



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 249 OF 2015

(Formerly CA 262 of 2008)

MINI BAKERIES (NAIROBI) LIMITED CLAIMANT

VERSUS

DAVID OCHIENG OYUGI (Suing as the

Administrator of the Estate of

BERNARD OKETCH OYUGI (Deceased)..... RESPONDENT

Mr. Kuria for applicant

Mr. Gitau for respondent

JUDGMENT

1. The appeal was instituted vide a memorandum of appeal dated 20th May 2008 against the judgment and decree of the Chief Magistrate's Court at Nairobi (Honourable Mr. M. K. Kiema Resident Magistrate), delivered on 29th April 2008 in the High Court of Kenya at Nairobi.

2. The appeal was subsequently, upon application, transferred to the Employment and Labour Relations Court at Nairobi. The appeal is premised on the grounds set out in the memorandum of appeal as follows:-

1. THAT the Learned Resident Magistrate erred in both fact and law in failing to return a finding on whether or not the plaintiff had locus standi to institute and/or proceed with the suit regardless of the fact that the letters of administration *Ad Litem* of the Estate of the deceased were issued to two administrators.

2. THAT the Learned Resident Magistrate erred in fact and in law in finding that the plaintiff had proved his case on balance of probabilities in spite of:

i. The special damages relating to the terminal dues of the deceased were not specifically proved;

ii. The particulars of malice and ill-will pleaded in the further amended plaint were not proved by way of evidence or otherwise;

iii. The finding that the deceased was wronged by the appellant was at variance with the undisputed evidence of the criminal case proceedings and the defence testimony on the record;

iv. The fact the Learned Resident Magistrate failed to make any adverse inference in relation to the plaintiff's failure to sue or call police evidence in relation to the case; and

v. The plaintiff failed to prove all four essential elements of malicious prosecution against the defendant, as set out in case of **John Ndeto Kyalo –Vs- Kenya Tea Development Authority [2005] eKLR.**

3. THAT the Learned resident Magistrate erred in law in failing to appreciate the principle that acquittal per se on a criminal charge is not sufficient basis to succeed in a suit for malicious prosecution but spite and ill-will must be proved, which mental element cannot be found in an artificial person but must be attribute to a servant of such artificial body, which principle is set out in **Nzoia Sugar Company Limited –Vs- Fungututu [1988] KLR.**

4. THAT the Learned Resident magistrate erred in fact and law in failing to dismiss the plaintiff's suit on the ground that there was appellant had a justifiable cause to report the complaint to police for investigation and the prerogative to charge a suspect rests solely with the Attorney-General.

5. THAT the Learned Magistrate erred in both fact and law in failing to consider the issues raised in the pleadings, proceedings, submissions filed in court and case law cited in the judgment delivered.

3. The appellant seeks for orders that:-

- a) this appeal be allowed and the judgment and decree of the Chief Magistrate Court made on 29th April 2008 be wholly reversed;
- b) the suit against the defendant/appellant be dismissed with costs;
- c) the respondent herein do pay costs of this appeal and the suit in the Chief Magistrate's Court.

4. The appellant filed submissions in support of the appeal and the submissions may be summarized thus;

Brief facts relating to the matter

Mr. Bernard Oketch Oyugi (hereinafter referred to as the deceased) had worked as a driver with the appellant company from 1993 and was assigned motor vehicle registration number KAJ 806Q. his duties were to make deliveries and thus he was responsible for ensuring that he transported the appellant's goods to their rightful destinations.

5. Sometime in October 2001, the appellant company received a report that the aforesaid motor vehicle had been spotted in Gikomba Market selling the appellant's gunny bags that were being transported in it contrary to the instructions of the Appellant.

6. Upon perusing its own records, the appellant discovered that the deceased had been receiving gunny bags from the Appellant's branches in South B and South C for delivery to the head office. However, the said gunny bags had not been arriving at their intended destinations and the deceased could not account for the missing gunny bags.

7. The Appellant filed a complaint against the deceased with the police and the deceased together with his loader Mr. Winstone Wetende were arrested and charged with stealing by servant contrary to Section 281 of the penal code in Makadara Criminal case **No. 22753 of Republic –Vs- Bernard Oketch Oyugi & another.**

8. Upon hearing the case, the court came to the conclusion that the prosecution had proved that the appellant had lost various gunny bags and that the deceased may have been involved in the theft. However, the court was of the view that the evidence against the deceased was not sufficient to prove his guilt beyond reasonable doubt and therefore acquitted the deceased.

9. It is the appellant's case that the Learned Magistrate erred in law and fact in finding

“The defendant herein made a complaint against the deceased upon which the deceased was arrested and prosecuted. He was later acquitted. Nevertheless, his employment was terminated summarily. I find then, that the plaintiff was wronged by the defendant and is entitled to the reliefs sought.”

10. The appellant submits that the Honourable Magistrate failed to appreciate the principle that acquittal *per se* on a criminal charge is not sufficient basis to succeed in a suit for malicious prosecution but spite and ill-will must be proved, which fact the respondent did not prove.

11. That the Honourable Magistrate failed to show that the respondent had proved all the four elements of malicious prosecution against the Appellant as set out in the case of **John Ndeto Kyalo –Vs- Kenya Tea Development Authority [2005] eKLR** which was aptly quoted by the said Magistrate in the Judgment.

12. More importantly, the Hon. Magistrate failed to appreciate the law on substitution of a deceased plaintiff by an administrator in that, the deceased died on 10th April 2005 and was substituted by one of his two administrators David Ochieng Oyugi who had acquired limited letters of administration *Ad Litem* jointly with Serifina Obora Adoyo.

13. The appellant relies on the case of **Misc. Civil Application No. 103B of 2013 Republic –Vs- Nairobi City council Exparte Christine Wangari Gachege (Suing on behalf of the Estate of Rahab Wanjiru Evans) 2014 eKLR**, wherein Majanja J. stated as follows;-

“the capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times.... One administrator out of the others lacks the capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate.”

14. The Appellant further quotes the case of **Simon Kamau Muhindi (suing as the administrator of the Estate of Esther Nyokabi Muhindi –Vs- Monica Wambui Ngugi & another [2014] eKLR**, when Gitumbi J. relying on Exparte Christine Wangari Gachege (*supra*) held;

“on that issue, I find that the plaintiff lacks capacity to file suit on behalf of the estate of the deceased in the absence of his co-administrator Richard Wainaina Muhindi.”

15. In the present case, Serafina Obora Adoyo, the administrator of the deceased's estate relinquished her power to prosecute the suit jointly with the respondent herein vide a consent dated 23rd March 2006 which was produced during the trial on 13th February 2008.

16. The appellant submits as was held by Majanja J. that;

“in the circumstances this suit is incompetent, it cannot be sustained.”

Majanja J. warned himself thus;

“I warn myself that striking out of a suit is a drastic remedy but where there is no capacity of the parties, the axe must fall.”

17. The appellant prays that the appeal be allowed on the basis that the Learned Magistrate did not consider this point of law which was fatal to the suit.

18. The Appellant finally submits that the Hon. Magistrate erred in law and fact by finding that the special damages had been proved on a balance of probability inspite lack of evidence to prove the same. The appellant relies on the **Civil Appeal No. 184 of 2007, Afic Pak International Ltd. Vs. Jared Odhiambo Odera [2010] eKLR** where the court stated:-

“It is trite law that each and every particular of special damages must be pleaded specifically it is not enough to simply aver in the plaint as was done in this case that the particulars of special damages were:- “to be supplied at the time of trial”

19. The deceased in the present case having been summarily dismissed was not entitled to payment in lieu of notice. Secondly, the respondent during the trial failed to produce any evidence to prove the leave allowance and travelling allowance claimed in the further amended plaint. That under cross-examination the respondent stated;

“the letter of application did not provide for two (2) months pay in lieu of notice. It also did not indicate leave allowance or travelling allowance.”

20. The appellant prays that these awards be set aside for want of proof.

21. With respect to claim for service pay for ten (10) years amounting to Kshs.189,000, this was only payable where a claimant was declared redundant as was held in the case of **Thomas Mbulo –Vs- Cedars Restaurant Company Limited [2014] eKLR**.

22. The appellant therefor prays that the entire Appeal be allowed and the award of the court *aquo* set aside with costs in the court below and on Appeal.

Respondent’s submissions

23. The respondent submits that he was substituted in the suit on 12th March 2008 after a full interparties hearing. That the substitution was granted upon production of a death certificate, letter of administration and consent of the co-administrator showing he was competent to proceed with the suit.

24. That the respondent proved that the deceased was wrongly summarily dismissed. That he had worked for over 8 years. The dismissal was verbal and he was not paid any terminal benefits upon dismissal contrary to the law.

25. That a letter of summary dismissal dated 20th February 2002 was produced by the appellant in court. In the letter, the Appellant confirmed that it did not pay the deceased his terminal benefits for 8 years and 8 months served.

26. That the dismissal took place while the criminal case was pending and the appellant declined to reinstate the respondent upon his acquittal by the Magistrate’s Court. That the respondent did not commit any theft and the Magistrate did not err in finding that the prosecution was malicious and the dismissal was wrongful.

Furthermore, the respondent proved all the terminal benefits in the statement of claim and the same were rightly awarded by the Hon. Magistrate.

27. The respondent prays that the appeal be dismissed with costs.

Determination

The issues for determination are as follows:-

- i. Did the Magistrate err in not striking out the suit for erroneous substitution of the deceased with one of the two (2) co-administrators?

ii. Did the Magistrate err in assessing the standard of proof in a civil suit?

iii. Did the Magistrate err in finding that the reliefs sought had been sufficiently proved?

Issue i

28. It is not in dispute that Mr. Bernard Oketch Oyugi substituted the deceased as the plaintiff in this suit with consent of the co-administrator. The consent was filed in court. The substitution followed interparties hearing before the Hon. Magistrate.

29. The court has carefully considered the findings by the **High Court in Exparte Christine Wangari Gachege and Simon Kamau Muhindi cases (supra)** and distinguishes the present case in that in the two (2) cases above, the High court did not consider the import of filing a consent by a co-administrator, authorizing the other to act on behalf of the deceased.

30. The purpose of insisting all co-administrators be party to the suit where substitution of a deceased is done is to avoid possibility of a fraudulent suit being instituted by one of the co-administrators to the loss and detriment of the estate. This possibility is completely diminished by the filing of a consent by a co-administrator who opts out of the suit.

31. The court finds that the respondent had locus standi to proceed with the suit on behalf of the deceased and the Hon. Magistrate did not err in failing to strike out the suit on this ground.

Issue ii

32. The Hon. Magistrate made a brief judgment. The Learned Magistrate addressed the standard of proof required by a plaintiff in a claim of malicious prosecution by citing the case of John Ndeto Kyalo (supra) in which it was held that; the plaintiff must prove that;

i. the defendant instituted the prosecution against the plaintiff;

ii. the prosecution ended in the plaintiff's favour;

iii. the prosecution was instituted without reasonable and probable cause; and

iv. the prosecution was actuated by malice;

v. The Hon Magistrate went ahead to find that the defendant acted wrongfully by initiating the complaint upon which the respondent herein was arrested and prosecuted and subsequently acquitted. Nevertheless the Appellant went ahead and summarily terminated the employment of the respondent.

33. The court finds that the court was apparently aware of the requirements of the law, the burden and standard of proof in the circumstances of this case. The fact that the Hon. Magistrate did not elegantly elaborate these requirements does not mean that the court erred in finding that the plaintiff had proved his case for wrongful dismissal. The court went ahead to award damages for malicious prosecution in the sum of Kshs.50,000. This award is in the lower end of the scale of awards for malicious prosecution and the court finds no reason to interfere with the same.

Issue ii

34. The next issue for determination is whether the Hon. Magistrate erred in finding that the special damages claimed had been sufficiently proved.

35. An appeal court will only interfere with the finding and discretion of a trial court if it is manifestly clear that the trial court's decision was in breach of the law and or is manifestly contrary to the

prepondence of evidence presented before the court.

36. Upon considering the record of the Appeal and the submission by the parties, the court finds that the special damages were sufficiently particularized in the further amended plaint filed on 2nd July 2007. That the Appellant responded to the special damages claimed under paragraph 5 of the further amended plaint in vague terms without specifically addressing any of the itemized particulars of claim.

37. From the record of proceedings, RW1, David Ochieng Oyugi testified that his deceased brother was not paid the claimed terminal benefits.

38. In re-examination, RW1 clarified that the document he was referring to was a letter of appointment and it provided for one month's salary in lieu of notice and that he was not aware if the notice period had changed. At most, the Learned Magistrate ought to have awarded the respondent, one (1) month's salary in lieu of notice and not two (2) months. The award is reduced accordingly.

39. The letter of appointment according to RW1 did not also provide for leave allowance or travel allowance. However DW1 Thomas Mwaura in his sworn testimony produced a leave application form for the respondent indicating that the deceased had taken a total of sixty (60) leave days. The Magistrate erred in finding that the claim for leave allowance and leave travel allowance had been sufficiently proved there being no evidence on record to that effect. The award of leave allowance and leave travel allowance is set aside.

40. With regard to the claim for service gratuity for ten (10) years, the evidence before court is to the effect that the deceased had served as a driver for a period of eight (8) years and eight (8) months.

41. The trial court erred firstly in awarding service gratuity for ten (10) years instead of eight (8) years and eight (8) months.

The claim was not sufficiently rebutted by the appellant by for example demonstrating that for the period the deceased served the appellant, he was registered with the National Social security Fund (NSSF) and or any other pension scheme and the employer contributed to the fund on behalf of the deceased.

42. In the absence of any such evidence, the Learned Magistrate did not err in finding that the deceased was entitled to service gratuity for the period served.

43. Service gratuity is not the same with severance pay payable when an employee is declared redundant. Service gratuity is payable in lieu of or lack of a pension scheme to which an employer has contributed overtime on behalf of the employee towards the retirement of the employee.

44. The award of service gratuity by the trial court is retained but for a period of eight (8) years and eight (8) months instead of ten (10) years.

45. The final orders of the court are that the appeal is partly successful in the following respects;

- i. the respondent is awarded payment in lieu of one (1) month notice in the sum of Kshs.12,500;
- ii. service gratuity is awarded for the period of eight (8) years and eight (8) months in the sum of kshs.163,800;
- iii. the award of Kshs.50,000 for malicious prosecution is upheld.
- iv. the award in respect of leave travelling allowance and travelling allowance is set aside;
- v. award in respect of interest is retained;
- vi. appellant to pay costs in respect of the trial in the lower court and half the costs in the court of

Appeal.

Dated and delivered at Nairobi this 18th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE