



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 29 OF 2018

(Being an Appeal from the judgment of the Hon. J.M Njoroge, Senior Principal Magistrate

delivered in Kisii on 30th day of June, 2016 in Kisii CMC NO. 65 OF 2011)

(Before Hon. Justice Mathews N. Nduma)

CHARLES CORRIS MOMANYI.....APPELLANT

VERSUS

B.O.G NYABURURU GIRLS HIGH SCHOOL.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF EDUCATION.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of J.M. Njoroge SPM Kisii delivered on 30th June 2016. The learned Magistrate dismissed the suit for malicious prosecution and unlawful dismissal from employment by the Appellant and equally dismissed a counter claim by the respondent's employer for payment of monies allegedly misappropriated by the appellant in the course of his employment as the school Bursar.

2. The grounds of Appeal are set out in the memorandum of Appeal filed by the Appellant on 1st August 2016 and the grounds of Appeal may be summarized as follows:

(a) The learned magistrate erred in law and fact by failing to find that the Appellant had proved his case on a balance of probabilities.

(b) The learned magistrate erred in misapplying the law applicable to the present case.

3. The learned magistrate recorded the proceedings in a manner not legible and only understood by himself thereby occasioning a mistrial. The Appellant prays for orders:

(a) Setting aside the judgment of the trial magistrate and enter a finding that the claimant had proved his case on a balance of probabilities.

(b) That the honourable court assess the damages payable to the Appellant.

(c) In the alternative, the court declare that due to illegible and incoherent proceedings, there was mistrial and direct the suit be heard afresh before another magistrate except J.M. Njoroge on priority basis.

Determination

4. Following the *Locus Classicus* in handling of first Appeals, ***Selle and another vs Associated Motor Boat Company Limited and others (1968) EA***. The court has proceeded to consider the pleadings and evidence placed before the trial magistrate and has assessed the same

afresh bearing in mind that the appeal Court did not have the advantage of hearing the witnesses and evaluating their credibility.

5. In this regard, the court has noted the complaint that the proceedings were not properly recorded by the learned trial magistrate. The court has carefully perused the entire record and considered the same and has come to the conclusion that the learned trial magistrate properly captured the evidence by PW1 and DW1, DW2 and DW3 whose evidence comprise the full hearing of the case. The pleadings and the exhibits in the suit were elegantly preserved and the typed proceedings were certified to be a proper record of the trial court by the relevant officer at the magistrate court.

6. The court therefore dismisses the complaint that the proceedings of the trial court are not proper and dismisses the prayer by the Appellant to declare a mistrial. The court therefore finds no reason to remit this matter back to the magistrate court for retrial.

7. Having found the above, the court proceeds to consider the main complaint by the Appellant that the finding by the trial magistrate went against the grain of evidence adduced before the trial court and that the learned trial magistrate misdirected himself in law and fact in finding that the Appellant had not proved his case on a balance of probabilities.

8. From the record, evidence by PW1 (The Appellant herein) was that he was employed by the 1st respondent as the bursar of the school. That he served the school diligently by collecting school fees and other monies paid to the school, kept the records and did banking as was required of him. That other persons including the Principal of the school also collected funds and so though it was true the school had lost funds estimated at Kshs. 1,214,079, the loss could not be attributed to him. PW1 testified that he was maliciously arrested, charged and prosecuted by the police before a Principal Magistrate Court with the theft of school funds. That the said arrest, charge and prosecution was maliciously instigated by the 1st respondent. That the fact that the Appellant was found not guilty and acquitted by the trial magistrate was proof of such malice on the part of the 1st respondent in unlawfully causing PW1 to be falsely prosecuted by the police. That PW1 had suffered loss and damage and that the court should award him damages for the malicious prosecution and also grant him compensation for the unlawful dismissal from employment and direct that he be paid terminal benefits set out in the plaint with interest and costs of the suit. PW1 conceded that the trial magistrate in the criminal case, observed that it was probable that PW1 was involved in the loss of school funds but PW1 had created sufficient doubt to warrant his acquittal since the case had not been proved beyond reasonable doubt.

9. The evidence by DW1, DW2 and DW3 was to the effect that PW1 was the school bursar. That he had been imposed on the board of governors by the 2nd respondent, the Ministry of Education and so they were not sure of his qualifications and competence as the school bursar. That whilst PW1 was the school bursar and therefore the collector and custodian of school funds, the school lost about Kshs. 1,214,079 according to the school audit report. That PW1 was summoned by the Board of governors to explain the loss. That the explanation by PW1 was not satisfactory and the Board of Governors dismissed PW1 from his employment as the school bursar. The further testimony by these witnesses is that following the investigations and the Audit report, PW1 was lawfully arrested, charged and prosecuted by the Kenya Police with the theft of school funds. That the report to the police and subsequent prosecution was not instigated by malice since the school had lost large sums of money under the watch of PW1. The further testimony by the witnesses for the respondents is that though the claimant was acquitted by the magistrate in the criminal trial he was not wholly exonerated from possible involvement in the loss of the money. That the criminal court gave PW1 the benefit of doubt but that could not prevent the 1st respondent from instituting disciplinary proceedings against PW1 for the loss of the school funds under his watch. That the 1st respondent had filed a counter claim against PW1 for the lost funds in the sum of Kshs. 1,214,079. That the suit by the PW1 lacked merit, the same was properly dismissed by the trial magistrate and the appeal lacks merit and it be dismissed with costs.

Determination

10. The court has carefully analyzed the competing evidence adduced by PW1 *vis a vis* that adduced by DW1, DW2 and DW3. The court has also carefully studied the judgment by the trial magistrate and has arrived at the conclusion that the learned trial magistrate, though in not a very elegant manner, captured the essence of the evidence placed before court and arrived at the correct finding of fact and law that the Appellant though acquitted by the criminal court of the charge of theft of school funds had misconducted himself in the course of employment by causing the 1st respondent loss of school funds under his watch as the school bursar.

11. The magistrate equally arrived at the correct verdict that the 1st respondent did not breach rules of natural justice since the board of governors had given the Appellant opportunity to be heard in a disciplinary hearing and the 1st respondent was entitled to the decision it arrived at. That the explanation by the appellant regarding the lost funds was not satisfactory and that this constituted a valid and lawful reason for the dismissal of the appellant from the employment of the 1st respondent as the school bursar. This court has also arrived at the same finding having carefully analyzed the evidence placed before the trial court and which comprises part of the Appeal record before court

12. This court is equally satisfied by the finding by the trial magistrate that the 1st respondent had not sufficiently proved the counter claim against PW1 even though the 1st respondent did not file a cross appeal before this court.

13. Accordingly, the court finds that the Appeal lacks merit in its entirety and upholds the judgment of the trial magistrate delivered on 30th June 2016 dismissing the entire suit by the appellant and the counter claim by the respondent.

14. Each party to bear their own costs of the suit before the trial magistrate and the Appeal Court.

Judgment Dated, Signed and delivered this 5th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Aboki Begi and company Advocates for the Appellant.

Kimanga and Company Advocates for the Respondent.

Litigation Counsel for Hon. Attorney General.

Chrispo – Court Clerk