

- 1) Kshs. 726, 781.10.
- 2) General damages.
- 3) Costs.
- 4) Interest,
- 5) Any other order and or further relief that the Honourable Court may deem just and fit to grant in the circumstances of the case.

The 1st respondent filed a response to the claim on 07.02.2018 through M/S Muturi Gakuo & Company Advocates. The 1st respondent admitted employing the claimant and stated that 200 bags of tea that went missing between 10.08.2016 and 27.08.2016 when the claimant was in-charge of the warehouse and the bags of tea in issue had been received from KURESOI and UNILEVER for temporary storage waiting to be exported. The loss was reported to the police by the 1st respondent on 07.09.2016 after the 1st respondent had undertaken an internal investigation. The 1st respondent indicated to the police that the claimant was the person in-charge of the warehouse. Further the claimant had kept on telling the clients that their bags of teas were missing and that the clients should not inform or report the issue to the 1st respondent's office since he was going to sought out the issue and the clients got tired of the claimant's empty assurances since the person the clients were to deliver the teas to had started complaining and the clients decided to inform the 1st respondent's management and the stock taking revealed what the claimant had been hiding all along. A show cause issued, the claimant responded, and he was suspended for 14 days from 09.09.2016. He was invited for disciplinary hearing and it was to be held on 30.09.2016 but adjourned to 07.10.2016 and he attended and found negligent. Throughout the material time the claimant was not subjected to inhuman treatment. The claimant was arrested and charged but case withdrawn under section 87 of the Criminal Procedure Code meaning that if evidence becomes available the claimant can be made to stand trial. The internal disciplinary process was different from the criminal process. The dismissal was fair per the Employment Act, 2007. Police independently decided to charge the claimant with theft of 360 bags and not 200 and based on their own investigations. The allegations of malicious prosecution are denied. The 1st respondent prayed that the claimant's suit be dismissed with costs.

The 2nd respondent filed the response to the claim on 21.06.2018 through learned litigation counsel Winnie Namahya Waswa, for Attorney General. The 2nd respondent's case is that the claimant's arrest and prosecution was upon a reasonable suspicion and after investigations. He was arrested and prosecuted per police duty to prevent and detect crimes. The arrest and prosecution was lawful, justified and not motivated by malice or bad faith whatsoever. The 2nd respondent prayed that the claimant's claim be dismissed with costs.

The claimant testified to support his case. The 1st respondent's witness was Shirin Yakubali Mubarakli (RW), the Administrative Manager. The 2nd respondent did not call a witness but filed final submissions through the learned Principal Litigation Counsel Kiti M. Nimwaka. The claimant and the 1st respondent filed their final submissions. The Court has considered all the material on record and makes pertinent findings as follows.

To answer the 1st issue for determination the Court returns that there is no dispute that the 1st respondent employed the claimant as a Warehouse Clerk and he was last deployed at the Jomvu Warehouse. The claimant's remuneration was as pleaded for the claimant.

To answer the 2nd issue for determination the Court returns that the 1st respondent terminated the claimant's employment by reason of the loss of 200 bags of teas at the Jomvu Warehouse.

To answer the 3rd issue, the Court returns that the termination was not unfair or unlawful. The claimant was afforded a letter to show cause, he responded, he was invited to a disciplinary hearing in company of staff of his choice, he attended, was heard and a letter of termination issued. The Court finds that the respondent invoked due process of a notice and a hearing per section 41 of the Employment Act, 2007. Further the Court finds that the claimant does not dispute that 200 bags of teas got lost and he was the in-charge clerk at the warehouse at the material time. The claimant in cross-examination testified that the tea that got lost was about 14 tonnes and it was a lot of tea that could fit in a 20ft container and the loss was therefore apparent or conspicuously noticeable. Further, he confirmed that he was the clerk in-charge of loading teas, off-loading teas and signing related documents. He further testified, "**When the tea got lost, as records keeper, I did not report. From my records I noticed the tea was missing.**" By that evidence, the Court finds that it has been established by the claimant's own evidence that 200 packages of teas were missing, the claimant as the in-charge clerk failed to report the loss to the respondent's management, and the claimant on that account got dismissed. The Court finds that the 1st respondent has thereby discharged the burden in sections 43 and 45 as read with section 47(5) of the Act that as at the time of termination, there existed valid reason for termination - that 200 packages of teas had gone missing and the claimant as the in-charge clerk had failed to report the loss despite being aware about the same. The Court finds that as submitted for the 1st respondent the termination was not unfair both in procedure and merits or substance.

The 4th issue is whether the claimant has established a case for the tort of malicious prosecution. As submitted for the 2nd respondent in Clerk and Lindsell, O n Torts, 11th Edition (1954), Sweet and Maxwell (Par.1413 to 1415) the learned authors stated, "**It is the malicious preferring of an unreasonable criminal charge that is the usual foundation for the form of action under consideration....in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say that the law was set in motion against him on a criminal charge, secondly, that the prosecution was determined in his favour, thirdly, that it was without reasonable and probable cause, fourth, that it was malicious. The onus of proving every one of these is on the claimant.**" Again in Gliniski -Versus- Mclver (1962) AC 726 at 758 Lord Denning held, "**In order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the judge that, at the timer when the charge was made, there was an absence of reasonable and probable cause for the prosecution.**" And that the prosecutor need not believe in the guilt of the person

accused but needs only to be satisfied that there is a proper case to lay before the Court and, “**Guilt or innocence is for the tribunal and not for him.**” The Court is guided accordingly.

In the instant case and by the claimant’s own evidence, as at the time of the report to the police, then the arrest and prosecution, the information was that while the claimant was in-charge of the Jomvu Warehouse as Warehouse Clerk, undisputedly, some substantial amounts of teas (200 packages and in the charge 360 packages) went missing, the claimant had noticed the missing teas but failed to report to the respondent and, the claimant and another were arrested and prosecuted. The Court finds that in view of that available information, it cannot be said that the police and the prosecutor did not have information amounting to reasonable suspicion as to prefer the charge of alleged offence of stealing by servant. The Court finds that the variance in the packages of teas was a point of amendment of the charge and did not diminish the reasonable suspicion in any manner. The Court therefore returns that as submitted for the respondents, it cannot be said that the tort of malicious prosecution had been established for the claimant. The claim will collapse as unjustified.

The **5th issue** is whether the claimant is entitled to any of the remedies as prayed for. The Court returns that the claims for unfair termination and compensation will fail. Similarly, general damages for malicious prosecution will fail. The claimant had been on paid suspension and the evidence was that he had taken four leave days. The Court finds that on balance of probability, for the period served, no leave was due. There was no evidence that the claimant travelled to take up annual leave and leave travel allowance is declined. He is awarded **Kshs. 20, 755.00** being September 2016 salary because there was no evidence that the same was ever paid. Pay for unexpired contractual tenure was not justified at all and the claimant not having worked for the 1st respondent and the 1st respondent not have been said to have occasioned him inability to engage profitably elsewhere, the claim is declined. The Court has considered the margins of success and all circumstances of the case and each party to bear own costs of the suit.

In conclusion judgment is hereby entered for determination of the suit with orders the respondent to pay the claimant **Kshs. 20, 755.00** by 15.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit and, each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 3RD DECEMBER, 2021.

BYRAM ONGAYA

JUDGE