



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 751 OF 2017

HAMISI JUMA SHABANI.....CLAIMANT

VS

TEA WAREHOUSES LIMITED.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. By his Statement of Claim dated and filed in court on 14th September 2017, the Claimant lays a claim for general damages against the 1st and 2nd Respondents jointly and severally.
2. The 1st Respondent filed a Response on 15th January 2018, which was later amended on 6th February 2018. The 2nd Respondent filed its Response on 2nd November 2017.
3. At the trial, the Claimant testified on his own behalf and the 1st Respondent called its Administration Manager, Shirin Yakubali Mubarakli. The 2nd Respondent did not call any witness.

The Claimant's Case

4. The Claimant states that he was employed by the 1st Respondent as a Warehouse Clerk from 1st January 2004 until 1st April 2006 when he was laid off due to reduction in business.
5. The Claimant was recalled back to work by the 1st Respondent and issued with a two (2) year contract running from 4th January 2007 to 4th January 2009. He was deployed at Shimanzi Warehouse.
6. The Claimant's contract was renewed for a further term of 2 years from 5th January 2009 to 4th January 2011.
7. The Claimant states that upon expiry of the latter contract, the 1st Respondent retained him as a Warehouse Clerk without a formal contract.
8. The Claimant therefore maintains that the terms of his employment were converted from fixed term contract to long term contract for an indefinite period of time.
9. On 31st May 2016, the Claimant was transferred from Shimanzi Warehouse to Jomvu Warehouse. He claims that between 31st May 2016 and 27th August 2016, he was appointed Acting Supervisor with no corresponding acting/responsibility allowance.
10. On 3rd September 2016, a discovery was made that some tea was missing from the 1st Respondent's Warehouse at Jomvu.
11. After stocktaking on 5th September 2016 and reconciliation on 7th September 2016, it was noted that 200 bags of tea were missing.

12. On 9th September 2016, the Claimant was suspended pending investigations.
13. On request by the 1st Respondent's Human Resource Manager, Salim Joha, the Claimant presented himself at Changamwe Police Station where he and his colleague, Kenneth Ogongo were held overnight on 20th October 2016.
14. On 21st October 2016, the Claimant was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code in **Mombasa Chief Magistrate's Court Criminal Case No 2033 of 2016**.
15. The Claimant was acquitted on 27th February 2017 and on 9th March 2017, he wrote to the 1st Respondent inquiring about his return to work date.
16. The Claimant states that he was issued with a letter of summary dismissal dated 7th October 2016 but with a post mark of 10th March 2017.
17. The Claimant claims that his dismissal was wrongful and unfair.
18. He states that he attended a disciplinary committee meeting on 30th October 2016, which he perceived as a fact finding process, as to how the tea got lost.
19. The Claimant avers that there was no determination or finding by the Disciplinary Committee as the Jomvu Warehouse In-Charge, Titus Wabwile was to appear to give his version of events that led to the loss of 200 bags of tea.
20. The Claimant terms his summary dismissal suspicious and malicious and therefore claims the following from the 1st Respondent:
 - a. Salary for September 2016.....Kshs. 28,190.00
 - b. Unpaid salary from 1st October 2016 to 9th March 2017.....178,898.00
 - c. Acting/responsibility allowance (31/5/2016-27/8/2016).....87,869.70
 - d. Gratuity for 10 years.....140,950.00
 - e. Leave pay (27 days from 2015 to 2016).....30,358.50
 - f. Leave allowance.....4,600.00
 - g. 12 months' salary in compensation.....338,280.00
21. The 2nd Respondent has been sued on behalf of the Kenya Police Service and the Director of Public Prosecutions.
22. The Claimant avers that the 1st Respondent's complaint against him lodged at Changamwe Police Station was made maliciously and without reasonable cause.
23. The Claimant further avers that the 1st Respondent falsely accused him of having committed the offence of stealing by servant contrary to Section 281 of the Penal Code.
24. As a result of the 1st Respondent's complaint, the Claimant was arrested by the Kenya Police and detained at Changamwe Police Station on 20th October 2016 and subsequently arraigned in court on 21st October 2016 and charged by the Director of Public Prosecutions in **Mombasa Chief Magistrate's Court Criminal Case No 2033 of 2016**.
25. The Claimant accuses the 2nd Respondent of maliciously and without reasonable cause prosecuting the said charge before the Chief Magistrate's Court whereby the Claimant stood trial until he was acquitted.
26. The Claimant maintains that the arrest, charge and subsequent prosecution was malicious and without reasonable cause.
27. He cites the following as particulars of malice:
 - a. The arrest, charge and prosecution were instigated at the behest of third parties, namely the 1st Respondent's Human Resource Manager, Salim Joha and/or the 1st Respondent's employees acting on behalf of the 1st Respondent and not as a result of any competent investigations by the Kenya Police Service;
 - b. The Kenya Police Service did not carry out any investigation and/or any credible investigation into the matter, before presenting the case to the trial court;

- c. All the evidence available pointed to the innocence of the Claimant;
- d. None of the evidence available pointed to any acts of commission or omission by the Claimant that led to the offences;
- e. There was no evidence to support the loss of 360 bags of tea as per the charge sheet;
- f. There was no evidence to support the particulars of the offence as set out in the charge sheet;
- g. The internal audit carried out by the 1st Respondent noted a loss totally different from that in the charge sheet;
- h. The arrest and prosecution was an attempt at a cover up;
- i. The Claimant was a sacrificial lamb given up to save others from the carelessness or negligence of senior employees of the 1st Respondent;
- j. The complaint and prosecution were selective;
- k. The 2nd Respondent relied upon and/or placed premium upon the statements of the Claimant's supervisors or seniors and/or busybodies but not what the investigations and/or the evidence revealed;
- l. The 1st and 2nd Respondents ignored the Claimant's pleas of innocence;
- m. The Claimant was forced to take a fall as an Acting Supervisor for loss of tea through a defective or tampered warehouse door, yet the duty of securing the warehouse and the warehouse door was not one of his assigned duties;
- n. The security company hired to secure the Jomvu Warehouse was not held liable and none of its security guards were charged;
- o. It is highly unlikely that the tea would have been stolen during the day, yet the Claimant did not work at night;
- p. The Claimant was totally innocent of the theft or loss of the tea;
- q. The Claimant did not benefit from the theft or loss of the tea. No evidence was led to demonstrate or establish any alleged benefit to the Claimant;
- r. The Claimant was only an Acting Supervisor at the Jomvu Warehouse from 31st May 2016 to 27th August 2016;
- s. The theft or loss of tea was discovered on 3rd September 2016, when the Claimant was no longer the Acting Supervisor at Jomvu Warehouse;
- t. There is no clear evidence of the date when the theft took place. The 1st Respondent relied on the evidence of the date of discovery of the missing tea;
- u. There was a total of ten (10) people working at the Jomvu Warehouse including a supervisor, warehouse clerks, contract employees and casuals;
- v. The Warehouse was secured within a fenced compound with one access through the main gate at the premises owned by Road Tainers (Msa);
- w. There are four (4) other warehouses within the complex, all secured by one exit;
- x. The sole exit/gate is manned 24 hours by private security guards;
- y. The fence surrounding the Warehouse is high and ringed with an electric fence and it is impossible to remove tea bags through the fence without being detected, during the day time;
- z. All goods leaving or entering the Jomvu Warehouse complex, including all motor vehicles are checked and their consignments/luggage, especially tea, cross checked against delivery orders, loading instructions or local purchase orders and invoices;
 - aa. The 1st Respondent's Jomvu Warehouse is guarded by S.G.A Security Guards hired by the 1st Respondent;
 - bb. S.G.A Security Guards had two (2) guards during the day and one (1) guard at night;
 - cc. The security guards had the responsibility of checking the access and/or warehouse gates and ensuring that they were secure or raise alarm if they were tampered with and/or insecure;

- dd. Two hundred (200) bags of tea are approximately 12,000 to 14,000 kilos and cannot be transported out of the Warehouse without a vehicle;
- ee. There exists the possibility that the tea was stolen during the night with the connivance of the night guard, when all employees, including the Claimant had left;
- ee. After the event, the 1st Respondent hired an extra night guard to guard the two warehouses, instead of the single night guard. As at the time the Claimant was charged with the theft, there were already two night guards at the Warehouse;
- ff. The S.G.A Security Guards were neither charged nor were they interrogated;
- gg. The tea could not have been removed from the Warehouse during the usual daily operations, with connivance of loaders and daytime security guards without someone leaking the information;
- hh. The loaders and daytime security guards were neither charged nor interrogated;
- jj. The senior employees gave up the Claimant as a sacrificial lamb to cover up for their acts or omissions of negligence and/or carelessness and/or theft to save their jobs;
- kk. It is a well-known fact that once the senior employees presented a report that tea had been stolen and a suspect charged, the 1st Respondent's Directors did not follow up to confirm how the theft actually took place. All internal investigations were closed once the alleged thief was apprehended and charged;
- ll. The amount of missing tea as per the internal audit report being 200 bags and that on the charge sheet being 360 bags, were at variance as to create doubt to any investigating officer as to whether the alleged theft actually took place or the person suspected was a thief;
- mm. Looking at the statement of the investigating officer, Joyce Maluk self-recorded on 20th October 2016, the Claimant was at a loss as to what evidence incriminated him and why out of all other employees of the 1st Respondent, he was singled out as a main suspect, let alone being charged in court;
- nn. The Changamwe Police Station did not conduct any independent, reasonable and credible investigations as recording statements alone cannot amount to reasonable investigations;
- oo. There was no evidence as to give rise to a probable cause for the charges raised against the Claimant. Prosecution witnesses were recording statements after the Claimant had been charged in court;
- pp. The Claimant was prosecuted maliciously and without any basis;
- qq. The 1st Respondent's Human Resource Manager, Salim Joha never testified against the Claimant;
- rr. The Claimant was arrested at the behest of the 1st Respondent and it was the 1st Respondent's Human Resource Manager, Salim Joha who sent the Claimant to Changamwe Police Station, to be arrested and locked up;
- ss. The charge sheet clearly indicated that Salim Joha was a prosecution witness;
- tt. The Claimant was prosecuted by the Director of Public Prosecutions who is represented by the 2nd Respondent on behalf of the Government of the Republic of Kenya;
- uu. The Claimant was charged with theft of tea between 20th July 2016 and 23rd August 2016 without any reason or justification;
- vv. That the Claimant was an Acting Supervisor could not make him liable in criminal acts or omissions that led to the loss of tea as theft is an issue of individual responsibility;
- ww. Not even an iota of evidence linked the Claimant to the loss of the tea.

28. The Claimant therefore claims damages against the Respondents jointly and severally.

The Respondents' Case

29. In its Response as amended on 15th January 2018, the 1st Respondent states that 200 bags of tea went missing between 10th August 2016 and 27th August 2016 while the Claimant was in charge of the Jomvu Warehouse. The 1st Respondent clarifies that the bags had been received from two different producers namely, Kuresoi and Unilever, for temporary storage prior to export.

30. The 1st Respondent reported the loss of the bags of tea to the Police on 7th September 2016. The 1st Respondent states that it conducted its own internal investigations which revealed that the Claimant, being the person in charge of the Jomvu Warehouse, had a case to answer.
31. The 1st Respondent states that the Claimant, being the person in charge as a supervisor, ought to have reported any deficit and/or shortage in tea count to the Head Office.
32. The 1st Respondent claims that the Claimant told the clients that their bags of tea were missing but asked them not to report to the main office as he would sort out the issue. The clients however informed the management upon which a stock taking exercise was undertaken.
33. On 8th September 2016, the Claimant was issued with a notice to show cause in respect of the loss of 22 bags of tea. The Claimant responded to the show cause notice on the same day.
34. The Claimant was subsequently suspended for 14 days from 9th September 2016 to pave way for investigations. He was asked to report back on 26th September 2016.
35. When the Claimant reported back on 26th September 2016, he was issued with a letter inviting him for a disciplinary hearing on 30th September 2016. The 1st Respondent avers that the Claimant was informed of his right to be accompanied by at least one independent witness at the hearing.
36. The 1st Respondent states that it never dealt with the Claimant after issuing him with the letter informing him of the disciplinary hearing until 7th October 2016, when the meeting actually took place as it was impossible to have it on 30th September 2016, which the Claimant was made aware of.
37. The 1st Respondent further states that the Claimant attended the disciplinary hearing of 7th October 2016 at which it was resolved that the Claimant and Kenneth Ogongo Muhenyé were negligent and therefore liable to face disciplinary action.
38. The 1st Respondent distances itself from the requirement imposed on the Claimant to record a statement at the Police Station, which the 1st Respondent maintains was within the purview of the Police.
39. The 1st Respondent avers that the criminal case against the Claimant was withdrawn under Section 87(a) of the Criminal Procedure Code which does not bar the prosecution from instituting fresh charges.
40. The 1st Respondent avers that its investigations and disciplinary process were not bound by the outcome of the criminal case. The 1st Respondent maintains that the internal disciplinary process was independent and the decision to summarily dismiss the Claimant had nothing to do with the criminal case but was based on the disciplinary process, wherein it was revealed that the Claimant was negligent in execution of his duties.
41. The 1st Respondent states that the Claimant was afforded a fair disciplinary process and adds that the Claimant did not raise any issue during the hearing.
42. The 1st Respondent's case is that the Claimant was lawfully dismissed as provided under the Employment Act, 2007.
43. The 1st Respondent refutes the allegations of malice made against it by the Claimant and adds that the decision to charge the Claimant with theft of 360 instead of 200 bags of tea was within the purview of the Police who conducted independent and separate investigations from those conducted by the 1st Respondent.
44. The 1st Respondent denies all the particulars of malice cited by the Claimant.
45. The 1st Respondent maintains that the withdrawal of the criminal case against the Claimant did not absolve the Claimant from responsibility.
46. In its Response dated 31st October 2017 and filed in court on 2nd November 2017, the 2nd Respondent maintains that it was not privy to the employer-employee relationship between the Claimant and the 1st Respondent.
47. The 2nd Respondent admits that the 1st Respondent lodged a complaint at Changamwe Police Station regarding the loss of 200 bags of tea.
48. The 2nd Respondent further admits that the Claimant and Kenneth Ogongo were held in custody for purposes of being arraigned in court on 21st October 2016.
49. The 2nd Respondent states that conclusive investigations were carried out that revealed that the Claimant had a case to answer before court.
50. The 2nd Respondent avers that due process was followed when the Claimant was charged in court on 21st October 2016 in **Mombasa**

Chief Magistrate's Court Criminal Case No 2033 of 2016.

51. The 2nd Respondent denies that the report made by the 1st Respondent was malicious, unreasonable or without probable cause.

52. The 2nd Respondent maintains that the 1st Respondent followed due process in good faith when it lodged its complaint against the Claimant.

53. The 2nd Respondent denies the allegations of malicious prosecution made against it by the Claimant. In this regard, the 2nd Respondent denies all particulars of malice cited by the Claimant.

54. The 2nd Respondent's case is that all reasons raised by the Claimant as a basis for instituting suit against the Attorney General are of no consequence as they do not meet the threshold for proving malicious prosecution.

55. The 2nd Respondent therefore concludes that the Claimant has no cause of action against him.

Findings and Determination

56. From the parties' pleadings, three (3) issues fall for determination by the Court:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant has made out a case of malicious prosecution;
- c. Whether the Claimant is entitled to the remedies sought.

The Dismissal

57. The Claimant's dismissal was communicated by letter dated 7th October 2016 stating thus:

"Dear Hamisi,

RE: SUMMARY DISMISSAL

This is to inform you that your services have been summarily terminated under the terms of the employment Act section 44 (4) (c) which states and I quote;

An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly deserves to be summarily dismissed.

We refer to the disciplinary hearing meeting held in TWL board room held on October 7, 2016 which was attended by you among other committee members where you were required to explain the circumstances to (sic) which customer teas under your supervision were lost or could not be accounted for.

Your explanation to the above matter was not satisfactory since you were not able to explain the whereabouts of some teas in the warehouse, the committee failed to understand your responsibilities as the supervisor in charge of the jomvu warehouse. It was your sole responsibility to make sure each and every consignment that comes in and leaves out (sic) the warehouse are well documented and for (sic) but you never observed this.

In view of the above, the Management has decided to summarily dismiss you from employment with immediate effect.

Your dues in full and final settlement with the Company will be based on the following workings;

- Salary including and up to October 7, 2016.
- Pending leave days – 23 days.
- Less tax and any cash advances taken earlier.

The above payments will be made to you subject to your complete handing over of any of the company's property in your possession to your immediate Supervisor and or the Undersigned with immediate effect.

Yours Faithfully,

TEA WAREHOUSES LTD.

(signed)

SALIM JOHA

HUMAN RESOURCES MANAGER.”

58. According to this letter, the Claimant was dismissed on account of gross misconduct under Section 44(4) of the Employment Act which provides as follows:

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a).....;

(b).....;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

59. In his pleadings, testimony and final submissions, the Claimant sought to rely on his acquittal in the criminal case, as a justification that he was innocent of the administrative charges made against him.

60. The law, as it stands, is that an acquittal in a criminal case does not automatically absolve an employee from administrative liability at the work place.

61. In its decision in *Attorney General & another v Andrew Maina Githinji & another [2016] eKLR* the Court of Appeal affirmed that an acquittal in a criminal case does not immunise an employee against disciplinary action on the same set of facts.

62. This basic principle arises from the legal 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. Going against the outcome of a criminal trial does not therefore make an employer’s decision unlawful or unfair.

63. Moreover, as held by the Court of Appeal in *Jacob Oriando v Kenya Hospital Association Ltd t/a Nairobi Hospital [2019] eKLR* a discharge under Section 87(a) of the Criminal Procedure Code, as happened in this case, is not proof of innocence and does not operate as a bar to subsequent proceedings on account of the same facts.

64. Section 43 of the Employment Act provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

65. This provision requires an employer to demonstrate a valid reason for terminating the employment of an employee and the applicable burden of proof is always on a balance of probability.

66. One more thing on this issue; in determining whether an employer has demonstrated a valid reason, the Court is not at liberty to substitute its own decision with that of the employer. Put another way, the Court does not ask itself what it would have done had it been in the shoes of the employer; all the Court asks is whether in the particular circumstances of the case, the employer acted reasonably and fairly. This is what is commonly referred to as ‘*the reasonable responses test*’ (see *Charles Musungu Odana v Kenya Ports Authority [2019] eKLR*).

67. The Claimant himself told the Court that some tea disappeared from the 1st Respondent’s Warehouse at Jomvu, where he served as Acting Supervisor at the material time.

68. In his response to the show cause letter as well as in his pleadings filed in court, the Claimant sought to exonerate himself from blame by pointing at what he perceived as weaknesses in the investigation process. In my considered view, the line taken by the Claimant on this issue did not prove that he was not negligent in the performance of his duties as Acting Warehouse Supervisor.

69. The Court is therefore satisfied that, applying the ‘*reasonable responses test*’ the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.

70. Regarding the disciplinary process, it is evident that the Claimant was availed the procedural fairness safeguards of Section 41 of the Act, beginning with a show cause letter to which he duly responded and a personal hearing held on 7th October 2016.

71. Overall, I find and hold that the Claimant's dismissal was lawful and fair and the claim for compensation is without basis.

Malicious Prosecution?

72. The Claimant accuses the Respondents of the tort of malicious prosecution. In his final submissions filed on 9th March 2020, he refers to the decision in *Stephen Ayugi v National Housing Corporation & 4 others [2019] eKLR* where my brother, Nduma J cited with approval, the persuasive decision in *Nelles v Ontario Ontario [1989] 2 SCR 170* where it was reiterated:

“There are four elements to the tort of malicious prosecution. The prosecution must have been initiated by the defendant. The proceedings must have been terminated in favour of the plaintiff, there must be an absence of reasonable and probable cause and there must be malice or a primary purpose other than that of carrying the law into effect.”

73. In his pleadings filed in court, the Claimant cited many particulars of malice, which the Court has had occasion to interrogate.

74. As held by *Mativo J* in *Stephen Gachau Githaiga & another v Attorney General [2015] eKLR* the mere fact that an accused person has been acquitted does not necessarily attach malice on the part of the prosecutor. In other words, the decision to prosecute does not of itself give rise to the tort of malicious prosecution. The question is whether the decision to prosecute is honest and reasonable.

75. In a cause of malicious prosecution, the burden of proving dishonesty and unreasonableness rests with the Claimant. I have looked at the particulars pleaded by the Claimant on this limb of his claim, which appear to be no more than an attempt to show his innocence and to paint the Respondents' failures in carrying out proper investigations.

76. As already stated in this judgment, the Claimant admitted that some tea got lost from the 1st Respondent's Warehouse where he was in charge. At the inquiry stage, all the Claimant did was to shift blame to the Respondents. It seems to me that there was a reasonable and probable cause for his arrest and prosecution. I find nothing to suggest that any of the Respondents acted either dishonestly or unreasonably.

77. The claim for malicious prosecution was therefore not proved and is disallowed.

Other Claims

78. The Claimant claims leave pay for 27 days. The 1st Respondent did not provide any documentary evidence to prove satisfaction of this claim which therefore succeeds and is allowed.

79. The Claimant is also entitled to salary for seven (7) days in October 2016.

80. No basis was laid for the claim for salary arrears, acting/responsibility allowance, gratuity, and leave allowance which therefore fail and are dismissed.

81. In the end, I enter judgment in favour of the Claimant as against the 1st Respondent as follows:

a. Leave pay for 27 days (28,190/30*27).....	Kshs. 25,371
b. Salary for 7 days in October 2017.....	<u>6,578</u>
Total.....	31,949

82. This amount will attract interest at court rates from the date of judgment until payment in full.

83. As the Claimant's claim succeeds only in part, I direct that each party will bear their own costs.

84. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Njoroge for the Claimant

Miss Nyaga h/b for Mr. Gakuo for 1st Respondent

Mr. Mkok for the 2nd Respondent