



REPUBLIC OF KENYA

THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 1902 OF 2015

(FORMERLY HIGH COURT CIVIL SUIT NO. 856 OF 2005)

(Before Hon. Justice Hellen S. Wasilwa on 13th December, 2018)

DANIEL MUNGAI KARANJA.....CLAIMANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL....1ST RESPONDENT

STANDARD CHARTERED BANK LIMITED.....2ND RESPONDENT

JUDGMENT

1. The Claimant herein filed a Complaint dated 7th July 2005 and a subsequent Amended Complaint dated 5th June 2006 and filed on 9th June 2006, where he stated that he was wrongfully dismissed and he sought the following prayers:

a. Special Damages – Kshs. 200,000/=;

b. General damages for malicious prosecution, defamation, mental and psychological anguish and the subsequent loss of future earnings in the 1st Defendant;

c. General damages for illegal detention;

d. General damages for wrongful dismissal;

e. Terminal benefits;

f. Costs and interest on a, b, c and d at Court rates; and

g. Any other relief that this Honourable Court may deem fit and just to grant.

Facts of the suit

2. CW1 Daniel Mungai Karanja testified that he was employed by the 2nd Respondent and served as a Tick Back Clerk, where he worked for 9 years until 2002.

3. Further, he stated that in the course of duty he came across documents which he suspected to be fraudulent and reported the same to his manager Mr. Oduor. By then, the documents had not been posted but it was insisted that they should be posted. The documents were finally posted by Flora Mwarania who was a clerk.

4. After investigation of the document, the Claimant was arrested and kept in some office for 9 days. On 9th August 2002, he was taken to Kileleshwa Police Station where he was detained for a week before being arraigned in Nairobi Chief Magistrate's Court and charged with 4 counts namely:

a. Fraudulent false accounting contrary to section 330 (b) of the Penal Code, count I and II;

b. Stealing contrary to section 275 of the Penal Code, counts III to IV.

5. He was further remanded in Industrial Area Remand Prison for four days before he was able to raise the bond. CW1 testified that he was later acquitted under section 210 of the Criminal Procedure Code on 11th April 2004.
6. During trial, CW1 stated that he was a member of BIFU which had a CBA with the 2nd Respondent. According to the CBA, before termination, there were conditions, which were to be met under Clause B, but these were not met. He avers that he was not warned before dismissal.
7. He further stated that under Clause A5, the grounds for termination were listed. According to him, the grounds did not apply to him because he was acquitted from the alleged offence. He further stated that he was not given any termination notice and was only issued with a sacking letter together with KShs. 53,000/=.
8. The Claimant in his Complaint avers that he suffered severe mental torture and anguish especially because the alleged crime was published in the Daily Nation on two different days namely: Saturday 17th August 2002 and Tuesday 27th August 2002. The Claimant avers that the newspaper articles were taken to mean that he was a liar, a thief, dishonest, corrupt, evil, unreliable, untrustworthy and a fraudulent person.
9. Further, the Claimant avers that the contents of the aforesaid articles prompted and guided the 2nd Respondent's complaints against the Claimant which were taken to mean that the Claimant was a liar, a thief, dishonest, corrupt, evil, unreliable and a fraudulent person. However, the Claimant avers that the words as published in the Daily Nation were false, baseless, malicious and calculated to tarnish the Plaintiff's character.
10. The Claimant avers that as a result of the arrest, defamation and prosecution, his employment with the 2nd Defendant was terminated summarily and without any notice vide the letter dated 2nd August 2002. Prior to the dismissal, the Claimant used to earn a gross salary of KShs. 53,000/=.
11. The Claimant avers that he was only 34 years old and would have worked as a banker until the retirement age of 55 years. Further, he suffered severe shame and psychological torture as his wife deserted the matrimonial home and his children were mocked and humiliated in the society. In addition to this, he lost the prestigious position he used to hold as an official in charge of youth affairs of the Liberal Democratic Party and as a delegate for Standard Chartered Bank in Kenya and Bankers Sacco, Secretary Kenya Bankers Nairobi Branch and the Director of Elections in Kenya Bankers Sacco. The Claimant also avers that he has never gotten another job to date.

The Response

12. On 29th July 2005 and 3rd June 2008, the 2nd Respondent filed its Statement of Defence dated 27th July 2005 and Amended Statement of Defence dated 30th May 2008 respectively. The Respondent denied that its actions prompted the Daily Nation Newspaper or any other media house to publish the articles complained of in the Complaint.
13. The 2nd Respondent further averred that the publication in the Daily Nation Newspaper was privileged, justified and/or fair comment on the proceedings as they transpired in Court on the days cited in the articles.
14. The 2nd Respondent further averred that it made a complaint to the police with utmost good faith and on reasonable and probable cause that an offence had been committed. In addition, in Kenya it was mandatory that fraud in any bank be reported to the Kenya Police, Anti-Fraud Unit for investigations. As such, if the Claimant was arrested, then the arrest was made by Kenya Police Anti-Fraud unit and on reasonable grounds and which the 2nd Respondent had no control over.
15. The 2nd Respondent's witness, Mercy Nyawade in her witness statement dated 15th May 2015 explained the role of a tick back clerk as that which involved validating items which had been entered into various customer accounts to ensure that the correct amounts have been debited and credited.
16. She further stated that the fraud was discovered on 31st July 2002 when the Head of Technology and Operations Mr. Kamau reported to her that vouchers for USD 120,120/= had allegedly been found unposted. The Vouchers appeared to be from the Bank's International Payment Department but when they were queried, they denied knowledge of the vouchers. The Claimant was suspected to be involved as follows:-
 - a. He alleged that he found an unposted entry. He could have been the one who put the entry among his posted batches. He was therefore a suspect together with other persons who processed such as: Solomon Atela and Lawrence Manoa who did not take action to detect the fraud yet they could have with reasonable diligence. Therefore, they were also suspects.***
 - b. When the Claimant was asked to give an explanation, he craftily acted as if he had found the unposted document.***
17. Other parties who were allegedly involved in the fraud were: Joseph Maina Kangara and Francis Kipkirui Moso.
18. RW1 Christopher, testified that in July 2002 a report was made about fraudulent transactions in Telesem's account for the amount of USD 120,120. The sum was to be debited from Aga Khan Foundation. Enquiries were made to Aga Khan Foundation and they denied having knowledge of any transaction. He claimed that the payment of USD 120120 was introduced in the bank by the Claimant. An investigation was conducted and several staff members were interviewed and recorded statements. The investigation report found that the Claimant was

the suspect. RW1 conceded to the fact that he was not aware of whether Flora Mwarania had been charged or whether the Claimant had been granted a fair hearing.

19. The 2nd Respondent admitted to terminating the Claimant's employment on 2nd August 2002 but denied that the termination was unlawful, malicious and without justification. In addition, the termination was because the Claimant failed to perform his duties according to expectations and allowing loopholes and irregularities in the area of his control as a result of which the Bank lost confidence in him.

20. The 2nd Respondent further averred that it was under no obligation to continue employing the Claimant and was at liberty to terminate his services at any time upon giving notice or payment of one-month's salary in lieu of notice. The 2nd Respondent also stated that the skills acquired by the Claimant in the course of his employment were not unique to the 2nd Respondent only or to the Banking industry and the Claimant could as well source for jobs elsewhere.

21. The 2nd Respondent's witness Mercy Nyawade, in her witness statement, admits that she was aware that the Claimant had been acquitted, but it was because the Prosecution had failed to avail witnesses and as such was ordered by the Court to close its case.

Claimant's Submissions

22. The Claimant in his submissions dated 22nd October 2018 submits that the 2nd Respondent not only failed to give the Claimant his right of being heard but also failed to consider the fact that he had been acquitted of all charges against him. The fact that a suspension letter was issued to the Claimant after he was released is in itself suspect and is a clear violation of the Claimant's rights. The Claimant further submits that his right to fair administrative action under **Article 47 of the Constitution** was violated.

23. The Claimant submits that an essential rule of natural justice is the right to be heard. He relies on the case of **David Onyango vs. Attorney General – Civil Appeal No. 152 of 1986** where Nyarangi JA stated that:-

“I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which would affect others to acted (sic) substantively and arbitrarily. A decision in breach of the rules of natural justices (sic) is not cured by holding that the decision would otherwise have been right if the principal of natural justice is violated it matters not that the same decision would have been arrived at.”

24. The Claimant therefore submits that the 2nd Respondent should have:-

- a. Informed him of the offence he is alleged to have committed and the particulars thereof, in a language he understands;***
- b. Offered him the opportunity to be heard or provide ample time to submit a reply;***
- c. Informed him of the decision within ample time.***

25. The Claimant submits that **the Constitution** grants an individual the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations which is the equivalent to natural justice. The rules of natural justice and rules of procedure only require:-

- a. A hearing;***
- b. Unbiased adjudication; and***
- c. A fair procedure.***

26. The Claimant further submits that the Respondent flouted those principles and its actions were gravely impaired by bad faith and cannot stand. Although the 2nd Respondent had power to hire and fire, such powers must be exercised according to the law. As such the Claimant urges the Court to make a finding that the Claimant's termination was wrongful and unfair both procedurally and substantively and award him terminal benefits as prayed in the Statement of Claim which include:-

- a. Special damages.***

27. The Claimant paid his advocates a sum of KShs. 200,000/= to represent him in ***Criminal Case No. 2214 of 2002 – Nairobi.***

- b. General damages for malicious prosecution, illegal detention, mental and psychological anguish.***

28. The Claimant was maliciously prosecuted by the Respondents although there was no sufficient evidence to support the alleged fraud. The police did a shoddy job on the instructions of the 2nd Respondent and as a result the Claimant was subjected to untold suffering. The Claimant relies on **Civil Suit No. 578 of 2012 Joseph Wamoto Karani vs. C. Dorman Limited & Another** where the Honourable Lady Justice Aburili held that:-

“Taking into account all the circumstances of this case.... I award the plaintiff a global sum of KShs. 2,000,000.00 general damages for malicious prosecution.”

c. Loss of future earnings.

29. The Claimant submits that he lost his employment at the prime of his life. He has never secured employment since the wrongful dismissal and urges this Honourable court to award him damages for loss of future earnings.

d. General damages for illegal detention

30. The 2nd Respondent illegally detained the Claimant for a period of 9 days and upon the expiry of the said period, the Claimant was further arrested and detained at the Kileleshwa Police Station. The Claimant urges the Court to consider awarding him damages for illegal detention. The Claimant urges the Court to be guided by *Civil Suit No. 578 of 2012 Joseph Wamoto Karani vs. C. Dorman Limited & Another.*

e. Salary in lieu of notice

31. The Claimant was never issued with a notice for the termination of his employment and the same should be awarded.

f. General damages for wrongful dismissal

32. The Claimant submits that the termination was founded on malice and as such the dismissal was wrongful and therefore the Claimant is entitled to general damages for wrongful dismissal.

g. Terminal benefits

33. The Claimant submits that at the time of termination the Claimant had worked for the 2nd Respondent for 9 years and had expected to work until the attainment of a mandatory age. However, since the 2nd Respondent terminated his employment arbitrarily, he should be compensated by way of terminal benefits.

h. Reinstatement or any other relief deemed fit by this Honourable Court.

34. The Claimant submits that he would love to have his work back despite the lapse in time. The Claimant relies on **Section 49 of the Employment Act**, which gives the Labour Officer powers to reinstate an employee where he is of the opinion that the termination or dismissal of the employee is unfair. He further relied on *Industrial Court Case No. 509 of 2012 Edgar Ndemo Momanyi vs. Catering & Tourism Development Levy Trustees* where the Honourable Lady Justice Maureen Onyango held that :

“I have considered the Claimant’s length of service, the fact that he had a clean record and find that the only remedy in this case is reinstatement.

i. Costs and Interests of this Claim

Respondent’s submissions

35. The 1st Respondent submitted that the Claimant was detained for a lawful cause so that the police could proceed with their investigation and they found the Claimant culpable.

36. The 2nd Respondent in its submissions dated 30th November 2018 submits that the matter was initially filed in the High Court and transferred to the Employment and Labour Relations Court on 14th October 2015 and directions taken 18th November 2015. During the directions, parties agreed to proceed with the pleadings, documents and witness statements as previously filed in the High Court.

37. The Claimant further submits that the 1st Respondent raised a preliminary objection on the issue of defamation and the Court delivered a Ruling on 1st April 2016 striking out the claim for defamation.

38. The 2nd Respondent further submits that the Claimant has failed to prove any of the particulars stated in the Complaint and has in any case failed to prove on a balance of probability that he was illegally arrested and detained.

39. Further, the Claimant’s arrest was by the police and not the 2nd Respondent and that upon making a complaint to the police on the suspected fraud, the responsibility of setting the law in motion was on the banking fraud unit. The 2nd Respondent relies on the case of *Douglas Odhiambo Apel and Another vs. Telkom Kenya Limited & 2 Others [2006] eKLR* where P. Kihara J (as he then was) stated as follows:-

“The Plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney-General as the public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the Plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya made a complaint to the police, it was left to the police to investigate the complaint and decide whether or not to charge the Plaintiffs.”

40. The 2nd Respondent further relies on the case of *Catherine Wanjiku Kariuki vs. Attorney General & Another [2011] eKLR* in which H.P.G. Waweru J. stated that:-

“It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground, to have been committed, or being committed, or about to be committed. Once the civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion The further role of any person making the initial report or complaint to the police can only be that of a witness.”

41. The 2nd Respondent submits that the Claimant’s claim that he was detained for 9 days by the 2nd Respondent, does not meet the threshold required for the tort of false arrest/detention.

42. The 2nd Respondent submits that the Claimant was reporting to work and being placed in a designated area. The 2nd Respondent relies on the case of *Daniel Waweru Njoroge & 17 Others vs. Attorney General [2015] eKLR* where Mativo J. considered the meaning of false imprisonment to include the following:-

- a. There must be... unlawful restraint of a person’s liberty or freedom of movement.
- b. That detention needs not be forceful...;
- c. Detention must be total...;
- d. Detention must be for an appreciable time, however short...;
- e. The detention must be unlawful and must be against the Plaintiff’s will;
- f. Malice is not an ingredient in the tort of false arrest.

43. On the issue of malicious prosecution, the 2nd Respondent submits that it merely made a report to the police on a situation involving fraud, which report was a true report of the facts as they existed at that point. The 2nd Respondent relies on the case of *Catherine Wanjiku (Supra)* where it was stated that all citizens have a duty to report any crime they suspect to have occurred on reasonable grounds.

44. The 2nd Respondent further submits that in pleading malice, the Claimant failed to comply with the provisions of ***Order 2 Rule 10 (b) of the Civil Procedure Rules*** since he failed to give the particulars of the names of person(s) to whom such malice is attributed. In the case of *M’Mbwiria M’arachi vs. M’Mukiri M’arimi & 3 Others [2009] eKLR* the Court stated that:-

“Malice means in law wrongful intention. It includes any intent which the law deems wrongful and therefore serves as ground of liability.”

45. The Claimant thus failed to demonstrate that any of the 2nd Respondent’s officers had any wrongful and malicious intention while reporting the possible fraud to the police. Further, the prosecution was for reasonable cause. The 2nd Respondent further relied on the case of *M’Mbwiria M’arachi (Supra)* where the court defined probable cause as:

“A reasonable amount of suspicion supported by circumstances sufficiently strong to justify a prudent and cautious person’s belief that certain facts are probably true.”

46. The 2nd Respondent further submits that an acquittal of the Claimant did not connote malice. Further, even though the prosecution was terminated in favour of the Claimant, the conduct of the prosecution solely lay in the power of the police, the prosecution and the presiding Magistrate. The Respondent’s witnesses were bonded to testify and as such had an obligation to do so, which they did without malice.

47. On the issue of summary dismissal, the 2nd Respondent submits that the Claimant was summarily dismissed by a letter dated 8th August 2002, which letter the Claimant refused to acknowledge receipt on 9th August 2002 as indicated at the bottom of the letter. The Claimant’s termination was preceded by an investigation conducted by the 2nd Respondent. The 2nd Respondent further submits that the Contract of Employment made provisions for summary dismissal and the Respondent was therefore justified in relying on those terms.

48. On the issue of loss of future earnings and terminal benefits the 2nd Respondent submits that there is no legal basis for such an award made in an employment dispute and employment contracts provide for exit from the contract and the Claimants contract therefore could be terminated prematurely.

49. It is therefore the Respondents submission that the Claimant’s suit is misconceived and should be dismissed with costs.

50. I have examined all evidence and submissions of the parties herein. From the evidence herein, the Claimant was summarily dismissed from the bank on 8/8/2012. The letter terminating his services did not set out the reasons for the summary dismissal.

51. Given that there were reasons assigned to the termination, it is not possible to assign whether the reasons of the dismissal or termination fall under the ambit of the actions or omissions of summary dismissal as envisaged under the law.

52. Further, there is no indication that the Claimant was accorded any fair hearing according to rules of natural justice and according to the Collective Bargaining Agreement between the 1st Respondent and Claimant's union. In the circumstances, the termination of the Claimant was unfair and unjustified.

53. The Claimant was indeed arrested and charged in Court with an offence of stealing and fraudulent accounting. There is evidence that the Claimant was acquitted under Section 210 of CPC. That notwithstanding, the Claimant was acquitted because there was no evidence adduced against him in the criminal case. He told Court that he was a Tick Back Clerk and his work was to basically tick and check what he had been posted.

54. He was not the originator of the documents that he found to be fraudulent. In the circumstances, he had not stolen anything or fraudulently accounted any documents. It was thus a case of poor investigation or no investigation for the police to charge him as they did. The act by the police was therefore malicious and indeed this subjected the Claimant to ridicule.

55. As pointed out in **Catherine Wanjiku Kariuki vs A.G and Another (2011) eKLR** – (supra), the 1st Respondent may have made a report to the police, but the police had a duty to carry out their independent investigation and arrive at their own conclusion. The 2nd Respondent is therefore not to blame for the action of the 1st Respondent in charging the Claimant on false charges.

56. I therefore agree with the Claimant that he was not only unfairly terminated/dismissed, but was also maliciously charged and detained. I therefore, find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 53,000/=.

2. 8 months' salary as compensation for unlawful termination = 8 x 53,000/= = 424,000/= .

3. Special damages of 200,000/= paid to the Claimant's counsel during the criminal hearing.

4. General damages for malicious prosecution and detention, mental and psychological anguish – 3 million.

1st and 2nd above be paid by the 2nd Respondent

3rd and 4th above be paid by the 1st Respondent

5. The Claimant should also be issued with a certificate of service by 2nd Respondent.

6. The Respondents will bear costs of this suit and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **13th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Masese for Claimant – Present

Oyugi for 1st Respondent – Present

Okeyo holding brief for Orego for 2nd Respondent – Present