

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-CS-0562 OF 2005

KIWANUKA GEORGE :::PLAINTIFF

VERSUS

THE ATTORNEY GENERAL::DEFENDANT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff, a former Deputy Headmaster of Mengo Senior Secondary School brought this action against the Attorney General for general and special damages, interest and costs arising from wrongful dismissal, false arrest, detention and malicious prosecution.

The defendant in their written statement of defence denied the claim and further contended that the action was not only time barred but the plaintiff was arrested and detained basing on a reasonable and probable apprehension that he had uttered false documents with the object of obtaining money meant for another person (Arthur Magala Musoke), which he actually received and shared with his relative, a one Musoke Samuel.

During scheduling, the parties agreed that the plaintiff was arrested, detained, prosecuted and acquitted in Buganda Road Chief Magistrate's Court in criminal case vide No.311 of 1998; Uganda versus George Kiwanuka. The parties also agreed upon the following issues;

- i) Judgement in criminal case No.3116 of 1998; Uganda versus George Kiwanuka.
- ii) Letter of interdiction Ref. UTS/K2735 dated 12/11/1998.

The following were the agreed substantive issues;

1. Whether the suit is time barred.
2. Whether the plaintiff was maliciously prosecuted.
3. Whether the plaintiff was unlawfully dismissed from his employment.
4. Whether the plaintiff is entitled to special damages.
5. Other remedies are available to the parties.

At the hearing of the suit, the plaintiff was the sole witness of his case while the defendant sought to call the Director, Education, Ministry of Education and Sports; the Commissioner in charge of secondary education, Ministry of Education & Sports, and the Headmaster of Mengo Secondary School. The defendant however after several adjournments failed to procure the said witnesses to court hence court proceeded under O.17 r 4 which states;

“Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.”

It was the plaintiff’s testimony that he was posted to Mengo S.S on 1/7/1979 as a registered graduate professional teacher, Chemistry/ Biology. He was appointed graduate teacher by the Teaching Service Commission in February, 1983 and confirmed in July 1986 when he received a Registration Certificate, an appointment and confirmation documents. He was promoted as a Deputy Headmaster on 16/8/1988 and was re- posted as a Deputy Headmaster, Mengo S.S through the posting instructions that he received on 15/2/1989.

The plaintiff further testified about the period he served at Mengo SS where he was assigned with duties of Personnel and Administration. He was given a schedule of duties among which was to be in charge of keeping teachers' and students' files plus students' certificates and pass slips. He was also charged with responsibility of signing school documents for example Identity cards for staff and students, letters and circulars.

It was the plaintiff's testimony that on 12/11/89 he received a letter from Commission of Education alleging that he had received information that he had forged the school's identity card in the names of Musoke Samuel Magara who was alleged to be his brother and he obtained another Musoke's money of retrenchment (Musoke Arthur) worth Shs. 1million by false pretence. He stated that this allegation was totally untrue because he did not forge or receive the said money. The two Musoke's were non teaching staff employees working on the school's plantation farm situated at Nsoloolo, Mityana 64 km away. Musoke Arthur was the Farm Manager and was residing in Kampala while Musoke Samuel was an Assistant Farm Manager and was residing in Nsoloolo.

The plaintiff contended that when the Commissioner received the allegation, he never allowed him the opportunity to be heard, got hold of the two ID's of both Musoke's and forwarded them to Police. The Commissioner then wrote to the CID to carry out investigations to arrest and prosecute him because the IDs were endorsed by him.

It was the plaintiff's further testimony that the said IDs bore a common name of Musoke and a common job title of Farm Manager. These two existed and the ID of one of the Musoke's had the word "Assistant". The IDs read both as Farm Managers. These people were retrenched along with other non-teaching staff employees working at the school. The Minister of Education and Sports promised a package to those affected. They were summoned to go to the Ministry of

Education & Sports. They all personally went to pick the package. Musoke Samuel was issued with Shs. 1million cheque which he thought was his. When the second Musoke went to pick his, he was informed that only one cheque was processed for a Musoke and it was meant to be for Musoke, the farm manager. When Musoke Samuel learnt the cheque he had picked was not meant for him, he brought it to the school 2 days after picking it from the Ministry. It was handed over to Musoke Arthur. Both Musoke's tendered in their IDs in the Ministry and the Ministry officials suspected forgery which culminated into the plaintiff's arrest and eventual prosecution.

The plaintiff further testified that he was charged with forgery and obtaining money by false pretence and on 12/11/98 he received a letter interdicting him and another letter dated 4/2/99 from City Education Officer putting him on half pay. He also stated that he received another letter asking him to show cause why he should not be dismissed from the Public Service. In response, he wrote to the Commissioner on 20/12/98 requesting a stay of the dismissal until final disposal of the criminal case. This was however not heeded; the plaintiff was thus dismissed before determination of the criminal case; which terminated in the plaintiff's favor.

During cross examination, the plaintiff testified that there was an over sight when he was signing the documents in issue (IDs) and that the omission was not in any way intentional.

The parties were allowed to file their written submissions accordingly.

Mr. Baingana John Paul, counsel for the plaintiff conceded that the causes of action for false arrest and wrongful imprisonment were time barred.

As to whether the plaintiff was maliciously prosecuted, counsel contended that time begins to run after the acquittal. (see *Waimo Vs AG 1990-1994* 1 EA 603). There

is proof that the plaintiff in this case was charged, tried and acquitted vide Uganda versus Kiwanuka George criminal case No.3116 of 1998. He further relied on the authority of *Muruli Muyambi Vs Uganda Revenue Authority HCCS No.805 of 1997* for the proposition that in a claim grounded in malicious prosecution, the plaintiff must prove that the criminal proceedings were instituted against the plaintiff by the defendant and that the proceedings terminated in favour of the plaintiff; that there was no reasonable or probable cause for the prosecution; and that the prosecution was malicious; and that the plaintiff suffered loss as result of the prosecution. Further, that the plaintiff was enjoined to prove that the prosecution not only lacked reasonable or probable cause, he must prove that it was done out of malice or bad faith, ill will or improper motive.

It was Mr. Baingana's contention that the failure of the Ministry officials to hear the plaintiff before setting in motion criminal prosecution; dismissal of the plaintiff even before the criminal trial was completed; and the failure to hear from the plaintiff aged 58 and a teacher of 22 years standing was a clear manifestation of malicious prosecution.

As to whether the prosecution was without reasonable and probable cause, counsel cited the authority of *Kagane & others Vs Attorney General [1969] 1 EA 643* and contended that since the school had two people sharing the name Musoke, who were non teaching staff on the retrenchment list and destined to receive shillings one million, there was no forgery in the circumstances. It was his submission that indeed there was no objective basis for the prosecution. He contended that no prudent and cautious man would have found the plaintiff guilty. He maintained thus that the plaintiff was maliciously prosecuted by the defendant.

As to whether the plaintiff was unlawfully dismissed from employment, counsel contended that the plaintiff was dismissed while the criminal case was ongoing yet the allegations terminated in his favor. As a result of the dismissal, he was denied

his dues including pension. He stated that denial of a hearing/ right to be heard is a clear manifestation of unfair dismissal. He referred this court to the authority of *Kamulegeya Philip Vs Bank of Baroda HCCS No.1125 of 1998* (unreported).

Counsel further contended that the plaintiff was entitled to special damages being the salary/ emoluments arrears worth shs. 55,449,953.85. citing the authority of *Bank of Uganda Vs Betty Tinkamanyire Civil Appeal No.12 of 2007*; where Tsekooko JSC referred to the case of *Agbettoh Vs Ghana Cocoa Marketing Board (1984-1986)* GLRD for the proposition that it would be just and proper for the court to mark its disapproval of the plaintiff's unconstitutional retirement by ordering that the defendant board pay to each plaintiff an amount equal to 2 years salary in addition to receiving their entitlements under the contract of employment. Counsel thus invited court to award the said special damages accordingly.

The last issue was premised on the remedies that are available to the plaintiff. Counsel contended that the plaintiff was entitled to terminal benefits. He relied on section 9 (1) of the Pensions Act, Cap 286 which provides;

“Every officer employed in the public service who has qualified for a pension shall be entitled to it.”

On the other hand section 10 provides for circumstances in which pension is granted. Sub section 2 thereof provides;

“Notwithstanding subsection (1), a pension, gratuity or other allowance shall be paid to an officer who retires on the attainment of the age of forty-five years if he or she has served for a continuous period of ten years or more.”

It was counsel's contention that the plaintiff was entitled to his full terminal benefits at the time of his dismissal as he had worked in the Public Service for 20 years. Citing the circular standing instrument No.1 of 2009, Counsel contended

that the plaintiff was entitled to shs.1,199,462= which would then translate to shs14, 393, 544 in total as his terminal benefits.

Alternatively, learned counsel contended that at least the plaintiff should have been placed within the ambit of section 15 of the Pensions Act, which provides thus;

“Where an officer is dismissed from the Public Service, the pensions authority may if he thinks fit, grant such pension, gratuity or other allowance as he or she thinks just and proper, not exceeding in amount that for which the officer would be eligible if he or she retired from public service in the circumstances described in section 10 (1) (e).”

As for general damages; counsel relied on *Kiyingi Vs National insurance Corporation (1985) HCB 4* where a senior member of staff’s services were wrongly terminated, and the court awarded him general damages for embarrassment and inconvenience while in Betty Tinkamanyire (supra) the court was able to award damages reflecting its disapproval of a wrongful dismissal and the sum was not confined to an amount equivalent to the worker’s wages.

In the instant case, counsel invited court to award Shs. 100 million as general damages to the plaintiff.

For exemplary damages, counsel referred this court to the authority of Betty Tinkamanyire (supra) where their Lordships held that the acts of the appellant were not only unlawful but were degrading and callous and an award of aggravated damages was a proper one. Counsel invited court to award aggravated damages of Shs. 100 million.

Counsel further relied on *John Muruli Muyambi Vs URA Civil Suit No.804 of 1997* where Tinyinondi , J, stated that nobody gets arrested and is left unbruised

mentally. The plaintiff in that case was awarded 5million as damages for malicious prosecution in 1997. Counsel in the instant case invited court to award the plaintiff shillings 50 million under that head.

He also invited court to award the plaintiff the costs for the suit.

In reply, counsel for the defendant concurred with Mr. Baingana that indeed false arrest and imprisonment as causes of action in this suit were time barred as they were brought after the expiry of the statutory 2 years limitation.

On whether the plaintiff was maliciously prosecuted, Mr. Oluka relied on ***Owiny Kenneth Vs the Attorney General HCCS No.11 of 1995*** for the proposition that; to uphold the tort of malicious prosecution the plaintiff must prove that his prosecution by the defendant was actuated by malice and to prove that malice, the plaintiff may show that the prosecution was based on reasonable or probable cause that the plaintiff had committed the offence with which he was prosecuted.

Counsel maintained that there was ample reason to actuate the plaintiff's prosecution. The plaintiff having been in charge of administration ought to have taken caution/ care in the issuance of IDs so as to avoid instances like the one before this court.

As to whether the plaintiff was lawfully dismissed from his employment, counsel referred this court to ***Bank of Uganda Vs Betty Tinkamanyire Civil Appeal 12 of 2007*** where Kanyeihamba JSC opined as follows;

“it is trite law that, a court of law should not use its powers to force an employer to retake an employee it no longer wishes to continue to engage...”

Counsel contended that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they could have retired is unattainable in law. He further relied on the Public service Orders, items F-t, Regulation 7 to state that when a public officer is dismissed, he or she forfeits all his or her rights and privileges as a public officer, including the claim to the period of notice...

Counsel submitted that the plaintiff's circumstances amounted to an action divesting and stripping a person of any semblance of employment rights. He maintained that the plaintiff, notwithstanding the acquittal of the charges against him, could not be availed the option of claiming an entitlement to any form of right from the government, whether he had pleaded his innocence and had been acquitted by court or otherwise.

Counsel for the defendant did not agree that this was a case where the plaintiff should be awarded special damages as so claimed; he thus invited court to ignore the same.

As to the other remedies sought by the plaintiff, Mr. Oluka submitted that there was no basis for the grant of terminal benefits and general damages to the plaintiff and that there were neither any oppressive, arbitrary or unconstitutional acts on the part of the Government that would warrant the grant of exemplary damages. He referred court to *Charles Acire Vs Ann Mary Engola (1992) IV KALR 143*.

In reply, Mr. Baingaina submitted that the regulation under the Public Service Orders cited by Mr. Oluka was misplaced in this case. He invited court to look at Regulations 4 & 7 under the heading of F-r accordingly.

I will deal with the issues in the chronology in which they were raised.

At the hearing of the suit, the plaintiff abandoned the issue of limitation. Learned counsel submitted that the causes of action of false arrest and wrongful imprisonment were time barred as they were instituted beyond the statutory period of two years. I concur with counsel's submission on this point; limitation is a matter of law, an action barred by limitation is barred by law and it must be rejected. Accordingly the actions of false arrest and wrongful imprisonment are herein rejected.

The plaintiff together with another who is not a party to the proceedings before this court was charged with a number of counts of criminal offences. However, the court was not persuaded that the accused persons were guilty of the said offences. They were accordingly acquitted. It is not the duty of this court in this case to determine whether the trial court was entitled to decide as it did. That would be for an appellate court in that matter which this court is not. However, after studying the exhibits relating to that trial, it is evident that there was a probable cause for the investigation and prosecution of the suspects. It was not altogether a hopeless case. The IDs in issue bore similar names and similar titles (farm Manager) yet one would have been the assistant farm manager. When the Ministry received the said IDs in the same names of Musoke as a farm Manager, they thought there was a forgery that needed to be investigated, I have addressed my mind to the arguments of counsel and the ingredients of malicious prosecution as laid out in the *AG Vs Adam Farajala 1977 HCB 29*. In the circumstance I am inclined to find that though the proceedings terminated in the plaintiff's favour, there was probable cause for the prosecution.

In law, wrongful termination is termination in breach of the contract of employment. To determine whether the Plaintiff's contract was wrongfully terminated or not, it is pertinent to refer to the contract of itself. The Plaintiff's complaint is that he was wrongfully terminated from his employment before the conclusion/ determination of the criminal case against him.

It is not the law, unless parties have so agreed in the contract of employment, that the employer must wait for the outcome of the criminal trial before he can decide the fate of the employee. In *British Home Stores Vs Burchell [1978] I.R.L.R 379* an employee was dismissed for alleged dishonesty relating to staff purchases. The Employment Appeal Tribunal held that in such cases the employer had only to show that he entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time.

I'm agreeable to that position. In practice this will require the employer to have made sufficient investigation into the matter before dismissing the employee. I am of the considered view that the employer's obligation in such a situation is to ensure that the employee has had an opportunity to know exactly what allegations have been leveled against him. He should also most importantly be allowed to put his own side of the story to the employer before any decision is taken.

It is clear under the Public Service Standing Orders that the Defendant can interdict with half pay, a public servant who is accused of misconduct, pending the outcome of investigations into the allegations. The Plaintiff, in his testimony stated that he was given an opportunity to show cause why he should not be dismissed from the Public Service, which he did.

I therefore agree that the termination was in accordance with the said Orders. It was not wrongful. This issue is accordingly answered in the negative.

The plaintiff made a claim for special damages; these must be pleaded and strictly proved: *Kampala City Council Vs Nakaye [1972] EA 446 at 449*. I have perused the plaint especially paragraph 7 thereof where the plaintiff laid out his claim for special damages and came up with a total of shs 55,449,953.85 only ranging from February 1999 to June 2005, i.e.

i)	Feb to Oct 1999	-	2,131,121.85
ii)	Nov 1999- June 2000	-	4,579,994.00
iii)	2000/2001 (July to June)	-	7,213,488.00
iv)	2001/2002 (July to June)	-	8,041.488.00
v)	2002/2003 (July to June)	-	9,904,560.00
vi)	2003/2004 (July to June)	-	11,285,880.00
vii)	2004/2005 (July to June)	-	12,293,424.00
TOTAL			55,449,953.85

Although the plaintiff did not show how he arrived at these figures in the plaint, he led evidence touching this matter during the trial. He testified that at the time of his dismissal, his salary was in salary scale U2 Upper scale and that he had received half payment for a period of 9 months i.e. February- October 1999 totaling to shs 2,121,121.85 only. I agree that he is entitled to this claim.

Additionally the plaintiff testified that according to the current circular from the Ministry of Public Service, 2009/ 2010, salary scale of U2 upper is shs 1,199,482 per month. I do not agree with this position that this is the scale under which he should be paid as the same was approved after his dismissal from the service. The claim based on this, must, therefore fail.

In *Fulungensio Sernako Vs Edirisa Ssebugwano [1979] HCB 15* it was held that in an action for damages one of the duties of counsel should be to put before court material which would enable it to arrive at a reasonable figure by way of damages. In this respect counsel owes duty to their clients as well as to court to lay down the basis for arriving at a reasonable award. No effort was made by counsel to

discharge that duty. In the case before this court, no evidence was led as to how the other figures of special damages were arrived at, i.e.

i)	Nov 1999- June 2000	-	4,579,994.00
ii)	2000/2001 (July to June)	-	7,213,488.00
iii)	2001/2002 (July to June)	-	8,041.488.00
iv)	2002/2003 (July to June)	-	9,904,560.00
v)	2003/2004 (July to June)	-	11,285,880.00
vi)	2004/2005 (July to June)	-	12,293,424.00

These claims were never proved, they must therefore fail.

As to the other remedies to the plaintiff, I wish to refer to the letter from the Ministry of Education and Sports to the plaintiff dated, 14/09/1999 vide CA/22/1/41 which stated;

“RE: DISMISSAL FROM THE PUBLIC SERVICE

I regret to inform you that the Education Service Commission vide Min 23 of 1999 has directed that you be dismissed from the Public Service forthwith.

Your dismissal does not attract any terminal benefits.

FXK LUBANGA

PERMANENT SECRETARY.”

It is trite law that a dismissed employee is also entitled to recover the arrears of salaries due to him and the benefits that have accrued to him for the completed period of service. See *Tommy Otto Vs Uganda Wildlife Authority HCCS No.208 of 2002.*

In the instant case, the plaintiff is entitled to the unpaid half of his salary for the period of interdiction; benefits he was ordinarily entitled to in the course of his employment until date of dismissal.

However, since the plaintiff has not succeeded on the claims of malicious prosecution and the wrongful termination; no general damages accrue in the instance. The authorities cited by counsel for the plaintiff on the issue of other remedies are with respect, distinguishable from the instant case and are therefore inapplicable.

With regard to costs, the justice of this case requires that each party bears its own costs.

It is so ordered.

Elizabeth Musoke

JUDGE

12/02/2013