**Koech v African Highlands and Produce Company Limited and another**

**Division:** High Court of Kenya at Kericho

**Date of judgment:** 28 October 2005

**Case Number:** 48/98

**Before:** Musinga J

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] Employment law – Termination of contract of employment – Whether rules of natural justice apply.*

*[2] Malicious arrest and prosecution – Acquittal of an accused person – Whether this is evidence of*

*malicious prosecution.*

**JUDGMENT**

**Musinga J:** This judgment is in respect of the aforesaid two suits which were consolidated pursuant to a consent order recorded on 29 February 2000. In the first suit (High Court civil court number 48 of 1998) the plaintiff stated in his plaint that until 5 September 1996 he was an employee of the defendant designated as the Head Plumber at a basic salary of KShs 11 013 per month. By a letter dated 5 September 1996 signed by the Chief Engineer of the defendant, the plaintiff’s employment was terminated with immediate effect. The plaintiff complained that the principles of natural justice were violated because he was not given an opportunity to state his defence to the charges that were levelled against him before termination of his services. The plaintiff further claimed that prior to the said termination of his services he had worked for the defendant for a period of 14 years’ and he was therefore entitled to gratuity. He said that out of his basic salary of KShs 11 013 the defendant was deducting 10% thereof towards gratuity benefits. The plaintiff further alleged that during his employment, he was entitled to the following benefits which he lost by virtue of the said termination of his services: (*a*) Tea leaves allowance of 1 kilogram per month. (*b*) Firewood allowance of 3 cubic metres per month. (*c*) Free housing, water and electricity. (*d*) Free medical treatment for himself and his family. He claimed damages for loss of the said benefits. The plaintiff averred that he had suffered loss of employment and claimed two months’ salary *in lieu* of notice, gratuity benefits and provident fund. In its amended defence and set off, the defendant denied that it was bound to follow the principles of natural justice whilst terminating the plaintiff’s services. The defendant admitted that it was deducting 10% from the plaintiff’s monthly salary towards the provident fund which was a term of his contract. With regard to the plaintiff’s claim for two months’ salary, gratuity and provident fund benefits, the defendant stated that by virtue of section (*e*) of the Collective Bargaining Agreement, an employee was entitled to either gratuity or provident fund, whichever was higher, and the plaintiff was entitled to provident dues only in the sum of KShs 365 043,70 as these were higher than his gratuity benefits. The defendant proceeded to pay into court KShs 102 186,70 which was less the value of three lost steam control valves which it said disappeared as a result of the plaintiff’s negligence during his course of employment on 14 August 1996. The defendant stated that it would set off KShs 262 857 being the value of the 3 lost steam control valves from the plaintiff’s dues. The defendant denied that the plaintiff was entitled to the allowances and other benefits as claimed since he had ceased being an employee of the defendant from the date of termination of his services and in any event, it added, the same had been conferred purely at the defendant’s discretion. The defendant stated that it had paid the plaintiff one month’s salary in lieu of notice amounting to KShs 11 013 on 2 September 1996. In the second suit (High Court civil case number 71 of 1998) the plaintiff claimed that on 15 August 1996, without any reasonable cause, the first defendant’s manager of its engineering section accompanied by their security personnel took the plaintiff to Kericho Police Station and falsely and maliciously reported that the plaintiff had on 14 August 1996 stolen 3 pieces of steam control valves valued at KShs 262 857 the property of the first defendant. The plaintiff claimed that he was arrested on 15 August 1996 and detained in police custody and later taken to court and charged with stealing contrary to section 281 of the Penal Code in criminal case number 186 of 1997 which was heard and determined in his favour. He claimed as against the defendant’s special and general damages for malicious prosecution and false imprisonment.

The special damages were claimed as hereunder:

(*a*) Legal fees incurred in defending the Criminal case KShs 20 000

(*b*) Subsistence and travelling expenses in defending

the said case KShs 7 000

(*c*) Cost of proceedings and certified copies KShs 960

(*c*) Cost of proceedings and certified copies KShs 960

Total KShs 27 960

In its defence, the first defendant denied that it took the plaintiff to Kericho Police Station on 15 August 1996 and that it falsely and maliciously reported to the police that the plaintiff had stolen 3 steam control valves from the defendant. To the contrary, the first defendant stated that it made a report to the police that it had discovered that 3 steam control valves had disappeared and suspected them to have been stolen. It therefore had reasonable grounds to make the complaint, it stated. The first defendant also averred that the second defendant carried out its own independent investigations into the disappearance of the steam control valves and thereafter made an independent decision to charge the plaintiff with the offence of theft by servant. The second defendant denied the plaintiff’s claim and said that the prosecution was not malicious because proper investigations had been conducted in utmost good faith. During the hearing, the plaintiff testified that he used to contribute KShs 1 012,70 towards provident fund and by August 1996 he had contributed KShs 365 043. He said that he took his annual leave for 1996 in August from 5 August 1996 and he handed over his duties to the foreman before he left. While he was on leave, his wife called him to say that he was required at his place of work. On 3 September 1996 he was arrested and charged in Criminal case number 186 of 1997 for theft by servant. He produced the proceedings as P exhibit “10” and the same showed that he was given the benefit of doubt and acquitted on 19 December 1997. Earlier on 5 September 1996, the plaintiff had been served with a letter of termination of his employment by the company’s chief engineer. The said letter stated that its investigations had established that he was aware of and knowledgeable about disappearance of 3 steam control valves from a plumbing cupboard on 14 August 1996. The termination of his services was with immediate effect and he was to be paid one month’s salary in lieu of notice and was informed that his terminal dues were to be paid upon vacation of the company’s house and handing over of the company’s property. It is important to consider in some detail the evidence that was adduced by the first defendant to connect the plaintiff with the disappearance of the 3 steam control valves as the loss of those items is what gave rise to both the criminal case aforesaid and these two civil suits. Mr Wilson Kipkemoi Arap Rono was working for the first defendant as a purchaser but had retired at the time when he was testifying in this matter. He said that on 4 January 1996 he raised a Local Purchase Order (LPO) for 3 steam control valves, having received a requisition for the same. The order was forwarded to Kipsigis Traders Shop at Kericho and the value of the items was KShs 262 857. The items had been requisitioned by one Nicholas Cheruiyot who collected them on 27 February 1996 and were to be utilised at the first defendant’s Kitumbe factory. Mr Nicholas Cheruiyot signed a delivery note and there was no dispute that he collected the same. Mr Rono said that on 14 August 1996 he received a report from Nicholas Cheruiyot that the 3 steam control valves were missing. Mr Rono then reported the matter to the head of engineering section, Mr Douglas Dufresne who directed that the matter be reported to the police for appropriate investigations. A watchman at the gate had reported that the items had been removed from the workshop by two artisans, Henry Omariba and Alfred Inzauli and passed through the gate on instructions of the plaintiff. The police recorded statements from all the relevant persons and also visited the Engineering department. The police thereafter went to look for the plaintiff in his house but they found that he had gone to Nairobi. Mr Rono denied having made to the police a false and malicious report. Henry Omariba, a plumber, told the court that he was working at the Engineering department of the first defendant company and the plaintiff was his supervisor. He testified that on 14 August 1996 while he was at the workshop, a person who was staying with the plaintiff told him that the plaintiff wanted some 3 boxes which contained steam control valves. The boxes were in a cupboard which was being used by the plaintiff and Nicholas Cheruiyot. At the time, the plaintiff was outside the gate and Mr Omariba went near the gate and the plaintiff gave him the keys to the cupboard. The plaintiff told Mr Omariba to open the cupboard and take out the 3 boxes and give them to him so that he could go and do some work at Kitumbi factory. Mr Omariba (DW2) opened the cupboard as instructed and he carried out the boxes with another plumber known as Inzauli and took them to the gate. At the gate, they were checked by the gate man, a Mr Kirui who signed the internal delivery memo. The plaintiff was outside the gate in his vehicle next to a petrol filling point and he opened his car boot and put the 3 boxes inside. The plaintiff, though he denied having taken the 3 steam control valves, admitted that on 14 August 1996 he had gone to the first defendant’s premises to fill up his car with fuel. DW2 said that he did not know that the plaintiff was on leave at the time. Nicholas Cheruiyot, (DW3) confirmed having requisitioned for the 3 steam control valves and having collected them on 27 February 1996. Thereafter he kept them in a cupboard which he was sharing with the plaintiff. He said that the items were required for Kitumbi factory which was under construction. There were 6 plumbers and the plaintiff was their supervisor. On the morning of 14 August 1996 he went to Kitumbi factory to do some work and returned to the workshop at around 10am. He realised that the steam control valves were missing and upon enquiry, he was informed by Mr Alfred Inzauli, (DW6) that they had been taken to Kitumbi factory by the plaintiff. He then went back to Kitumbi factory but found that the plaintiff had not been seen there. At the gate, he was told by the security man that the items had been taken out by Mr Inzauli (DW6) and Mr Henry Omariba (DW2), and handed over to the plaintiff. Wycliffe Atunga (DW4) was working for the first defendant as a cleaner at its petrol station which was a few metres from the workshop. He testified that on 14 August 1996 Mr Inzauli and Mr Omariba carried 3 cartons and put them in the boot of the plaintiff’s car. Mr Alfred Inzauli corroborated the evidence of the other witnesses regarding removal of the three steam control values from the cupboard in the workshop and putting them in the plaintiff’s car on his instructions. The first defendant’s Engineering Executive, Hugo Douglas Dufresne said that while the plaintiff was on leave, he used his position to get two of his juniors to remove the three steam control valves from the workshop. He had several statements recorded by several workers which implicated the plaintiff and as a result the management of the first defendant company lost confidence in the plaintiff and terminated his services. He said that the plaintiff was at the time of his employment a unionisable staff but was later promoted and at the time of termination of his services he was not a unionisable staff. He also stated that the plaintiff was entitled to provident fund, not gratuity and he produced the provident fund rules in support thereof. At the time of termination of his services, the plaintiff was entitled to KShs 365 043,70 of the provident fund. Of that sum, the first defendant was to pay on behalf of the plaintiff KShs 46 368 to Ndege Chai Sacco, KShs 262 857 to the plaintiff but which sum the first defendant wished to retain as a set off in respect of the 3 steam control valves which were unlawfully taken by the plaintiff, then, KShs 55 818,70 was to be paid to the plaintiff. The company drew the three cheques as above but the plaintiff refused to collect the same. Mr Dufresne also stated that the plaintiff was paid one month’s salary *in lieu* of notice and produced the plaintiff’s pay slip for September 1996 as evidence and the plaintiff signed on the cash register, the witness added. The witness said that the tea allowance and other allowances that the plaintiff was claiming were not payable or awardable upon termination of an employee’s services. Having summarised the evidence that was tendered by both parties let me now consider the issues that arose in both cases. Order XX, rule 5 of the Civil Procedure Rules states that in suits in which issues have been framed, the court shall state its findings or decision with the reasons therefor upon each separate issue. In respect of the first case, High Court civil case number 48 of 1998, the advocates for the plaintiff and the defendant, drew and signed an agreed statement of issues dated and filed in court on 12 August 1999; The first issue was framed as follows: “Are the principles of natural justice applicable in termination of the plaintiff? (*sic*) If yes, were the principles of natural justice applied in the termination of the plaintiff?” This issue, in my view, was not well crafted but I have to answer it all the same. The rule of natural justice which the parties referred to in that issue, I believe, was the plaintiff’s right to be heard by his employer before his services were terminated. I would say that the defendant was not obliged to hear the plaintiff before he terminated his services. Their contract of employment was explicit that either party could terminate the same by giving to the other one month’s notice or month’s salary *in lieu* of notice. None of them was obliged to assign any reason for terminating the contract as long as he gave the required notice or paid one month’s salary in lieu thereof. In *Rift Valley Textiles v Edward Oganda* civil appeal number 27 of 1992 (UR) the Court of Appeal considered a similar issue and categorically stated that unless there existed specific provisions for the application of the rules of natural justice in a contract of employment, those rules were irrelevant in a case of termination of services and any alleged breach of the rules could not found a cause of action. The second issue was as follows: “Was the plaintiff’s termination (*sic*) unlawful?” From what I have stated in my answer to the first issue, the termination of the plaintiff’s services was not unlawful. It was in accordance with his letter of appointment. His employer stated that the company had lost confidence in him. That was not even necessary because as I have already stated, none of the parties was obliged to give any reason for termination of services. “Was the plaintiff paid one month’s salary in lieu of notice by the defendant?” I would answer this question in the affirmative. The plaintiff’s pay slip for September 1996 was produced by Hugo Douglas Dufresne (DW5) and it showed that a sum of KShs 11 120 was paid in cash, even though the plaintiff did not sign the pay slip. It was stated he signed on the cash register although the same was not produced in court. The termination letter given to the plaintiff by his employer advised him that he would be paid one month’s salary in lieu of notice. On a balance of probabilities, I find that the defendant proved that it paid the said sum.

The fourth issue was as follows:

“(i) Are the terms of the Collective Bargaining Agreement between the Kenya Tea Growers Association

and the Kenya Plantation and Agricultural Worker’s Union dated 3 July 1996 applicable to the plaintiff?

( ii) If yes, what were the terms of the Collective Bargaining Agreement as regards gratuity and Provident benefits? Is the plaintiff entitled to both gratuity and provident fund benefits or is he entitled to only one of the foregoing?”

According to the evidence that was given by Mr Hugo Douglas Dufresne, at the time of termination of his services, the plaintiff was not a unionisable staff; he had been promoted to the position of a supervisor. That was also the plaintiff’s evidence. The Collective Bargaining Agreement aforesaid was therefore inapplicable. The plaintiff was also not entitled to both gratuity and provident fund dues. He was entitled to provident fund dues only under the fund rules which were produced in court. Mr Dufresne also produced a circular dated 11 January 1996 (D exhibit “10”) which contained the latest revised terms for the plaintiff and other specially related artisans. The fifth issue was as hereunder: “Did three steam control valves ‘disappear’ as a result of the plaintiff’s negligence? If ‘yes’, is the defendant entitled to set off the value of the valves in the sum of KShs 262 857 from the plaintiff’s provident dues?” From the evidence that was adduced by the defendant’s witnesses, it was clear that the plaintiff master minded the disappearance of the three steam control valves. I had no reason to disbelieve the said witnesses and in particular Henry Omariba (DW2) and Alfred Inzauli (DW6) who categorically stated that they loaded the said items into the plaintiff’s car on his instructions. The plaintiff had directed (DW6) to open the cupboard where the said items had been kept and remove them into his car. He did so innocently and in the mistaken belief that the plaintiff lawfully required the said items for fitting them at the defendant’s Kitumbi factory which was under construction. The three steam control valves were openly taken through the gate and loaded into the plaintiff’s car and the gate man testified as such as well as (DW4), Wycliffe Atunga, a cleaner at the Petrol Station where the plaintiff’s car was parked. The three steam control valves were never recovered and neither were they taken to the defendant’s Kitumbi factory and only the plaintiff knows what he did with them. In criminal case number 186 of 1997, the prosecution witnesses explained in great details how the plaintiff caused the disappearance of the said items. The proceedings were produced before this Court and upon reading them and listening to the defendant’s witnesses in this case, I had no shadow of doubt in my mind that the plaintiff actually master minded the entire unlawful exercise. In spite of all the evidence that was adduced against the plaintiff in the criminal case, in his unsworn statement of defence, all he stated was as follows: “I am Joel Kiprotich Arap Koech. On 5 August 1996 I took my leave. (I produce this leave form as exhibit ‘1D’). On 14 August 1996 I went to the Engineering Department to fill my vehicle. I am allowed to do that. I passed through the barrier and was checked. I was on my way to Nairobi. On 29 August 1996 my wife rang me to state the police were looking for me for stealing. I returned to Kericho. I reported to the police where I was arrested. I did not steal anything.” The plaintiff said nothing to rebut all that was said of him by the prosecution witnesses. While in a criminal case it is the prosecution which has to prove its case beyond any reasonable doubt, once it has discharged its burden sufficiently, as I believe it did, if the defendant wants to demolish the prosecution evidence and cause the court to accept his contention, then he has to tender a credible defence which discounts in sufficient details the parts of the prosecution evidence that implicated him and painted him badly. Only then can a trial court make a meaningful determination of the matter. Whereas I am not sitting as an appellate court over the trial court’s findings in the aforesaid criminal case, as a Superior Court, this Court is not precluded from expressing its views in respect of the trial court’s judgment which entertained some doubts as to whether the plaintiff was guilty of stealing by servant and gave him the benefit of doubt. If the learned trial Magistrate had carefully analysed the evidence of all the eleven prosecution witnesses who testified and weighed that evidence against the plaintiff’s statement of defence, he would have come to only one conclusion that the plaintiff actually stole the three steam control valves. It was unfortunate that the Attorney General did not appeal against the said judgment. As far as issue number five is concerned, it was not a matter of the steam control valves having disappeared as a result of the plaintiff’s negligence; it was a clear case of theft of the said items by the plaintiff. In answering the second limb of the fifth issue, I would say that the defendant is entitled to set off the value of the valves in the sum of KShs 262 857 from the plaintiff’s provident dues. It was proved that the aforesaid amount was the actual cost of the said items. I agree with Miss *Kinyenje*’s submissions that an employee is under a duty to act in good faith, honestly and account for all moneys or property of the employer entrusted to him, see *Chitty on Contracts*, volume 2 at 821 and 825. An employee who dishonestly deals with his employer’s property as plaintiff did should not expect to be allowed to benefit from his illegal acts. Infidelity in places of work must be discouraged by all means and employees must realise that where they breach their duty of fidelity or duty to account, apart from their employer’s right to relieve them of their duties, even summarily, the employer has a right to pursue them for restitution of any loss that he may have suffered as a result of such breach and the criminal laws of the land can also be used to punish them if such breach also discloses a criminal offence. The sixth issue was as follows: “Is the defendant’s set-off independent of the facts set out in the plaint?” Order VIII, rule 2 provides that a defendant in a suit may set-off or set up by way of a counterclaim against the claims of the plaintiff, any right of claim, whether such set off or counterclaim is in damages or not and such set-off or counterclaim shall have the same effect as a cross-suit. The basis of the set off has already been stated. The seventh issue was: “Is the plaintiff entitled to rely on the proceedings in Kericho criminal case number 186 of 1997?” I have already expressed my views with regard to the aforesaid criminal case. I have also carefully perused sections 43–47A of the Evidence Act Chapter 80 dealing with judgments and their implications in so far as their admissibility and implications are concerned. Firstly, my understanding of the phrase “proceedings” in the context of this matter is the record of all the evidence that was tendered by both the prosecution witnesses as well as the accused and the judgment that was delivered thereafter. If that be the case, the plaintiff can rely on the said proceedings to prove what may have been stated by any or all of the witnesses and/or himself therein as well as the finding of the trial court. But as far as the judgment was concerned, that was not a judgment *in rem* as defined under section 144 of the Eevidence Act. A judgment *in rem* is a final judgment or order or decree of a competent court which confers or takes away from any person any legal character, or to be entitled to any specific thing, not as against any specified person but absolutely. If the trial court had expressly declared that the plaintiff was innocent or that he had absolutely no role in the disappearance of the steam control valves, then the judgment would have been conclusive proof of his innocence. Section 45 of the Evidence Act proceeds to state that judgments or decrees other than judgments *in rem* are admissible if they relate to matters of a public nature relevant to the inquiry but such judgment are not conclusive proof of that which they state. The judgment in the criminal case aforesaid was not a judgment *in rem* and did not pronounce the plaintiff innocent; it merely gave him the benefit of doubt. In other words, the trial magistrate was saying that in his mind, some doubts had been created as to whether the plaintiff actually stole the said items and since the law required the prosecution to prove its case beyond any reasonable doubt, he could not therefore convict the plaintiff. This position should be contrasted with the provisions of section 47A of the Evidence Act which provides as follows: “A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.” I therefore hold that the plaintiff can rely on the proceedings in Kericho criminal case number 86 of 1997, just like the defendant but as stated by section 45 of the Evidence Act, the judgment therein is not conclusive proof of that which it states.

“Is the plaintiff entitled to the allowances set out in paragraph 7 of the plaint?”

The above was the eighth issue for determination and my simple answer to the same is in the negative. In *Mwangi v University of Nairobi* [1995] LLR 391 (CAK) the Court of Appeal affirmed the position that an employee is not entitled to payment of his allowances upon termination of his services. Those allowances were also not specifically pleaded and proved and no evidence was adduced in respect of the same. The ninth issue was as follows: “Does the plaint disclose any reasonable cause of action?” In view of what I have already stated, the plaint does not disclose any reasonable cause of action because the plaintiff’s services were lawfully terminated in accordance with the provisions of his appointment letter. He had been paid one month’s salary *in lieu* of notice and his provident fund dues had been well tabulated, what was lawfully due offered to him but he refused to accept the same thus forcing the defendant to deposit in court what he was rightly entitled to. The last issue was: “Who should bear the costs of this suit?” Having found that the plaint did not disclose any reasonable cause of action, my conclusion is that this suit High Court civil case 48 of 1998 is for dismissal with costs to the defendant. The plaintiff is only entitled to the money deposited in court by the defendant. That money includes KShs 46 868 which is payable to Ndege Chai Sacco and that is not in dispute. The first defendant should be given back the sum of KShs 102 186,70 which it deposited in court so that it can issue a cheque of KShs 46 868 to Ndege Chai Sacco and another cheque of KShs 55 818,70 to the plaintiff. In High Court civil case number 71 of 1998 the advocates for the plaintiff and the first defendant filed a list of agreed issues on 28 March 2000. The second defendant did not sign the same and neither did it adduce any evidence during the trial but filed a defence as already stated. Since I have already dealt with most of the issues in the first case, I will just briefly answer the various issues raised therein. The first one was whether the first defendant lost three steam control valves. The answer is in the affirmative. He lost them and they were recovered. The second issue was: “Did the first defendant take the plaintiff to Kericho Police Station on the 15 day of August 1996?” The answer is in the negative. The first defendant, through its employees, made a report to the police after realising that the three steam control valves were missing. The plaintiff presented himself to the police after learning that they were looking for him. The police then arrested the plaintiff. “Did the first defendant make a false and malicious report concerning the plaintiff to the police as regards the disappearance of three steam control valves?” The report made to the police was not false and malicious in any way. The said items had gone missing and there was credible evidence to implicate the plaintiff with the disappearance of the same. “Was the first defendant involved in the second defendant’s investigations and the resultant decision to charge the plaintiff with the offence of theft?” The simple answer is “no”. The police carried out their own investigations and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigations regarding the disappearance of its property, just like any prudent person or company would in the circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence. The discretion as to whether to charge a suspect or not lies with the police as was well stated by the Court of Appeal in *Jediel Nyaga v Silas Mucheke* civil appeal number 59 of 1987 (UR). The fact that he was acquitted does not mean that he had established a cause of action for malicious prosecution as against the defendants. In *Nzoia Sugar Company Limited v Collinus Fungututi* civil appeal number 7 of 1987 (UR) the Court of Appeal held that: “That a suspect who is acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established.” The fifth issue was: “Is the plaintiff entitled to special and general damages?” The plaintiff has not succeeded in proving his claim of malicious prosecution and false imprisonment and therefore he is not entitled to any damages at all. The last issue was: “Who is to bear the costs of this suit?” Generally, costs follow the event unless for a good reason the court orders otherwise. The plaintiff, having not succeeded in his case as against the defendants shall bear the costs of the suit. However, only the first defendant will be entitled to those costs as the second defendant did not participate in these proceedings. Lastly, it is appropriate that I acknowledge with appreciation the effort that was demonstrated by both counsel in conducting this hearing which started about seven years ago. In particular, I must state that the first defendant’s counsel, Ms *Kinyenje*, conducted the defence case very ably and put in very good submissions which were well researched and that was very helpful in my preparation of this judgment.

For the appellant:

*Information not available*

For the first defendant:

Ms *Kinyenje*