



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

APPEAL NO. 6 OF 2019

(Formerly HCCA No. 495 of 2011 at Nairobi)

(Being an appeal against the Judgment and decree by Honourable P. Nditika, Senior Resident Magistrate, delivered on 28.09.2011 in Civil Case No. 481 OF 2007 at Nairobi)

MUKAWA (HOTEL) HODINGS LTD T/A THE NAIROBI

SAFARI CLUB.....APPELLANT

-VERSUS-

WILSON CHACHA MUHONO.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The facts of the case are as follows. The respondent was employed by the appellant in 1992. On 07.07.2003 the appellant made a criminal complaint against the respondent – and the respondent’s case is that his employment was terminated on that date. The respondent was locked at the central police station for 7 days and charged with the offence of stealing. The respondent was acquitted on 18.05.2004 under section 202 of the Criminal Procedure Code.

The respondent filed a plaint in the Magistrate’s Court on 29.01.2007 through Achola Jaoko & Company Advocates and alleging that on 07.07.2003 without any justifiable cause the appellant made a malicious and unreasonable complaint to Central Police Station against the respondent for the alleged offence of theft of one litre of sand sealer varnish allegedly valued at Kshs.312.70.

The appellant also filed a preliminary objection on 24. 04.2008 upon the following grounds:

- 1) The Court lacks jurisdiction as the plaintiff was a member of a trade union and subject of the Industrial Court process already concluded.
- 2) Other grounds and reasons to be adduced at the hearing.

A ruling on the preliminary objection was given on 30.05.2008 by E.N.Maina, Senior Principal Magistrate. The Court found that there had been no evidence to show that the plaintiff was bound by the CBA so that the dispute had to go to Industrial Court as a trade dispute. Further, for claims of malicious prosecution and false imprisonment, the same were not time barred because acquittal was on 18.05.2004 and the suit would not be time barred. The ruling appears silent on the objection that the Attorney General was a necessary party to sustain the claims of malicious prosecution and false imprisonment.

The respondent prayed for special damages of Kshs.153, 087.65 under the CBA dated 12.01.1999 and another CBA of 27.10.2004 between the Kenya Association of Hotel Keepers and Caterers and The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers. The respondent further prayed for general damages for the tort of wrongful, malicious and unreasonable arrest, confinement, false imprisonment and prosecution.

The appellant entered appearance on 05.03.2007 and filed a defence the same date through Kelvin Mogeni Advocates. The respondent pleaded that the claim for malicious prosecution, false imprisonment, arrest or confinement of the respondent was bad in law, offended the provisions of the Limitation of Actions Act Cap. 22 and should be dismissed. The appellant further pleaded that the respondent was dismissed on account of gross misconduct as per the Employment Act and the CBA and was not entitled to the remedies as prayed for.

The suit went to full trial and in a judgment delivered on 28.09.2011 the lower Court found as follows:

- 1) Prior to making the report to the Police Station the defendant should have at least verified whether what the plaintiff had furnished belonged to the company and without the complaint the plaintiff would not have been charged. Section 5(4) of Cap. 226 were breached as no notice was given to the plaintiff. Thus, the trial Court found that the plaintiff was entitled to general damages which were awarded at Kshs.300, 000.00 for malicious prosecution.
- 2) The plaintiff was awarded Kshs.153, 087.65 being special damages as prayed for and under the CBA.

The appellant was dissatisfied with the judgment and filed an appeal. The memorandum of appeal was filed on 04.10.2011 and prayed for:

- a) The appeal be allowed.
- b) The judgement and order be set aside.
- c) Judgment entered be substituted with an order dismissing the entire plaintiff's case.
- d) The appellant be awarded the costs of the original case and of the appeal plus interest at Court rates.

There are 6 grounds of appeal namely:

- 1) The learned Magistrate erred in finding that the Appellant was liable for malicious prosecution despite empirical evidence that this was clearly not.
- 2) The learned Magistrate further erred in arriving at a decision that was wholly against the weight of the evidence produced.
- 3) The learned Magistrate erred to appreciate the evidence tendered to show that the appellant merely lodged a complaint and the Hon. Attorney General made the decision to arrest, confine and prosecute the respondent.
- 4) The learned Magistrate failed to find that the claim was time barred.
- 5) The learned Magistrate lacked jurisdiction to award the plaintiff the sum of Kshs. 153, 087 as dues on termination of employment.
- 6) The award of Kshs. 300, 000.00 for general damages was excessive in the circumstances of the case.

Parties filed their respective submissions on the appeal.

The **1st issue** for determination is whether upon the evidence before the trial Court the appellant was liable for the alleged tort of malicious prosecution for which the trial court awarded Kshs.300, 000.00 in general damages. Malicious prosecution occurs where a criminal or civil proceeding is instituted for an improper purpose and without a probable cause. **Black's Law Dictionary 10th Edition** identifies four elements that must be proved:

- a) The initiation or continuation of a law suit.
- b) Lack of probable cause for the law suit's initiation.
- c) Malice.
- d) Favourable termination of the original law suit.

The Court returns that the Honourable trial Court misdirected itself when it implicated the appellant in the alleged malicious prosecution on the ground that the appellant made a report or complaint to the police. It is obvious that a report to the police did not amount to initiation or continuation of the criminal case against the respondent – such a report was not initiation or continuation of a legal proceeding. The Court finds that a legal proceeding, civil or criminal, is initiated through the act of filing the case in court and matters outside the court cannot constitute initiation of a legal prosecution: civil; criminal; or otherwise. The Criminal Case No. 1749 of 2003 in the Chief Magistrate's Court at Nairobi was between **Republic –Versus Wilson Chacha Muhono (the respondent herein) and Another**. It was clearly a public prosecution by the Hon. Attorney General and not a private prosecution by the appellant. The Court returns that upon that finding, there was no evidence that the appellant had initiated and continued the criminal case against the respondent and therefore the appellant could not be liable for the tort of malicious prosecution. Under section 26(3) of the former Constitution of Kenya it was the Hon. Attorney General who had the power to initiate, continue or discontinue such public criminal proceedings.

Accordingly, in the circumstances of the case, it was misconceived that a tort of malicious prosecution would be sustainable without the Attorney General being a defendant to the suit that the respondent filed in the lower Court. The Court finds that even if the complaint by the appellant was one way or the other unfounded, it was the Attorney General by himself or by his agents that had the discretion to initiate, continue or discontinue the public prosecution against the respondent and the appellant as the complainant could not influence the Attorney General's exercise of that discretion to prosecute the respondent. Thus section 26(8) of the former Constitution provided that in the exercise of the power to initiate, continue or discontinue a criminal prosecution, the Attorney General shall not be subject to the direction or control of

any other person or authority.

Thus, the trial Court erred in finding that the appellant was liable for the tort of malicious prosecution. The Court has already found that the ruling on the preliminary objection did not deal and decide that issue of the Attorney General not having been a party to the suit and despite the appellant having raised it before the trial Court so that the Court returns that the *doctrine of res judicata* will not apply as raised for the respondent herein as a bar to this Court deciding the issue. Further the issue is intertwined with re-evaluation of the evidence before the trial Court and the Court finds that there was no evidence that the appellant had initiated and continued (prosecuted) the criminal case against the respondent. Upon that finding the ground of appeal succeeds and the Court will not delve into whether the other 3 elements in a tort of malicious prosecution existed.

The **2nd issue** is whether the Court lacked jurisdiction to determine an employment dispute based on a CBA and therefore amounting to a trade dispute in the exclusive jurisdiction of the Industrial Court at the material time. First the Court finds that the ruling on the preliminary objection found that evidence was necessary to resolve the issue because at that stage, the trial Court had no benefit of the CBA and whether it applied. The special damages were awarded in the trial Court's judgment as prayed for and as based on the 2 collective agreements referred to in the plaint. Once again, the ruling having not conclusively decided the issue, the appellant cannot be barred from raising it by reason of *res judicata* as was urged for the respondent herein. In any event, such ruling even if it had resolved the issue in favour of the respondent would not thereby create jurisdiction where none had been granted by the Constitution or statute so that the appellant would urge that the judgment was a nullity upon the authority of **Owners of Motor Vessel "Lilian S" –Versus- Caltex Oil (Kenya) Ltd (1989)KLR1** thus, **"...A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."** The respondent confirmed that he was a member of the trade union and the CBA applied.

As submitted for the respondent the Employment Act, 2007 was enacted on 22.10.2007 and came into operation on 02.06.2008 so that it did not apply to the current cause of action. As at the time of the cause of action the Trade Disputes Act Cap. 234 (now repealed) applied. Part II provided for reporting, conciliation and investigation of trade disputes including those about dismissal. The definition of a trade dispute in section 2 of the act included a dispute about dismissal like in the instant case. Section 4 (5) of the Act provided that an appeal against the decision of the Minister in relation to trade disputes shall lie to the Industrial Court. Under section 8 thereof a trade dispute which was not settled would be referred to the Industrial Court. Section 14 of the Act provided for the establishment of the Industrial Court for the settlement of trade disputes and related matters. Accordingly, the Court returns that the Industrial Court and not the trial Court herein had the necessary jurisdiction to hear and decide the trade dispute relating to the respondent's dismissal. The respondent has not established a statutory provision under which the trial Court herein could have acquired the jurisdiction and the evidence was that the respondent failed to invoke the provisions of the Trade Disputes Act (repealed). The ground of appeal will similarly succeed.

To answer the **3rd issue** for determination the Court returns that the appeal will therefore succeed and the prayers issue as prayed for.

In conclusion judgment is hereby entered for the appellant against the respondent with orders:

- a) The appeal is allowed.
- b) The judgement and decree by the trial Court and all consequential process flowing thereof is set aside.
- c) Judgment entered by the trial Court is hereby substituted with an order dismissing the entire plaintiff's case.
- d) The appellant is awarded the costs of the original case and of the appeal.

Signed, dated and delivered in court at **Nairobi** this **Friday, 1st November, 2019.**

BYRAM ONGAYA

JUDGE