



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 439 OF 2017

JOSEPH KIBERA OMOTE.....CLAIMANT

VS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 6th June 2017 and filed in court on even date, the Claimant sued the Respondent for the following:

- a) Kshs. 2,411,090.60 severance pay plus Kshs. 2,893,000 in interest accruing at 12% from 1st January 2007;
- b) General damages for malicious arrest, detention and prosecution;
- c) Special damages amounting to Kshs. 500,000 being costs and/or fees for defending the malicious prosecution suit;
- d) Certificate of service
- e) Costs plus interest.

2. On 9th October 2018, the parties entered a partial consent before me in the sum of Kshs. 2,110,109 plus certificate of service. It was then agreed that Counsel would file written submissions on the issues of damages, costs and interest. This judgment is therefore restricted to these three issues.

The Claimant's Case

3. In his written submissions filed on 16th November 2018, the Claimant states that on 23rd January 2007, he was arrested and detained in police cells for 7 days on allegations of theft at the Respondent's instigation. He was subsequently charged in Criminal Case No 2312 of 2006 and was later acquitted under Section 215 of the Criminal Procedure Code. The Claimant relied on several decisions of the High Court being *Sammy Kiprotich Tangu v Attorney General [2015] eKLR*, *Chispine Otieno Caleb v Attorney General [2014] eKLR* and *George Ngige Njoroge v Attorney General [2018] eKLR* where the Plaintiffs were awarded varying amounts ranging between Kshs. 2,000,000 and 4,8000 in general and aggravated damages for malicious prosecution and false imprisonment.

4. Based on these decisions, the Claimant claims the sum of Kshs. 4,000,000 in general damages plus Kshs. 500,000 as special damages being the cost of defending himself in Criminal Case No. 2312 of 2006.

5. On the issue of interest, the Claimant states that the Respondent had agreed to pay the severance package in the sum of Kshs. 2,411,096 after conclusion of the criminal case. He therefore claims interest on the said sum at 14% from the date of retirement.

The Respondent's Case

6. The Respondent filed its submissions on 20th December 2018 stating that on 23rd February 2006, the Claimant applied for voluntary early retirement which was approved on 30th April 2006, upon which he was paid his pension dues and accrued leave. Further payments due to the Claimant were stopped after criminal charges were preferred against him.

7. The Respondent submits that this Court has no jurisdiction to award damages arising out of unlawful arrest and detention, which are civil in nature. The Respondent adds that in any event, the claims thereon were not proved.

Findings and Determination

8. There are three (3) issues pending determination before the Court:

- a) Whether the Claimant is entitled to damages for malicious arrest and prosecution;
- b) Whether the Claimant is entitled to interest;
- c) Who should bear the costs of the case.

Damages

9. Under this head, the Claimant claims both general and special damages in connection with his arrest and arraignment in the criminal court. In response, the Respondent submits that this Court has no jurisdiction to entertain such a claim, which is civil in nature. The Respondent further submits that the claims have not been proved.

10. The essential elements for malicious prosecution were set out in *Murunga v Attorney General [1979] KLR* and *Kagane & others v Attorney General [1969] EALR 643* as follows:

- a) Evidence that the prosecution was instituted by the defendant or their authorized agent;
- b) Termination of the prosecution in the plaintiff's favour;
- c) Evidence that the prosecution was instituted without reasonable cause; and
- d) Proof that the prosecution was actuated by malice.

11. It is not noteworthy that the claim herein is against the Respondent who was the Claimant's employer. In my understanding, all the Respondent did was to lodge a complaint with the police who upon conducting independent investigations, made the decision to charge the Claimant.

12. It is clear that the decision to charge the Claimant was not made by the Respondent nor was there any evidence of influence of the decision by the Respondent. It seems to me therefore that no action by the Respondent may be construed as malicious prosecution as defined in law. The claims for general and special damages therefore fail and are dismissed.

Interest

13. The Claimant claims interest on his severance pay from 1st January 2007. The Respondent states that the Claimant was paid his pension dues and accrued leave. Further payments were however withheld due to the pendency of criminal proceedings against the Claimant.

14. The Court did not find any legal basis for the Respondent's decision to withhold the Claimant's dues on account of the pendency of criminal proceedings against the Claimant. Terminal dues are a right to all employees irrespective of the mode and reason of exit. The Respondent's action in this regard, was therefore unjustifiable and the Claimant is entitled to interest at court rates based on the agreed sum of Kshs. 2,110,109 from the date of filing suit until payment in full.

15. The actual interest payable will be assessed by the Deputy Registrar of this Court, in the presence of both parties, within the next twenty one (21) days from the date of this judgment.

Costs

16. Since the Claimant's claim succeeds only in part, I direct that the Respondent pays him half of the costs incurred in this case.

17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Omwenga for the Claimant

Miss Opolo for the Respondent