



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 445 OF 2015**

**OMINGO ANARY.....CLAIMANT**

**VERSUS**

**BEACH SAND SUN LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant brought this suit on 30.6.2010 before the chief Magistrates court at Kwale alleging that he had been defamed, falsely imprisoned, maliciously prosecuted and his employment contract breached and wrongfully terminated by the Respondent. He therefore sought to recover Special damages as well as compensation for defamation and unlawful termination of his employment. The suit was later transferred to this court and amended to conform to the rules of procedure of this court.

2. The Respondents denied the alleged tort of defamation, false imprisonment and malicious prosecution and aver that the claimant was suspected to have written a life-threatening letter to the second respondent on 3.3.2008 and after investigations he was found culpable and charged. They denied that the claimant suffered any injury to his reputation and as such, he is not entitled to compensation. They further denied the alleged termination and averred that the termination was lawfully done on account of gross misconduct. They therefore prayed for the suit to be dismissed with costs.

3. The suit came up for hearing on 6.11.2017 the Claimant testified as CW1 but the respondent did not attend court to defend the suit. After the hearing both parties filed written submissions, which I have carefully considered herein.

**Claimant's Case**

4. CW1 testified that he was employed by the respondent on 1.5.2006 as a Barman for Kshs.10000 per month which was later increased to Kshs. 11000. On 5.3.2008, he was arrested on allegation that he had written a letter threatening to poison the second respondent and his family. The second respondent was the General Manager of the first respondent. The police were called to arrest him by the third respondent who was the director of the first respondent. Thereafter the Claimant was charged and prosecuted for 2 years in Criminal case No. 374 of 2008 but in the end he was acquitted. He immediately reported to back to work but he was told by the third respondent to go away.

5. Aggrieved by the turn of events, Cw1 instructed counsel to serve demand letter but the respondents Respondent through their lawyers denying liability and alleging that it is him who had deserted employment and they did not know his whereabouts. The Claimant however explained that the second and the third Respondents were prosecution witnesses in the said case. He therefore brought this suit praying for his salary for the years he was being prosecuted, service charge for the same period, leave for 2007/2008, 8 public holidays worked, salary in lieu of notice plus costs and interest.

**Analysis and Determination**

6. After careful consideration of the evidence and the submissions presented to the Court, it is not in dispute that the Claimant was employed by the first Respondent as he alleges. The foregoing finding is fortified by the Appointment Letter and Pay advice produced as exhibits by the Claimant herein. There is also no dispute that the Claimant was arrested on allegation of threat to kill his senior and thereafter charged with criminal case no. 374 of 2008 on 17.3.2008 but which ended with his acquittal in February 2010. Finally, it is without dispute that after the acquittal, the Claimant reported back to work with a copy of the Judgment but the third respondent told him to go away because had been summarily dismissed on 18.3.2008 . The issues for determination are:

- a) Whether the Respondents defamed, falsely imprisoned and maliciously prosecuted the Claimant;

b) Whether the Respondent wrongfully and unlawful terminated the Claimant's contract of service; and

c) Whether the Claimant is entitled to the reliefs sought.

**Defamation, false imprisonment and malicious prosecution**

7. After careful consideration of the evidence and submissions by the both parties, nothing was said to prosecute the tort of defamation, false imprisonment and malicious prosecution and those claims stands dismissed. Even if anything was said to prosecute the tort of false imprisonment and malicious prosecution, I would still find and hold that the Claimant did prove that it was the Respondents herein who made the decision to arrest and charge him and thereafter carried out his prosecution. Such decision to arrest and charge and prosecute most likely was done by persons who are not parties to this suit including the police and the office of the Director of Public Prosecution.

**Unlawful termination**

8. The claimant has not pleaded the date when his employment was terminated by the respondents. He has however produced a letter from the respondents' lawyer dated 16.3.2010 stating that the claimant was summarily dismissed on 18.3.2008 for misconduct he allegedly committed which led to him being arrested and charged in court. The letter further stated that the claimant never returned to work again, even to collect his terminal dues, and his whereabouts was unknown to the respondents. Finally, the letter invited him to collect his final dues as soon as possible. However the claimant never went for the final dues and instead he brought this suit.

9. In view of the said letter by the respondents' lawyers, the dispute herein squarely subjected to the provisions of the repealed Employment Act, which was in force in March 2008. The said Act never provided for mandatory hearing of the employee before dismissing him for misconduct. Once the dismissed the employee was only entitled to sue the employer to dispute the validity of that the reason for the dismissal. If the court agreed with the employee, the employer was ordered to pay salary in lieu of notice. In this case, the reason for termination was that the claimant had committed a criminal offence against the employer but after the trial he was found innocent and acquitted. I flowing from the said acquittal, find and hold that the claimant has proved on a balance of probability that, he was wrongfully and unlawfully dismissed because the summary dismissal was based on an invalid and unjustified reason.

**Reliefs**

10. The claim for general damages for defamation is dismissed for the reason that the claimant never adduced any evidence to prove the tort.

11. Likewise, the claim for gratuity is dismissed for lack of evidence. The claim for service charge and salary for March 2008- February 2010 is dismissed, save for the 18 days worked in March 2008, because the claimant's employment was dismissed from employment on 18.3.2008. He will therefore get Kshs. 7,615.40.

12. The claim for leave for one year and 8 public holidays worked is dismissed for want particulars and evidence. The claim for travelling allowance is also dismissed for want of particulars and evidence.

**Disposition**

13. For the reasons stated above the suit is dismissed. Save for the award of Kshs. 7,615.40 plus interest from the date filing suit. Each party to bear its costs

**Dated and signed at Nairobi this 23rd day of February, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 2nd day of March, 2018**

**LINNET NDOLO**

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**JUDGE**