



REPUBLIC OF KENYA



**Mohammed v Attorney General & 2 others (Civil Suit 177 of 2010)  
[2023] KEHC 2929 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2929 (KLR)

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

**CIVIL  
CIVIL SUIT 177 OF 2010**

**JK SERGON, J  
MARCH 31, 2023**

**BETWEEN**

**MOHAMOUD ALI MOHAMMED ..... PLAINTIFF**

**AND**

**HON ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMMED ISAAC HASSAN ..... 2<sup>ND</sup> DEFENDANT**

**OSMAN D HALAKE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in the present instance filed an amended plaint dated 28<sup>th</sup> June, 2011 and sought for judgment against the defendant in the following manner:
  - a. General damages
  - b. Exemplary damages
  - c. Costs of the suit
  - d. Any further or other relief that this Honourable Court may deem fit and just to grant
2. The plaintiff pleaded in his plaint that on or around May 5, 2007, the 2<sup>nd</sup> defendant falsely and willfully provided information to the District Labour Officer at the Ministry of Labour and Human Resource Development, and that on or around 3<sup>rd</sup> July, 2007, the 3<sup>rd</sup> defendant falsely provided information to the same District Labour Officer.



3. The plaintiff further pleaded in his plaint that the above complaints culminated in criminal charges being brought against them, of which he pleaded not guilty and subsequently released on a cash bail of Kenya Shillings Ten Thousand Only.
4. It was pleaded in the plaint by the plaintiff that on the 2<sup>nd</sup> of May 2009, their advocate wrote to the Executive Officer of the Chief Magistrate's court at the Central Registry in Nairobi informing him that they would not be available to appear in Court on the 16<sup>th</sup> of June 2009, due to the fact that his employer required him to travel to Germany and that the said letter was copied to the Labour Officer of the District Labour Officer.
5. It was also pleaded by the plaintiff that when he failed to attend for the matter's mention on June 8<sup>th</sup>, 2009, arrest warrants were filed against him. After a second mention, during which he appeared in court and a request was made to have the warrants against him dropped, the bail conditions were reinstated.
6. It was further pleaded that After the matter was scheduled for mention on July 2, 2009, the plaintiff requested that the court dismiss the case, and the Labour Department representative did not object. However, on July 8, 2009, police officers detained the plaintiff on the pretext that the warrants for his arrest had been lifted. The plaintiff was wrongfully held overnight at the Gigiri Police Station in Nairobi.
7. The 1<sup>st</sup> defendant entered appearance upon service of summons and filed its statement of defence on 13<sup>th</sup> September 2010 while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants entered appearance upon service of summons and filed their amended statement of defence on 12<sup>th</sup> July, 2011 to deny the allegations brought out in the plaint.
8. At the hearing, the plaintiff testified while the defendant called two (2) witness to support its case.
9. The plaintiff adopted his executed witness statement dated 8<sup>th</sup> February 2012 as evidence in chief and produced his list and bundle of documents dated 12<sup>th</sup> February 2012.
10. The plaintiff stated that in June 2007, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants each separately made false information alleging that their services were terminated without pay and as a result of that a criminal charge was preferred against him in the year 2009.
11. In cross-examination, it was the testimony of the plaintiff that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were his employees on diverse dates between 1999 and 2005 and that he terminated their services of both defendants and that the termination was lawful.
12. It was also the testimony of the plaintiff that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were terminated for theft but he has not filed any evidence proving theft and that he did not prefer any charges but instead summarily dismissed.
13. The plaintiff stated that he was aware that there were complaints filed and that he was invited for an amicable settlement by Kenya Human Rights and that he did not attend day meetings because the matter was still pending in court.
14. The plaintiff stated that criminal proceedings were initiated against him, the case proceeded and was dismissed or rather withdrawn under Section 87 (A) of the Criminal Procedure Code when the investigating officer failed to attend court.
15. In re-examination, it was testimony of the plaintiff that the police arrived to arrest him on July 8, 2009, and he had never been arrested before. He had paid the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in full, and the nature



- of the issues was such that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants should have filed a labor dispute rather than complaining to the police.
16. Mohammed Isaac Hassan who was DW1 adopted his signed witness statement as evidence and produced the defendant's list and bundle of documents as exhibits.
  17. In cross-examination, it was the testimony of the 2<sup>nd</sup> defendant that although the plaintiff verbally hired and fired the defendant as a night security guard in 2005 and used to pay him Kshs. 5,500/= per month, he has any documentation to support his claims.
  18. He stated that when he learnt of the termination of my case, he did not make a follow up on the same, neither did he file a case in the Employment Court and that he had no malice when reporting his complaint.
  19. The 2<sup>nd</sup> defendant stated that the plaintiff did not give him an employment contract.
  20. On re-examination, the witness stated that the Investigation Officer did not attend court hence the case was dismissed.
  21. Osman Dima Halake who was DW2 adopted his signed witness statement as evidence and produced the defendant's list and bundle of documents as exhibits.
  22. On cross-examination, the 3<sup>rd</sup> defendant stated that he was sacked by the plaintiff, that he was also aware that his co-defendant was equally sacked and filed a complaint before the Labour office which guided them to file the case before the High Court.
  23. The witness stated that he was employed on 19<sup>th</sup> January 2002 and that he had reported his complaint with Kituo cha Sheria, thereafter he instructed them to pursue their interests.
  24. The witness further stated that he was a witness in the labour court and that their main witness did not attend court hence their case was dismissed.
  25. At the close of the hearing, this court called upon the parties this court gave directions to have the suit disposed of by written submissions. I have re-evaluated the arguments presented before this court. I have also considered the rival written submissions. The issues for determination put forward by both parties revolve around the following issues:
    - i. Whether the plaintiff has made a case for malicious prosecution against the defendant;
    - ii. Whether the plaintiff is entitled to the reliefs sought; and
    - iii. Who should be made to bear the costs of the suit.
  26. Regarding the first issue, the term 'malicious prosecution' was appropriately defined by the court in the case of *Stephen Gachau Gitbaiga & another v Attorney General* [2015] eKLR thus:

“Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without probable cause and for a purpose other than that of bringing the alleged offender to justice...malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution.”
  27. The guiding principles to assist the courts in determining the success of a malicious prosecution claim were articulated in the case of *Kagane v Attorney General* (1969) EA 643 and are set out hereunder:



- a. The plaintiff must show 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; and
  - d. That the prosecution was actuated by malice.
28. It is incumbent upon the plaintiff to establish all the above elements in order for his claim to succeed.
  29. On the first principle, it is not in dispute that it's the plaintiff's uncontroverted evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant instructed the police to arrest the plaintiff, who was thereafter arraigned in court by the 1<sup>st</sup> defendant.
  30. Furthermore, the law sets out that the Attorney General, who is the 1<sup>st</sup> defendant in this instance, shall represent the State in civil proceedings. Resultantly, the first principle has been established.
  31. Concerning the second principle, upon my perusal of the record, it is evident that the criminal proceedings terminated in favour of the plaintiff by way of a dismissal under Section 87 of the [Criminal Procedure Code](#).
  32. The third principle touches on the subject of probable/reasonable cause.
  33. I appreciate that the burden of proving the absence of probable cause ultimately lies with the plaintiff. In the case of *Kagane v Attorney General (supra)* the court sought to define what constitutes reasonable or probable cause:
 

“Reasonable and probable cause is 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 an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...”
  34. Upon my examination of the evidence tendered, I note that the various demand letters that were sent to the plaintiff by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, are that the sums claimed in the letters are inconsistent, further, the demand was that failure to pay the sums would occasion institution of legal proceedings to recover the same.
  35. It is also noted that the failure by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to make a reasonable use of the sources of information available before instituting the criminal proceedings is evidence of want of reasonable and probable cause.
  36. Furthermore, the criminal proceedings were determined in the plaintiff's favour in which there was withdrawal of the charges under section 87 of the [Criminal Procedure Code](#) amounts to an acquittal and the fact that no fresh charges have ever been brought against the plaintiff 13 years since the withdrawal of the charges is evident enough that the plaintiff was discharged.
  37. For the foregoing reasons, I am of the view that the plaintiff has shown by way of credible evidence that there was no probable cause behind his arrest and prosecution.
  38. In relation to the fourth principle on malice, I note that the criminal proceedings instituted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants would not have achieved the purposes of getting their final dues.



- 39. It should also be noted that the filing of the Criminal proceedings did embarrass the plaintiff and was actuated by ill will and spite as the right forum to get their dues was by filing a suit at the Employment and Labour Court.
- 40. In view of the foregoing, I am not convinced that there was any presence of malice in the prosecution of the plaintiff notwithstanding the fact that charges were withdrawn under Section 87 of the Criminal Procedure Code.
- 41. Consequently, I find that the plaintiff has proved his case for malicious prosecution and/or wrongful arrest and detention on a balance of probabilities.
- 42. I will now address my mind to the third issue on whether the plaintiff is entitled to the reliefs sought.
- 43. Having found that the claim for malicious prosecution has been proved, I find that the plaintiff is entitled to an award of general damages on the same.
- 44. Upon considering the nature of work that the plaintiff was engaged in prior thereto and the experiences he underwent as a result of the prosecution, in addition to taking into account comparable awards made in cases involving plaintiff in a relatively similar standing in society as the plaintiff in this instance, I would have awarded the sum of Kshs.1,500,000/= under this head, upon considering the case of HCCC No. 1729 of 2001 – *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another*, where the Court made an award of Ksh.500,000/= to each of the petitioners as general damages for malicious prosecution. *Crispus Karanja Njogu v the Attorney General* [2008] KLR where the court made an award of Ksh.800,000/= as general damages. *Thomas Mutsotso Bisembe v Commissioner of Police & another* [2013] eKLR, the court awarded the plaintiff Ksh.800,000/= for general damages for malicious prosecution. *Chrispine Otieno Caleb v the Attorney General* High Court Civil suit No. 782 of 2007, the court awarded the plaintiff the sum of Ksh.2,000,000/= general damages for malicious prosecution.
- 45. In the case at hand, I am of the view that an award of Ksh.1,500,000/= general damages and a composite figure Ksh.500,000/= as exemplary, aggravated and punitive damages is reasonable.
- 46. Consequently, judgment is entered in favour of the Plaintiff and against the Defendants jointly and severally. The plaintiff is therefore awarded Ksh.2,000,000/=, as general damages. The plaintiff to have costs of the suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31<sup>ST</sup> DAY OF MARCH, 2023.**

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**J. K. SERGON**  
**JUDGE**

**In the presence of:**

- ..... for the Plaintiff
- ..... for the 1<sup>st</sup> Defendant
- ..... for the 2<sup>nd</sup> Defendant
- ..... for the 3<sup>rd</sup> Defendant

