



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 627 OF 2016

(Formerly NAIROBI HCC 191 OF 2006)

DANIEL ODHIAMBO AWINDE.....1ST CLAIMANT

MARGARET WANGARI WAINAINA.....2ND CLAIMANT

VERSUS

KENYA WILDLIFE SERVICES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

Mr. Njaramba for claimants

Mr. Lutta for 1st respondent

M/s Oyugi for 2nd respondent

JUDGMENT

1. The 1st and 2nd claimants seek damages for alleged unlawful and unfair termination of employment and in respect of malicious prosecution at the behest of the respondents.

Facts of the Case

2. The first claimant, Daniel Awinde was employed by the 1st respondent as a ranger. He gave evidence that he was suspended by the 1st respondent on 26th January 2000 on allegations of fraud.

3. He further testified that they were arraigned in the Anti-Corruption Court. However, the trial never materialized as the investigating body, the then Kenya Anti-Corruption Authority (KACA) was dissolved. They were released only to be arrested in the precincts of the court.

4. The 1st claimant further testified that he was removed from service via a letter dated 8th May 2000. He testified that his removal was unprocedural as he was not accorded a hearing nor was he taken through disciplinary process that is stipulated in the Kenya Wildlife Service (Armed Wing) Disciplinary Code. On cross-examination, he admitted that he did not appeal his removal since there were no formal proceedings to appeal against.

5. He was later paid his terminal dues and salary arrears and therefore he has no claim in that regard whatsoever.
6. He further claims that he was charged with theft by servant alongside nine others in 2001 in Kibera Criminal Case No. 5584 of 2001. He was acquitted in 2005 while two of the accused persons were convicted. He insisted that he was innocent and if he had been involved in the theft, he would be serving a jail sentence.
7. The particulars of the criminal charges were that he helped fill payment vouchers that were eventually used to defraud the 1st respondent. He testified that he filled the vouchers out of good faith, as some of the rangers were illiterate. During re-examination, he made it clear that he only assisted in filling the vouchers otherwise the rangers collected money themselves as one had to identify himself by producing his Identify Card for him to receive payment from the cashier. The 1st claimant confirmed that he was not involved with making payments, that was the work of the cashiers who were convicted in the criminal case.
8. He also testified that he incurred expenses in defending himself in the aforesaid criminal cases as he had hired an advocate. He however admitted to have misplaced the receipts, which were issued over 10 years ago.
9. He also testified that the actions of the respondents caused him and his family untold suffering. His family was kicked out of the servant quarters while he was still in remand. He tried to seek for an injunction order to stop the eviction vide CMCC No. 10102 of 2000 which matter did go for full trial as it was dismissed for want of prosecution as he was unable to facilitate because he was in remand. His son had also just begun his studies abroad and they were adversely affected by the respondents' unlawful actions.
10. The 1st claimant also experienced character assassination by virtue of the criminal charges and this occasioned him irreparable damage. He spent a period of over five years appearing in court on charges which were hardly investigated by the 2nd respondent's servants. He suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence. There are no hard and fast rules to prove that the claimant's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the respondent's conduct. A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible.
11. He requested for special damages enumerated in the plaint as well as damages for unfair termination and malicious prosecution.
12. The 2nd claimant, Margaret Wainana also testified. She was hired by the 1st respondent in 1992 as a Clerical Officer and later promoted to Accounts Assistant in 1995. Among her duties were making entries in the vote book which are later forwarded to the cash office.
13. She testified that she was suspended on 26th January 2000 pending investigations on the allegations of fraud. She was terminated on 14th April 2000. No notice of termination was given as per her contract of employment. Her terminal dues were paid later as well as salary arrears and she does not claim them.
14. She also testified that her termination was unprocedural and unfair. No disciplinary proceedings were conducted. She was not given a chance to make a representation nor did she defend herself against the allegations.
15. She was also arrested, charged with fraud by KACA, dismissed before trial when KACA was disbanded, rearrested and charged with theft by servant in Kibera Criminal Case No. 5584 of 2001. She was acquitted alongside the 1st claimant.

16. She testified that the prosecution was malicious and unlawful. She testified that after making entry into the vote book, the accounts examiners were the ones who were to verify the validity of the vouchers and after being satisfied that they are correct, authorize payment by the cashier. She testified that it was indeed the cashiers who were found guilty in the criminal case. She did not participate in the crime and that is why she was acquitted. During reexamination, she confirmed that her action of making entries in the vote book was not final and that the vote book passed through the accounts for verification before being paid by the cashier. She confirmed she was not involved with making payments at all.

17. She testified that the unfair termination and malicious prosecution caused her a lot of pain and suffering. At the point of her re-arrest, she was nursing a newborn baby such that when she was taken to Lang'ata Women's Prison, she was released on free bond due to her condition. The 2nd claimant also experience character assassination by virtue of the criminal charges. She spent a period of over five years appearing in court on charges which were hardly investigated by the 2nd respondent's servants. She suffered the indignity and humiliation. She is also entitled to recover damages for injuries to her feelings especially the possibility of serving a sentence.

18. She asked the court to grant her special damages for unfair termination and malicious prosecution alongside the other damages enumerated in the plaint.

19. The 1st respondent called one witness, Wilson Mulwa who was the 1st respondent's Human Resource Assistant.

20. He corroborated most of the claimants' evidence. He testified that there was an audit report that was handed over to KACA. The 1st respondent however did not include the report in their list of documents that were filed in court.

21. On cross-examination, Mr. Mulwa admitted that there was nothing morally or criminally wrong with filling vouchers for illiterate guards as the 1st claimant did. He confirmed that they indeed employed some illiterate guards.

22. He also admitted on cross-examination that the duty of the 2nd claimant was to make entries in the vote book and not to make cash payments.

23. He also confirmed that there was a criminal case against the claimants in which he was a witness and in which the claimants were acquitted.

24. He further confirmed that both claimants were not taken through any internal disciplinary proceedings. They were not given a chance to defend themselves against the allegations.

25. He also confirmed during cross examination that no notice was issued to the claimants prior to their termination and/or removal

26. He also confirmed that the claimants were not reinstated after they were acquitted in the criminal case.

27. On re-examination, Mulwa claimed that the 1st claimant did not have to be taken through a disciplinary process according to the Kenya Wildlife Service (Armed Wing) Disciplinary Code. He also claimed that Margaret was terminated in accordance with the termination clause in the letter of appointment, which did not accord her a right to be heard.

Response

28. The respondent states that the claimants admitted having been paid all terminal benefits in respect of the termination and therefore it was agreed during the trial only the claim in respect of malicious prosecution was pending and whether the claimants should be paid the special damages of Kshs.470,000/=.

29. The respondent states that the claimants were lawfully and procedurally removed from service having reasonably been believed to have been involved in financial misappropriation and or fraudulent transactions resulting in heavy monetary loss to the 1st respondent. That the claimants breached the trust bestowed upon them by the 1st respondent hence their removal from service.

30. The 1st respondent made a report to the police regarding the loss, upon investigations, the police preferred charges against the claimants. The report was made upon reasonable grounds and in the ordinary course of business.

31. The respondent therefore denies particulars of malice made by the claimants and puts them to strict proof thereof. The respondent avers that the court did not confirm the innocence of the claimants but were released on technicalities.

32. The respondent prays that the suit be dismissed with costs to the 1st respondent.

Determination

33. The issues for determination are as follows: -

- (i) Whether the termination of the claimants was for a valid reason and in terms of a fair procedure.
- (ii) Whether the respondents are liable for malicious prosecution of the claimants.
- (iii) Whether the special damages have been proved.

Issue i

34. RW1, Wilson Mulwa testified in support of the respondent's case and to rebut the testimony by the claimants and their witness. RW1 adopted a statement dated 17th November 2016 and filed on 14th March 2017 as his evidence in chief.

35. RW1 was the Human Capital Officer of the 1st respondent. RW1 was a witness in the prosecution case in which the claimants were charged for processing false claims in respect of the employees of the 1st respondent to the loss and detriment of the 1st respondent.

36. RW1 stated that there was no malice at all against the claimants and other members of staff who were implicated. The prosecution and termination followed an audit conducted by the 1st respondent in 1999, in which it was established that in the period 1998 to 1999 the claimants facilitated members of staff to make fraudulent claims by raising and signing vouchers on their behalf.

37. That the claimants were acquitted by the Magistrate's Court and were paid full terminal benefits upon their termination.

38. RW1 stated that some of the claims made by the claimants were in respect of employees who had since died. The 1st claimant initiated the claims for the employees in which fictitious identity cards and signatures were used to access the money.

39. The 2nd claimant committed the vouchers to the bulk vote.

40. RW1 stated that the Kenya Wildlife Service disciplinary code used to discipline the claimants did not require that the employees be charged or heard at a disciplinary hearing. The claimants were removed from service upon being charged with a criminal offence.

41. RW1 emphasized that it was not the role of the 1st claimant to fill the claim forms on behalf of the

employees. That this was clearly a scheme to defraud the 1st respondent using fake documents in respect of nonexistent employees. The cashiers were also charged and were convicted of the criminal charges.

42. The respondent relied on clause 12 (e) of the Kenya Wildlife Service code to remove the 1st and 2nd claimants from service.

43. The claimants did not deny having processed payments on behalf of rangers and counsel for the claimants stated that there was nothing untoward in assisting illiterate rangers in filling claim forms.

44. Furthermore, the 1st claimant admitted to have prepared some of the documents used to make the fraudulent payments, some of who were dead ex-employees. The 2nd claimant similarly admitted having entered some of the claims in the vote book and committed the 1st respondent to pay without checking the validity thereof. 2nd claimant also stamped some of the documents which she failed to enter in the vote book.

45. The Magistrate stated in the judgment that:-

“In conclusion, I would find that it has been established that theft took place at Kenya Wildlife Service where money was stolen over along period of time. – some of the accused persons may have been involved but the evidence adduced here is in their favour as the law requires that if there are any doubts then the benefit of such doubt is to the accused person.”

46. The finding of the Magistrate’s Court was sound because the standard or proof in criminal case is beyond reasonable doubt.

47. This is not the case in a civil suit like this one. Proof in here is on a balance of probability.

48. The totality of evidence before court shows that the claimants facilitated payments to existing and none existing employees to make fraudulent claims against the 1st respondent to the loss and detriment of the 1st respondent.

49. The 1st and 2nd claimants confirm having participated in the claims process negligently or otherwise. This constitutes a valid reason to terminate employment of an employee in terms of Section 43 of the Employment Act, 2007.

50. The respondent on the other hand admits having not conducted a disciplinary hearing to establish the existence of a valid reason prior to the termination.

51. It is however clear that an audit was conducted which implicated the 1st and 2nd claimants. It is not clear whether or not the 1st and 2nd claimants were involved in any manner in the conduct of that audit.

52. The court notes that Clause 2 (e) of the 1st respondent’s Code of Conduct violates the provisions of Section 41 of the Employment Act and is also contrary to Article 47 of the Constitution on Fair Administrative Action.

53. It is the court’s finding that the respondents need to revise the disciplinary code so as to conform to Section 41 of the Employment Act, by affording in every case, an employee an opportunity to show cause in writing and at a hearing where he/she is assisted by an employee of choice in a disciplinary hearing facing them.

54. In this particular case, however, the court finds that the admission by the claimants in court have assured the court that the omission by the respondent did not negate the validity of the reasons given to terminate the employment of claimants.

55. The court finds that the termination was both lawful and fair in the circumstances of this case.

56. The claim for compensation for unfair dismissal is therefore dismissed.

Issue ii

57. With regard to the claim for malicious prosecution, it is trite law that for a claim for malicious prosecution to succeed, one must establish four essential ingredients. They were set out in **Mbowa –vs– East Mengo District Administration [1972] EA. 353 by Lutta JA** as he then was at page 354:

“The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose for the prosecution should be personal and spiteful rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention of restraint of improper legal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility it is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:

(i) The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff. It suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority.

(ii) The defendant must have acted without reasonable or probable cause. Thus, there must exist facts which on reasonable grounds, the defendant genuinely believes that the criminal proceedings are justified.

(iii) The defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.

(iv) The criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.

The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action.....”

58. In defining the threshold for reasonable and probable cause, Justice Odunga in **Dr. Lucas Ndungu Munya –vs- Royal Media Services Limited and Another [2014] eKLR** stated:-

*“what amounts to reasonable and probable cause for the purposes of malicious prosecution as explained by Rudd, J in **Kagame and Others –vs– AG and Another [1969] EA 643**. Citing **Hicks –vs– Faulkner [1878] 8 QBD 167 at 171**, **Herniman –vs– Smith [1938] AC 305** and **Glinski –vs– Melver [1963] AC 736** the learned Judge stated: “Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”*

59. From the totality of evidence, the respondents had lawful cause to report the fraudulent transactions to the police. The claimants were among the several staff who were found to have participated in the impugned transactions following an internal audit. The respondents acted with reasonable or probable

cause. They did not act with malice or with ulterior motive. The fact that there was an acquittal is not by itself evidence of malice. The claimants must show specific action by the respondent indicative of bad faith and caprice on the part of the respondents.

60. The particulars of malice have not been proved on a balance of probability and the claim for malicious prosecution has accordingly not been proved and is dismissed.

Issue iii

61. The claim for special damages in the sum of Kshs.470,000/= is in respect of travelling expenses to court by the 1st and 2nd claimants being Kshs.40,000/= for each of the claimants and advocates charges for criminal case no. 1948/00 and no. 5584/01 for Kshs.210,000/= and Kshs.180,000/= for the 1st and 2nd claimants respectfully. No receipts were produced to support any of these claims. The excuse given was that this is a very old matter and the claimants have since lost some of the documents that they would have intended to rely on.

62. It is trite law that special damages must be specifically proved. There was no attempt to even produce any of the documents that were still available. In any event, having dismissed the claim for malicious prosecution, the court finds that the respondents bear no responsibility at all to pay the advocates' fees in respect of the criminal prosecution of the 1st and 2nd claimants. Similarly, travelling costs to court are part of taxable costs upon conclusion of a case, where costs have been awarded by the court.

63. The claims for special damages are therefore dismissed.

64. In the final analysis, the suit by the 1st and 2nd claimants as against the respondents is dismissed.

65. Since the respondents are Government institutions and the 1st and 2nd claimants had hitherto served the 1st respondent for a long time, the court finds this to be an appropriate case for each party to bear their own costs of the suit.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE