



REPUBLIC OF KENYA



**Katungu v Attorney General (Civil Suit 214 of 2019)
[2024] KEHC 15133 (KLR) (Civ) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 214 OF 2019**

JN NJAGI, J

NOVEMBER 27, 2024

BETWEEN

MARGARET AYUMA KATUNGU PLAINTIFF

AND

THE HONOURABLE ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The Plaintiff herein instituted the present suit against the defendant vide a plaint dated 10th September 2019 seeking for the following reliefs:
 - a. General Damages including aggravated and exemplary damages.
 - b. Special Damages of Kshs. 1,250,000/=.
 - c. Costs of the suit and interest therein.
2. The plaintiff pleaded in her plaint that she is a retired civil servant previously working with the Ministry of Foreign Affairs. That her last posting before her retirement was at the Kenya High Commission at Harare in Zimbabwe where she was posted in the year 2005 as a financial attaché.
3. It was her case that in the year 2008 a plan was hatched by Officers at the Ministry to her being recalled before the end of her duty of 4 years so as to replace her with a person of their choice.
4. That on 31st April 2010 she was interdicted on allegations that she had stolen USD 10,000 from the bank account of the High Commission at Standard Chartered Bank, Harare. It was her case that after interdiction she was not subjected to any disciplinary process within three months as required by the Civil Service Code of Regulations. That she was then compelled to file a case at the Employment



and Labour Relations Court being Industrial Case No. 2142 of 2012. That on 27th June 2013, the Employment Court ordered for her reinstatement.

5. That the said orders were ignored by the then Principal Secretary, Dr. Karanja Kibicho and she instituted contempt of Court proceedings against the said officer. The ministry then instructed her to report for duty but when she did so on 20th January 2014 she was arrested and charged with one count of forgery and 9 counts of stealing by a person employed in the public service. On 27th October 2016, the PS Dr. Karanja Kibicho was convicted for contempt of court and was ordered to pay a fine of Ksh. 200,000/= and in default to serve six months in prison.
6. The plaintiff was tried of the offences but was acquitted on all the counts under the provisions of section 215 of the Criminal Procedure Code. The plaintiff subsequently filed the present suit against the defendant wherein she is praying for damages for malicious prosecution.
7. The defendant filed his statement of defense dated 6th November 2019, wherein they denied the contents of the plaint and averred that the plaintiff's prosecution was based on a reasonable and probable cause. They denied that the arrest and prosecution of the Plaintiff was driven by malice. They contended that the police acted in their lawful duties in arresting and charging the plaintiff with the offences.

Plaintiff's Submissions

8. The Plaintiff submitted that she had proved that her arrest and prosecution was done maliciously without any reasonable and probable cause. That the same was a scheme to counter her reinstatement and maliciously paint her as a thief even where there was no evidence of stealing. That it was also a personal vendetta by the Principal Secretary for citing him for contempt of court.
9. The plaintiff submitted that all the ingredients of the tort of malicious prosecution as laid out in the cases of *Murunga v The Attorney General (1976-80) 1KLR 1251*, *James Alfred Koroso v Attorney General (2008) eKLR* and *Kagane v Attorney General (1969) E.A 643* were met, which are that the prosecution was terminated in favour of the plaintiff; that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice.
10. It was submitted that no adequate evidence was availed by the prosecution to support the charge or warrant charging the plaintiff with the offences and thus the prosecution was actuated by malice. The plaintiff relied on the case of *Thomas Mutsotso Bisembe vs. Commissioner of Police and another (2013) eKLR* where it was held that:

The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect... where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But



neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice.

11. On her claim of aggravated damages, the plaintiff relied on the holding in the case of Francis Xavier Ole Kaparo v The Standard & 3 others, HCC No. 1230 of 20014(UR) where it was held that:

Malicious and insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguishable from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors...Damages will be aggravated by the Defendant's improper motive.

12. It was submitted that the plaintiff suffered because she resisted arbitrary, punitive and malicious acts of senior officials in the ministry who even ignored court orders and attempted to circumvent justice by framing fake and bogus charges against her. That she testified that she suffered extreme mental agony, embarrassment, emotional torture, humiliation, financial loss, pain and suffering and is thereby entitled to general, exemplary and aggravated damages. The plaintiff cited the case of Emmanuel Kuria wa Gathoni v Commissioner of Police & another (2017) eKLR where the court awarded a sum of Ksh.25,900,000/= for malicious prosecution.

Defendant's Submissions

13. The defendant placed reliance in the case of Kagane vs. Attorney General (supra) where the court set out the four essentials of the tort of malicious prosecution. It was submitted that the plaintiff was required to satisfy the court on the four basic essentials of malicious prosecution and prove each one of them as to present a united whole.
14. On whether the prosecution of the Plaintiff was malicious, the Defendant submitted that the prosecution was based on reasonable and probable cause. That the information given to the DCI was credible which coupled with their independent investigations, was enough to satisfy a prudent and cautious prosecutor that the plaintiff was guilty of the offences accused of. It was submitted that investigations had proven that the Plaintiff had paid out non-existence services using forged signatures purportedly signed by various mission officials. More so that it should be noted that the plaintiff was acquitted under section 215 of the Criminal Procedure Code and as such the prosecution had demonstrated a prima facie case against the plaintiff. It was submitted that the plaintiff had failed to demonstrate lack of reasonable and probable cause on the part of the prosecution.
15. On malice, the defendant placed reliance in the case of Katerrega v Attorney General (1973) E.A 289 where it was observed in a claim of damages for malicious prosecution that malice must be proved showing that the person instituting the proceedings was actuated either by spite or by indirect or improper motives.
16. Similarly, in the case of James Karuga Kiiru vs. Joseph Mwamburi & 3 others, Nairobi Court of Appeal case No. 171 of 2000 it was held that:

To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

17. It was submitted that the ministry vide a letter dated 18th October 2010 informed the plaintiff of the offence she was suspected to have committed and by the said letter she was given 14 days to give written



presentations as to why disciplinary action should not be taken against her. That the plaintiff admitted in cross-examination that she made a response to the said letter.

18. It was submitted that vide a letter dated 30th November 2010, the plaintiff was informed by the ministry that the Standard Bank had confirmed that she received USD 10,000 in question and that the amount had been withdrawn using a forged signature as a result of which the plaintiff was interdicted vide the said letter.
19. It was submitted that the defence witnesses informed the court that investigations involved collecting evidence from officers at the ministry of Foreign Affairs both at the Headquarters in Nairobi and Harare, Zimbabwe as well as Standard Bank Harare which took a long period of time due to the logistics involved.
20. The defendant submitted that the plaintiff in cross-examination testified that she did not know the investigating officer in the matter, which meant that there cannot have been malice, spite or ill-will on the part of the police officers who investigated the case.
21. Further that the ministry requested the CID to investigate the plaintiff's case vide a letter dated 22nd February 2011. It was thus submitted from the forgoing that investigations in the matter started way back in the year 2010 and it was therefore not true as contended by the plaintiff that her arrest and prosecution was instigated by the orders the plaintiff obtained in the Industrial Court Case No. 2142 of 2012.
22. The defendant submitted that the mere acquittal of the plaintiff cannot form a basis of a case for malicious prosecution unless malice is proved. In this respect the defendant placed reliance on the case of *Socfinafkenya Ltd vs. Peter Guchu Kuria (Nairobi HC Civil Appeal No. 595 of 2000)* eKLR where it was held that:

“ That a suspect was 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.”
23. On Special damages pleaded by the plaintiff, the defendant submitted there were no receipts to prove that the plaintiff had spent Ksh.1,250,000/= as legal fees in the criminal case. Counsel referred the court to the cases of *Swalleh C. Kariuki & another v Violet Owiso Okuyu (2021)* eKLR and *Hahn vs. Singh (Civil Appeal No. 42 of 1983(1985))* for the legal principle that special damages must be both pleaded and strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. It was submitted that the plaintiff admitted in cross-examination that she did not have receipts to prove the claim for special damages.
24. In view of the foregoing, the defendant urged the court to dismiss the suit with costs.

Analysis and Determination

25. I have keenly gone through the judgment of the trial court in the criminal matter, the pleadings, the evidence adduced in this court and the submissions by the respective advocates for the parties in this matter. I find the issues falling for determination to be whether the threshold for proof of a case of malicious prosecution has been established and if so what damages should be awarded.



26. The principles that govern a claim founded on malicious prosecution were set out by the Court of Appeal in *Robert Okeri Ombeka v Central Bank of Kenya* [2015] eKLR while quoting the case of *Murunga v Attorney General* [1979] KLR as follows:

The Courts have pronounced themselves on the issue of malicious prosecution in various cases including *Murunga v Attorney General* [1979] KLR 138 and *G.B.M Kariuki v Attorney General* (2016) eKLR. From jurisprudence in these cases, it emerges that the elements to consider in determining a claim for malicious prosecution are that:

- a. That the prosecution was instituted by the defendant or by someone for whose acts he is responsible.
- b. That the prosecution terminated in the plaintiff's favour
- c. That the prosecution was instituted without reasonable and probable cause.
- d. That the prosecution was actuated by malice.

27. In *Attorney General v Peter Kirimi Mbogo & Another, Meru Civil Appeal 52 & 56 of 2020* (Consolidated) [2021] eKLR, the appellate court held that the four elements apply conjunctively and must all be proved in order to successfully claim for damages for malicious prosecution.

28. Turning to the matter at hand and on the first principle, it is clear that the proceedings in the criminal case were instituted after complaints were lodged by the then PS in the Ministry of Foreign Affairs, One Dr. Karanja Kibicho. The Plaintiff was charged as a result of these allegations. The plaintiff had thereby established the first principle that the prosecution was instituted by the defendant.

29. The second principle relates to how the criminal proceedings were terminated. The proceedings indicate that the respondent was acquitted under section 215 of the Criminal Procedure Code. The prosecution in the criminal case therefore terminated in the plaintiff's favour.

30. The third element of malicious prosecution is whether the prosecution was instituted without any reasonable and probable cause. The test for this was laid out by the Court of Appeal in *Kagane & Other v The Attorney General & Another* [1969] EA 643, where Rudd J held as follows: -

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

31. In *Samson John Nderitu v The Attorney General* [2010] eKLR, Nambuye J (as she then was) held as follows: -

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually



carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

32. The plaintiff in this case was charged with a total of 10 counts. Of these, the second count related to forgery contrary to section 345 as read with section 349 of the Penal Code in which she was accused of forging a certain letter dated 20th September 2010 purported to have been signed by one Florence Weche, the Deputy head of the Kenyan embassy in Harare in Zimbabwe. The other nine counts related to stealing by a person employed in the public service of various amounts of money the property of the government of Kenya.
33. In acquitting the plaintiff of the charge of forgery, the trial court found no evidence that the plaintiff forged the letter in issue that was used to withdraw money from the Standard Bank in Harare. The court said that the forensic examiner was not provided with specimen signatures of the plaintiff and consequently the court found no evidence to link the plaintiff with the forgery.
34. On the other counts related to stealing, the trial court held that the prosecution produced letters authorizing payments by transfer of funds from the High Commission bank account to named payees who did not include the plaintiff. That there was no evidence that the plaintiff received any of that money and as such there was no evidence that she stole any of the money.
35. I have re-examined the evidence adduced in the criminal trial and in this case. I am in agreement with the trial court that there was no evidence that the plaintiff forged the letter purporting to have been signed by the Deputy Head of embassy at Harare that was used to withdraw USD 10,000 on 20th September 2010. Evidence was adduced that though the investigating officer took specimen handwriting and signatures of the plaintiff, the same were not sent to the forensic examiner. Why then would the prosecution have charged the plaintiff with the offence of forging the subject letter when her handwriting had not been taken to the forensic examiner for examination so as to ascertain that she is the one who forged the letter? More so the prosecution does not seem to have recorded statements from the bank employees who purported that the plaintiff is the one who withdrew the USD10,000. Why would the prosecution charge her with the offence when they knew they would not be calling such crucial witnesses?
36. On the other counts of stealing money, the evidence adduced before the trial court was that the commission paid for services to some named payees through bank transfers. No statements were recorded from the said payees to confirm that the payments were not genuine. Why would the prosecution charge the plaintiff with the offences in the absence of such crucial evidence?
37. The prosecution called some of the Commission employees who denied to have signed some of the vouchers that were used to pay the money through bank transfers. However, there was no examination of the signatures of the said employees by the forensic examiner to ascertain that the vouchers were forged. Why the would the defendant have charged the plaintiff with the offence when there was no evidence to proof that the signatures of the employees were forged?
38. In view of the foregoing it is clear to me that there was no evidence to proof that the plaintiff paid for non-existent services as alleged by the defendant. The prosecution charged the plaintiff with the offences on half-baked evidence. Though the plaintiff was acquitted under section 215, of the Criminal Procedure Code, there was in my view, no reasonable and probable cause of charging her with the criminal offences in the first place.



39. The fourth element of the tort of malicious prosecution is proof that the prosecution was actuated by malice. The Black's Law Dictionary, 10th Edition at page 1100 defines malice as:

“The intent without justification or excuse to commit a wrongful act, reckless disregard of the law or of a person's legal rights and ill-will or wickedness of heart.”

40. It is my finding that the prosecution charged the plaintiff with the criminal offences without satisfying themselves that there was sufficient evidence against her. It is clear that the plaintiff was interdicted in the year 2010. There were no disciplinary proceedings conducted against her as required by the Civil Service Code of Conduct. She was not taken to court until after the ELRC ordered for her reinstatement. It is clear that the plaintiff was only taken to court so as to defeat the order for reinstatement. In view of the fact that the evidence that was in the hands of the prosecution could hardly prove the charges against her, the only conclusion that can be drawn in the prosecution taking her to court is that the prosecution was actuated by malice. Malice on the part of the officers of the defendant has therefore been proved.

41. Arising from the foregoing, it is my finding that the plaintiff has proved on a balance of probabilities her case of malicious prosecution against the defendant. She is entitled to compensation in form of damages.

Quantum

42. The plaintiff claims general, aggravated and exemplary damages and special damages. In the case of *Chrispine Otieno Caleb v Attorney General* [2014] eKLR, Odunga J. cited the Ugandan case of *Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993* where the court considered the factors to be put in mind in an award of damages for malicious prosecution and said that:

“The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”.

43. In respect to exemplary damages, the court in the case of *Godfrey Julius Ndumba Mbogori & another V. Nairobi City County* [2018]eKLR held that:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a



profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

44. In the case of *George Ngige Njoroge v Attorney General (2018) eKLR*, it was held thus:

“Aggravated damages are awarded in actions where damages are at large. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, and trespass to land, persons or goods. The matters that the court should take into account in awarding such damages include the Defendant’s motive, conduct and manner of committing the tort. The court has to consider whether the Defendant acted with malevolence or spite or behaved in a high handed manner.”

45. In *Jacob Juma & Another v The Commissioner of Police & Another Nairobi HCCS No. 661 of 2007*, the Court on 14th January, 2013 awarded the 1st plaintiff who was a private contractor a sum of Ksh. 2,000,000/= in general and aggravated damages for malicious prosecution.

46. In *Chispine Otieno Caleb v Attorney General [2014] eKLR*, the Plaintiffs were awarded Kshs 2,000,000/= general damages for malicious prosecution and punitive exemplary damages in the sum of Ksh. 500,000/= for being held in custody unlawfully.

47. In *Samuel Kiprono Chepkonga v Kenya Anti-Corruption Commission & another [2014] eKLR* the Court awarded Ksh. 5,000,000/= in January 2014 to the Plaintiff who at the time of his prosecution was the Chief Executive of a state corporation and was facing two criminal cases.

48. In *G.B.M Kariuki v Attorney General (2016) eKLR* the Court, in awarding damages, considered the Plaintiff’s position as a Judge as well as the inflationary tendencies, the nature of the offence which carried life sentence (attempted murder) and awarded the Plaintiff Kshs 5,000,000/= in general damages for malicious prosecution.

49. In this case, the plaintiff was charged with the criminal offences so as to defeat the court order for her reinstatement. The servants of the defendant acted oppressively against the plaintiff in dragging her to court to settle scores. She was out of work for a period of 5 years until when she was retired in 2015. I am satisfied that the plaintiff is entitled to exemplary damages.

50. Taking into account all the circumstances of this case, the status of the plaintiff, her age as well as the effect of the criminal proceedings on her and particularly considering that she was interdicted towards the end of her career when she should have been preparing for a peaceful retirement, I am of the view that a sum of Ksh.3,000,000/= would be appropriate in general damages and Ksh.500,000/= would do for exemplary damages.

51. On special damages, it is trite law that the same must be strictly proved. The plaintiff did not produce receipts to prove the amount of money paid to her lawyer in defending her in the criminal prosecution. I find the claim for special damages not to have been proved and decline to award the same.

52. In conclusion, I find that the plaintiff has proved the claim for malicious prosecution against the defendant and award her damages as follows:

- i. General damages Ksh.3,000,000/=
- ii. Exemplary damagesKsh. 500,000/=

53. The plaintiff to have the costs of the suit and interest at court rates.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2024.



J. N. NJAGI

JUDGE

In the presence of:

Mr. Jaoko for Plaintiff

Ms Wawira for Defendant

Court Assistant- Amina

