



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1146 OF 2013

TIMOTHY ASUDI MALWA.....CLAIMANT

VS

E-GAP SOLUTIONS LIMITED.....RESPONDENT

AND

THE COMMISSIONER OF POLICE THROUGH

THE ATTORNEY GENERAL.....INTENDED THIRD PARTY

RULING

1. By a Statement of Claim dated 19th July 2013 and filed in Court on even date, the Claimant sued the Respondent for wrongful dismissal. The Respondent filed a Response and Counterclaim on 2nd September 2013. The Respondent subsequently filed an application seeking joinder of the intended Third Party on 26th September 2013. The basis of the Respondent's application is that the intended Third Party contributed to the Claimant's acquittal in Criminal Case No. 2687 of 2010 in which the Respondent was the Complainant.
2. In a supporting affidavit sworn by the Respondent's Director, Eric Okuku on 26th September 2013, it was deponed that the intended Third Party occasioned a miscarriage of justice in the Criminal Case due to laxity in prosecution. The Claimant was consequently acquitted on a technicality.
3. The Claimant in a replying affidavit sworn on 10th October 2013 deponed that there is no relationship between the proceedings before this Court and the criminal proceedings before the Chief Magistrate's Court at Kibera
4. In the Grounds of Opposition filed by the intended Third Party on 11th October 2013 the jurisdiction of this Court to entertain the subject matter of the Respondent's application, being the manner in which the prosecution in Criminal Case No 2687 of 2010 was conducted was questioned.
5. Further, in the written submissions filed on behalf of the intended Third Party, it was submitted that no nexus had been established between the alleged laxity on the part of the intended Third Party and the acquittal of the Claimant in the criminal case. At any rate, the Respondent had not particularised the alleged laxity either in investigation or prosecution. According to the intended Third Party, the Police had fully discharged its mandate in the criminal case.
6. The single issue for determination in this application is whether the Respondent has made out a case for joinder of the intended Third Party in the Cause filed by the Claimant against the Respondent. The

Respondent's application is premised on the allegation that the intended Third Party bungled the Criminal Case in which the Claimant was the Accused and the Respondent was the Complainant.

7. In making a determination on the issue before the Court, I will begin with the jurisdiction of this Court to entertain the Respondent's application which was called to question by the intended Third Party.

8. The jurisdiction of the Industrial Court is donated by Section 12 (1) (a) the Industrial Court Act, 2011 which provides that:

12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b)

9. A plain reading of this provision leads to the conclusion that the business of the Industrial Court is to deal with the whole gamut of employment disputes.

10. From the record, the reason why the Respondent seeks joiner of the intended Third Party has to do with the failure by the intended Third Party to secure a conviction of the Claimant in Criminal Case No 2687 of 2010, which the Respondent attributes to laxity on the part of the intended Third Party. It seems to me then that the Respondent was banking on the conviction of the Claimant to forestall any claims arising out of the termination of the Claimant's employment.

11. In the case of *Kibe Vs Attorney General (Civil Appeal No 164 of 2000)* the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer.

12. In my view, a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.

13. The flip side is that an employer who decides to take disciplinary action against an employee must have a solid basis for doing so irrespective of whether the employee faces criminal proceedings or not.

14. The employer cannot abdicate this responsibility to the Police and where an employer feels that the Police has failed to discharge its investigation and prosecution mandate in a criminal trial, the proper remedy does not lie in joiner in an employment dispute between an employer and an employee.

15. For the foregoing reasons I find no legal basis for joiner of the intended Third Party and the Respondent's application is therefore disallowed with no order for costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MARCH 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*

.....*Intended Third Party*