THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.408 OF 2014

MUGABI TIMOTHY::PLAINTIFF

VERSUS

1. **TAGE BUDOLFSEN**
2. **KIDS OF AFRICA**
3. **ATTORNEY GENERAL::DEFENDANTS**

JUDGMENT

BEFORE HON JUSTICE SSEKAANA MUSA

The plaintiff is a former employee of the 2nd defendant. The 1st defendant is the Managing Director of the 2nd defendant. The 1st defendant received multiple death threats thereto reporting the matter to the police. Investigations were carried out and a police report was made pointing to the plaintiff as the person intending to harm the 1st defendant and his family.

The plaintiff was suspended from duty and was then invited for a hearing on 27th March 2013 regarding the threatening messages. The management committee of the 2nd defendant resolved to terminate the plaintiff's employment.

Criminal proceedings were commenced against the plaintiff but were later withdrawn by the DPP.

The parties filed a joint scheduling memorandum in which the following issues were agreed upon for determination by this court;

1. Whether the plaintiff's claim for wrongful termination is properly before this Honorable Court.
2. Whether the plaintiff's employment with the defendant was lawfully terminated.
3. Whether the plaintiff's claim for unlawful termination is time barred.
4. Whether the plaintiff was maliciously prosecuted by the defendant.
5. What remedies are available to the plaintiff?

At trial the plaintiff was represented by Ekirapa Isaac whereas the 1st and 2nd defendant were represented by Zimula Steven. The 3rd defendant was represented by Adongo Emelda.

The parties were instructed to file final written submissions that were duly considered by this court.

I shall now proceed to determine the agreed issues.

Issue 1: Whether the plaintiff's claim for wrongful termination is properly before this Honorable Court.

Counsel for the 1st and 2nd defendant submitted that issues regarding alleged unlawful termination can only be handled by the Labour Officer. Counsel submitted that the plaintiff in his pleadings sought damages for the alleged wrongful termination of his contract of employment with Kids of Africa which shows that the plaintiff seeks to enforce rights under the Employment Act

Counsel cited Section 93(1) of the Employment Act 2006 which provides that except where the contrary is expressly provided for by this Act, the only remedy available to a person who claims an infringement of any rights granted under this Act shall be by way of a complaint to a Labour Officer.

Counsel relied on the ***case Uganda Revenue Authority vs Rabbo Enterprises Uganda Limited and Mt. Elgon Hardwares Limited Civil Appeal no. 12 of 2004*** where the Supreme Court held that;

The proper procedure therefore is that all tax disputes must first be lodged with the Tax Appeals Tribunal and only taken before the High Court on appeal.

In this case the court made reference to Article 152(3) of the Constitution which is to the effect that parliament shall make laws to establish tax tribunals for purposes of settling tax disputes.

Counsel further submitted that under **Article 40 of the Constitution**, Parliament is mandated to make laws regarding employment matters in Uganda and it's on this basis that the employment Act was enacted. Counsel submitted that based on the above constitutional provisions which limit the jurisdiction of the High Court, they aver that it is only the District Labour Officer that has jurisdiction to handle labor disputes.

Counsel for the plaintiff submitted that the plaintiff instituted this suit based on causes of action of employment and tort.

Counsel in their submissions cited **Article 139(1) of the Constitution** that provides that the High Court has unlimited original jurisdiction in all matters. Counsel further submitted that there is no other Constitutional provision setting up another tribunal or court for the determination of labour disputes and in the absence of such, the original jurisdiction of the High Court in all matters labour disputes inclusive cannot be challenged.

Counsel submitted that the question whether employment related matters are a preserve of the Industrial Court has been subject to adjudication in several cases including ***Court of Appeal Engineer John Eric Mugenyzi vs Uganda Electricity Generation Co. Ltd Civil Appeal No. 096 of 2015***, where the Court of Appeal interpreted the meaning of Court under the Employment Act 2006 and concluded that the expression court means a court of judicature or a subordinate court.

Counsel also cited **Julius Bitatule vs Attorney General HCCS No. 626 of 2010** where this court decided a dispute based both on unlawful dismissal and the tort of malicious prosecution.

Counsel concluded that this dispute is rightly before this court.

It is true that the labor officer has jurisdiction when it comes to labor disputes including unlawful dismissal. **Section 93 (1) of the Employment Act** provides that the only remedy available to a person who claims an infringement of any of the rights granted under this Act is by way of complaint to a Labour Officer.

This position was reiterated by the Supreme Court in 2010 Former Employees of G4S Security Services Uganda Ltd v G4S Security Services Uganda Ltd, SCCA No. 18 of 2010.

In **Uganda Broad Casting Co-operation v Ruthura Agaba Kamukama, Misc. Application No. 638 of 2014,** Hon. Justice Stephen Musota held that;

"Much as this Court (High Court) has unlimited jurisdiction, if one looks at the intention of Parliament in conferring jurisdiction on the Labour Officer and the creation and operationalization of the Industrial Court with appellate jurisdiction it would be prudent if these two institutions are put to good use. This is our current court policy. Avoiding these institutions

would be defeating the intentions of the legislature since the Industrial Court is now operational. I find it proper to refer this matter to the Labour Officer for appropriate handling."

However in the instant case, the plaintiff has two claims that is; unlawful dismissal and malicious prosecution. Ideally the plaintiff would have filed the claim of unlawful dismissal before the Labour Officer and then filed the claim for malicious prosecution with this court. The decision of ***Engineer John Eric Mugyenzi vs Uganda Electricity Generation Co. Ltd Civil Appeal No. 096 of 2015*** has equally clarified on the jurisdiction of court vis-a-vis the Labour Officer. This court is bound by that decision and the plaintiff's case cannot be thrown out since the plaintiff is seeking general damages for wrongful termination of the employment and yet the Labour Officer has no power to award general damages.

Considering that the matter has already been duly heard, I shall exercise the unlimited jurisdiction of this court under **Article 139(1) of the Constitution** and determine both claims so as to avoid multiplicity of litigation/proceedings.

Issue 2: Whether the plaintiff's employment with the defendant was lawfully terminated.

The plaintiff led evidence to show that he was never availed with the police report in which he was allegedly incriminated in sending threatening messages to the 1st defendant. Counsel for the plaintiff submitted that the invitation to the plaintiff to defend himself against the findings of a police report that was not availed prior to the meeting breached the principles of natural justice and a fair hearing.

The plaintiff's counsel further submitted that Exhibit P6 which summoned the plaintiff to the meeting did not inform him of his right to attend the meeting with a person of his choice thereby failing to meet the standard under section 66 of the Employment Act.

Counsel submitted that the hearing held by the defendant was a complete mockery alluding to the fact that the plaintiff was also not given reasonable time to enable him prepare a defence. The evidence on record shows that the defendant was sent Exhibit P6 on 25th March 2013 summoning him for a meeting that was scheduled for 27th March 2013 at 2:30 pm. Counsel also submitted that the 1st defendant was both prosecutor and judge in the matter as he authored both Exhibit P6 and P7 which terminated the plaintiff's employment.

The plaintiff's counsel submitted that the defendant breached the plaintiff's constitutional right of presumption of innocence as there was no verdict by a court of law finding the plaintiff guilty of sending the defendant threatening messages.

Counsel concluded that all the above rendered the plaintiff's termination unlawful.

The defendant's counsel on the other hand submitted that the plaintiff was suspended from duty pursuant to investigations carried out by the police regarding threatening violence which made the plaintiff one of the suspects.

The plaintiff was invited for a hearing which invitation mirrored the contents of the suspension letter therefore he was not taken by surprise as he already knew the reasons of his suspension.

Counsel submitted that at the hearing the police report was read out and the plaintiff was requested to give his side of the story. It was during the hearing that it came out clearly to management pursuant to the investigative report that the plaintiff was responsible for sending the threatening messages hence his subsequent termination. The plaintiff was paid 2 months' salary in lieu of notice and one month's salary for the annual leave not taken for the year 2013.

Counsel further submitted that the plaintiff was at all material time aware of the allegations against him and had ample time to prepare his defence. This was due to the fact that the reasons were stated in his suspension letter on 1st March 2013 and the police report did not introduce anything new that was unknown to the plaintiff.

Counsel cited the Supreme Court case of *Hilda Musinguzi vs Stanbic Bank (U) Limited Civil Appeal No. 5 of 2016* where Justice Mwangusya Eldad held that; my reading of S.68(2) of the Employment Act 2006 is that it does not impose such a high standard of proof on the reasons of termination as would be required in a court of law. All that matters is that the defendant believed that the employee committed the acts complained of. He further stated that the right of an employer to terminate cannot be fettered as long as the procedure of termination is followed. No damages were awarded.

Counsel concluded that the termination was lawful.

From the submissions of counsel for the plaintiff, the plaintiff faults the defendant for terminating his contract before any court of law pronounced him guilty of having sent the threatening messages.

In **Robert Mukembo v Ecolab East africa(u) Ltd (Civil Suit No. 54 Of 2007)** The Honourable Mr. Justice Yorokamu Bamwine held that;

"If I have understood the plaintiff's complaint herein, and I believe I have, he attributes the alleged wrongfulness of the termination of his employment to the fact that the action was taken before his guilt or innocence was established through the normal police inquiry and prosecution. Such an argument cannot be sustained. In my opinion, in a situation where an employee is accused of a criminal offence, as herein, the employee may be prosecuted by the police. It could be many months before the case is tried. It is not the law, unless the parties have so agreed in the contract document, that the employer must await the outcome of that case before he takes action. Thus 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."*

In this case, the 1st defendant respondent engaged the police to investigate who was sending him threatening messages to which the police drafted a report that indicated the plaintiff as the culprit. The report even though not definitive caused the defendants to have reasonable suspicion amounting to the guilt of the plaintiff.

With regard to the process of termination, the plaintiff alleged that the entire hearing was a complete mockery.

I have reviewed all the evidence relating to the hearing and I find the plaintiff's allegations unsustainable. The plaintiff was suspended from duty pending investigations of threatening violence which made the plaintiff one of the suspects. He was invited for a hearing wherein the defendant mirrored the contents of the suspension letter hence being aware of the allegations against him. At the hearing the police report was read out and the plaintiff was requested to give his side of the story. Upon termination, the plaintiff was paid 2 months' salary in lieu of notice and one month's salary for the annual leave not taken for the year 2013.

From that I find that the plaintiff had reasonable time to prepare his defence hence the allegation that the hearing was a complete mockery is untenable before this court.

This issue is therefore resolved in the affirmative.

Issue 3: whether the plaintiff's claim for unlawful termination is time barred.

Counsel for the plaintiff cited Section 3(1)(a) of the Limitation Act Cap 80 which states that the time for instituting causes of action founded on contract is 6 years whereas this suit was instituted less than 24 months after termination.

The defendant's counsel submitted that under section 66(6) Employment Act 2006 which is the latter act than the Limitation Act Cap 80 provides that a complaint regarding unfair dismissal or termination must be brought within 3 months after the date of dismissal. The present claim was filed in court in 2014 whereas the plaintiff's employment was terminated in March 2013.

The limitation period cited by counsel is in regard to the labour officer and not to the courts of law. Section 66(6) does not make mention of limitation period when it comes to filing a claim for unlawful termination before a court of law.

This issue is resolved in the negative.

Issue 4: whether the plaintiff was maliciously prosecuted by the defendants.

The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice.

According to **Odunga's Digest on Civil Case Law and Procedure page 5276**, the essential ingredients to prove malicious prosecution are as follows:

1. The criminal proceedings must have been instituted by the defendant
2. The defendant must have acted without reasonable or probable cause
3. The defendant must have acted maliciously
4. The criminal proceedings must have been terminated in the plaintiff's favor.

From the evidence on record, there is no doubt that the 3rd defendant instituted criminal proceedings against the plaintiff in which the 1st defendant was the complainant.

We shall now determine whether the defendant acted without reasonable or probable cause.

Counsel for the plaintiff submitted that it is inconceivable that the 1st defendant waited for over a year to lodge a complaint with police if he honestly believed that it was the plaintiff responsible for sending him threatening messages.

The plaintiff's counsel further submitted that reliance on anonymous letters dropped by unknown persons cannot be the basis upon which the 1st defendant would have formed a belief that the plaintiff was guilty of sending threatening messages, more so given that the alleged letters were dropped one year and seven months respectively before the 1st defendant lodged his complainant with the police.

Counsel also submitted that the interim police report relied on by the defendants was highly contradictory and did not come with any data to substantiate its findings hence no reasonable cautious man would have acted on it which was no wonder that the DPP withdrew the charges against the accused.

On the other hand counsel for the defendants submitted that the police acted with probable and reasonable cause as investigations were carried out and the police report indicated that the plaintiff was responsible for sending the threatening messages as his phone was being used. The police report corroborated the letters written by the workers.

Reasonable and probable cause" was defined in ***Attorney General v. Farajara [1977] HCB 29*** as:

"…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 any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."

With that definition in mind, I find that the evidence presented to and by the police caused the defendants to come to the conclusion that the plaintiff was probably guilty of the threatening violence against the 1st defendant.

whether the defendants acted maliciously.

Counsel for the plaintiff submitted that the motive in instituting criminal proceedings was aimed at dismissing the plaintiff from work and not obtaining justice. This owed to the fact that the decision to initiate criminal charges well after a year of receiving the

threatening messages suggests another motive other than apprehending the true suspect.

Counsel further submitted that suspending the plaintiff before the police issued a report as well as terminating the plaintiff's employment based on an interim police report yet the suspension letter indicated that the plaintiff was to remain on suspension until a full report was received from the police proved that the defendants acted maliciously in hurriedly prosecuting the plaintiff.

The defendants' counsel on the other hand submitted that there was no malice in prosecuting the plaintiff. Counsel submitted that 1st defendant was actually surprised when it turned out that it was the plaintiff that was sending the threatening messages.

He further submitted that there was no malice as the phone used to send the messages was traced by police to the plaintiff and all this evidence was corroborated by the letters written by the affected workers Exhibits D2 and D3.

In the case of ***Attorney General v. Farajara (supra)*** "malice" was defined as:

"…indicating that a party was actuated either by spite or ill-will towards an individual or by improper motives."

Malice can be inferred on the basis of facts and circumstances of each case because it cannot be proved by direct evidence. From the facts of this case, I do not find that the defendants acted maliciously. The plaintiff's allegations do not substantiate malice on the defendant's side as the defendants all acted on a justifiable presumption that the plaintiff was guilty.

Lastly is whether the proceedings were terminated in favor of the plaintiff.

From the evidence on record, the criminal proceedings against the plaintiff were withdrawn by the DPP. Counsel for the plaintiff submitted that the prosecution of the accused hence ended in his favor. Counsel cited the case of ***Hannington Mpala & 2 Ors vs AG HCCS No. 116 of 2012*** to support his submission.

Counsel for the defendant submitted that the proceedings were discontinued shortly after the 1st defendant had testified unlike in the case that was relied on by the plaintiff. Counsel further testified that the plaintiff admitted that the DPP was personally known

to him therefore it cannot be ruled out that this was the reason for discontinuing the prosecution.

In of **Hannington Mpala & 2 Ors vs AG HCCS No. 116 of 2012** cited by counsel for the plaintiff, court held that *"it is an undisputed fact that the nolle prosequi to terminate the criminal proceedings against Kaluuya was filed on 23/05/2011. The charge was never reinstated. It is correct as stated by plaintiff's counsel that Kaluuya's prosecution was terminated in his favour, and there is authority to that effect. The Court of Appeal of Eastern Africa in* ***Egbema vs West Nile District Administration [1972]*** *EA 60 held that withdraw of a charge without fresh proceedings being brought is sufficient to establish that prosecution of an accused person has been brought to an end. The Learned Justices quoted Lindsell on Torts 12th Ed para 1707 that*

"It is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must in my opinion be considered equivalent to an acquittal, so as to entitle the appellant to bring a suit for malicious prosecution. (emphasis added)."

In this case it has been over 5 years with no fresh proceedings brought against the plaintiff hence it is perceivable to say that the proceedings were terminated in his favor.

We have to note that the gist of the action of malicious prosecution is malice and improper motive in the absence of which the claim is not tenable. The criminal proceedings of which the plaintiff complains ought to have been initiated in a malicious spirit that is from an indirect and improper motive, and not in furtherance of justice.

Therefore malice is the central point of the action for malicious prosecution. It should be *malice in-fact* as distinguished from *malice in-law.* Malice in-fact stands for the defendant that action was initiated either by ill will or improper motive. Malice means the presence of some improper and wrongful motive that is an intent to use the legal process in question for something other than its legally appointed or appropriate purpose.

In this case I find that the defendants showed no malice against the plaintiff as the only intention of the prosecution was to ensure justice for the 1st defendant who was receiving threatening messages that had been sent through the plaintiff's mobile telephone line.

This issue therefore fails.

Remedies available to the parties.

After the resolution of the above issues the plaintiff is not entitled to the remedies sought.

The suit is accordingly dismissed.

The 1st and 2nd defendants are awarded costs.

SSEKAANA MUSA
JUDGE
18th September 2020