



REPUBLIC OF KENYA



**Rukunga v Attorney General & another (Civil Case 518 of 2011)
[2023] KEHC 21543 (KLR) (Civ) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21543 (KLR)

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

CIVIL

CIVIL CASE 518 OF 2011

AN ONGERI, J

AUGUST 18, 2023

BETWEEN

MORRIS THURANIRA RUKUNGA PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

NORWEGIAN CHURCH AND ORGANIZATION 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case Morris Thurania Rukunga(hereafter referred to as the plaintiff only) filed a plaint dated 9/11/2011 against the two defendants herein, The Attorney General and Norwegian Church and Organization(hereafter referred to as the 1st and 2nd defendants) seeking the following remedies
 - i. General damages for unlawful arrest, illegal detention, malicious prosecution, mental torture and anguish.
 - ii. Special damages for loss of employment and loss of earnings
 - iii. Legal fees for an advocate
 - iv. Travelling expenses
 - v. Aggravated damages and punitive damages.
 - vi. Costs of the suit and interest.
2. The plaintiff avers in the said plaint that while working for the 2nd defendant, the 1st defendant had him arrested maliciously on 25/05/2006 on false allegations of stealing from the 2nd defendant.



3. Further, that the plaintiff was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code in Kibera cr Case no 2953 of 2006 which was transferred to Isiolo and it became Isiolo cr Case no 1228 of 2009.
4. After attending court for 5 years the plaintiff was finally acquitted under Section 215 of the CPC.
5. The plaintiff outlined particulars of malice on the part of the 1st and 2nd defendants in paragraph 7 of the plaint as follows Making report on alleged theft without any evidence. Getting plaintiff arrested without any tangible evidence against him. Failing to investigate properly to determine whether there was evidence to warrant or sustain a charge. Failing to give plaintiff opportunity to vindicate his innocence before charging him. Prosecuting plaintiff while there was no evidence to sustain conviction.
6. The particulars of special damages are also given as follows; Salaries and benefits he used to earn from the 2nd defendants ... Ksh.146754 per month. For two years contract. Advocates fees Ksh.200,000/= Expenses for advocate in attendances for 47 times @Ksh.10,000/= per day totaling to Ksh.470,000/= .Plaintiff attendances for 47 times @Ksh.2,000/= per day, fare to and from Meru and subsistence totaling to Ksh.94,000/= .Air fare vide ticket dated 28/9/2009 - SDG 1121 Air fare vide ticket dated 20/12/2009 – SDG 1279 Air fare vide ticket dated 4/2/2010 - SDG 1182
7. The 2nd defendant filed a statement of defence and counter claim dated 9/2/2012 denying the plaintiff's claim and seeking sums of money as follows;
 - i. USD 28,297 for Gendo
 - ii. USD 11,337 for Putland

Total USD 39,634
8. The case against the 2nd defendant was withdrawn and the hearing proceeded against the 1st defendant on 16/12/2019.
9. The plaintiff who testified as PW 1 adopted his statement filed together with his plaint (undated) as his evidence in chief.
10. The plaintiff's evidence in brief is as follows; he used to work for Norwegian Church Aid in Somalia as a group program coordinator. On 25/5/2006 the organization did a report at Muthangari Police Station that he stole US Dollars 19,109 and on 26/5/2006 without any investigation being carried out he was arrested and charged. He was detained for five days before being taken to court. He was acquitted on 7/12/2010 under section 215 of the CPC for lack of evidence. He lost his employment with the complainant, the earning and benefits which he used to earn to the tune of Ksh 146,754 per month for two years of contract.
11. He further hired an advocate for Ksh. 200,000 and continued to pay him Ksh,10,000/= for the attendances to court 47 times the matter came to court. He further attended court to and from Meru at a rate of Ksh. 2,000 per day for 47 times. He additionally attended court for the matter from sudan vide air tickets dated 28/9/2009, 20/12/2009 and 4/2/2010.
12. In cross –examination, the plaintiff said he was working with the 2nd defendant at the time of his arrest on 25/5/2006 and he was dismissed and charged with stealing by servant.
13. He said five witnesses testified in the criminal case and he was put on his defence.
14. The plaintiff further said in cross-examination that he used to pay his lawyer Ksh.10,000 for each court attendance but he did not have receipts.



15. The 1st defendant did not call any witnesses. The parties filed written submissions as follows; the plaintiff submitted that it is undisputed that the he was arrested by the police, locked in custody for 5 days, later availed in court and charged with the offence of stealing contrary to section 275 of the [Penal Code](#).
16. The plaintiff submitted that it is also undisputed that the matter was terminated in the Plaintiffs favor. The plaintiff was acquitted on the grounds that the amount that was allegedly stolen was not clear. The amount submitted in the charge sheet was contradictory to the evidence that was submitted. It was not established beyond reasonable doubt that the accused person received the amount that was claimed and it was not proved beyond reasonable doubt that the voucher in dispute was authorized by the accused person. The defendants therefore preferred criminal charges against the plaintiff without cause or reasonable justification.
17. The plaintiff argued that it clear that the defendants acted by malice by conducting botched investigations and preferred charges against the plaintiff. As a consequence, the plaintiff was dismissed on 26/5/2006 losing his livelihood to the tune of Ksh. 146,754 per month for the two years contract. In addition the plaintiff had to instruct counsel, spent on air fare and transport. He pointed out that he has presented the documentation necessary to prove special damages.
18. The 1st defendants submitted that the police did not instigate the criminal proceedings against the plaintiff. This was confirmed by the 2nd defendant's witness who testified as PW1 in the criminal case where he told the court that they are the ones who went to the police station and gave documents to them. There was also a total of 6 witnesses from the 2nd defendant company that testified in the criminal case and supplied documents in support of their case.
19. The 1st defendants submitted that the 2nd defendant recorded a complaint at the police station were thereafter the plaintiff was arrested and charged. The allegations against the plaintiff were based on reasonable suspicion and information that the plaintiff had committed a criminal offence. Informed by the fact that he was employed by the 2nd defendant where huge amounts of monies could not be accounted for that he was responsible for as he handled the books. Subsequently the actions of the 1st defendant were not unreasonable and without reasonable cause.
20. The 1st defendant submitted that the police had good intentions and carried out investigations. It preferred charges on the plaintiff because they had reason to believe that he committed the offence. That it is the mandate of the police to bring evidence it has before the court and it is the court that determines the culpability of the accused. The arrest and prosecution was lawful based on reasonable suspicion and information that the plaintiff had committed a criminal offence.
21. Further, the 1st Defendant submitted that the plaintiff was acquitted under section 215 of the [Criminal procedure Code](#) which meant that a prima facie case had been established against them due to sufficient evidence against them and put the accused on their defence. The 1st defendant therefore did not act with malice or ill motives against the plaintiff.
22. On damages the 1st defendant argued that the plaintiff is not entitled to the same as the arrest was lawful as the plaintiff was reported to have committed an offence and there was reasonable suspicion that he had committed the same. On the claim for false imprisonment, the plaintiff ought to have raised the same in the constitutional court where remedies would be available to him. Further, the claim for false arrest and confinement is statute barred as it offends the mandatory provisions of the [Government Proceeding Act](#) as it offends the provisions of Section 3 (1) of the [Public Authorities Limitations Act](#).



23. On special damages the 1st defendant argued that on loss of employment the plaintiff he brought to letter appointing him for a two-year contract commencing on 8th March 2003 which he also confirmed during cross examination. That would be construed to mean that the employment contract was terminated on or about 8/3/2005. He did not produce any other document with regard to his term of employment after that. He was arrested on 25th May 2006, which is after his employment lapsed as per the documents in court. He therefore cannot be said to have proved his claim for loss of salaries and benefits he used to earn during the period after which he was arrested and prosecuted.
24. On the services paid to a lawyer to defend him the 1st defendant argued that the plaintiff did not produce receipts of amounts paid to the advocate for the court attendances and therefore have not been proved. On his travel expenses the plaintiff also did not produce receipts to prove the same.
25. It is the duty of the plaintiff to prove his case against the 1st defendant. The standard of proof in civil cases is on a balance of probabilities.
26. The issues for determination in this case areas follows;
 - i. Whether the plaintiff has proved that the 1st defendant was responsible for his unlawful arrest, illegal detention, malicious prosecution, mental torture and anguish.
 - ii. Whether the 1st defendant is liable to pay the plaintiff the damages he is seeking.
 - iii. Who pays the costs of this suit?
27. On the issue the plaintiff has proved his case to the required standard, I find that the evidence of the plaintiff was not controverted since the 1st defendant did not adduce any evidence.
28. I find that there is evidence that the plaintiff was arrested and charged in court with the offence of stealing by servant and after 5 years of attending court in both Kibera and Isiolo he was acquitted under Section 215 of the [CPC](#).
29. The elements of the tort of malicious prosecution have been discussed in various authorities including [Murunga v The Attorney General](#) (1976-1980) KLR 1251 where Cotran J listed them as follows: -
 - i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - ii. That the prosecution terminated in the Plaintiff's favour.
 - iii. That the prosecution was instituted without reasonable and/or probable cause.
 - iv. That the prosecution was actuated by malice.
30. I find that in the absence of evidence to controvert the plaintiff's testimony, the plaintiff has proved his case to the required standards.
31. On the issue as to whether the plaintiff is entitled to the remedies he is seeking, I find that the plaintiff is seeking the following remedies
 - i. General damages for unlawful arrest, illegal detention, malicious prosecution, mental torture and anguish.
 - ii. Special damages for loss of employment and loss of earnings
 - iii. Legal fees for an advocate
 - iv. Travelling expenses



- v. Aggravated damages and punitive damages.
 - vi. Costs of the suit and interest.
32. Since the court has made a finding that the plaintiff has proved his case to the required standard, I find that the 1st defendant is liable to pay him damages.
33. I have considered the written submissions by both parties. The plaintiff's counsel proposed general damages of Ksh. 2,500,000 and relied on the following authorities;
- (a) *Joseph Wamoto Karani v C. Dorman Ltd and Anr* where Ksh.2,000,000 was awarded for malicious prosecution.
 - (b) *Chrispine Otieno Caleb v The AG*. HCCC No.782 of 2007 where the court awarded general damages of Ksh. 2,000,000 for malicious prosecution and exemplary damages of Ksh. 5000,000.
 - (c) *Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd and Another* HCCC No. 116 of 2003 where Ksh 2,000,000 was awarded as general damages for malicious prosecution.
34. I award general damages as follows;
- i. Unlawful arrest Ksh.500,000
 - ii. Malicious prosecution Ksh.2,500,000
35. On the issue of special damages the plaintiff pleaded the following;Salaries and benefits he used to earn from the 2nd defendants ... Ksh.146754 per month. For two years contract.Advocates fees Ksh.200,000/=Expenses for advocate in attendances for 47 times @Ksh.10,000/= per day totaling to Ksh.470,000/= .Plaintiff attendances for 47 times @Ksh.2,000/= per day, fare to and from Meru and subsistence totaling to Ksh.94,000/= .Air fare vide ticket dated 28/9/2009 - SDG 1121Air fare vide ticket dated 20/12/2009 – SDG 1279Air fare vide ticket dated 4/2/2010 - SDG 1182
36. However, the claim for Salaries and benefits the plaintiff used to earn from the 2nd defendants of Ksh.146754 per month for two years contract ought to have been raised in the ELRC Division.
37. I also find that the 2nd Defendant was removed from this suit and it has not been shown how the 1st Defendant was responsible for the plaintiff's for loss of employment and loss of earnings.
38. I also find that no receipts were produced to prove that the plaintiff incurred the special damages pleaded and therefore the same are not payable.
39. On the issue of aggravated damages and punitive damages, I find that the same are awarded where the general damages are not adequate.
40. I accordingly enter judgment in favor of the plaintiff against the 1st defendant in the sum of Ksh.3,000,000 together with costs and interest from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:



.....for the Plaintiff
.....for the 1st Defendant
.....for the 2nd Defendant

