



REPUBLIC OF KENYA



**Ombui v Amref Kenya Country Office & another (Civil Case 161 of 2012)
[2023] KEHC 21460 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21460 (KLR)

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

**CIVIL
CIVIL CASE 161 OF 2012**

**AN ONGERI, J
AUGUST 16, 2023**

BETWEEN

RICHARD OMBUI PLAINTIFF

AND

AMREF KENYA COUNTRY OFFICE 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case, Richard Ombui (hereafter referred to as the plaintiff only) filed this suit against Amref Kenya Country Office and The Attorney General (hereafter referred to as the 1st and 2nd defendants respectively) seeking the following remedies
 - i. Damages for false imprisonment and/or detention malicious prosecution and defamation.
 - ii. A declaration that the plaintiff is entitled to salary arrears and resumption of duty with the 1st defendant.
 - iii. Exemplary and/or punitive damages.
 - iv. Particular of special damages
Accommodation ksh. 98,000/=
Transport ksh.196,000/=
Food ksh. 49,000/=
Total ksh.343,000/=



- v. Costs of defending criminal case no 491 of 2006 and costs incidental thereto.
 - vi. Costs of this suit.
2. The plaintiff filed a plaint herein on 5/4/2012 which he amended on 11/5/2016.
 3. The plaintiff averred in the amended plaint that on or about the month of September 1998 the 1st defendant engaged the services of the plaintiff (without pay) on a volunteer service scheme for a period of fifteen months whereupon, the 1st defendant engaged the plaintiff in casual clerical work within its purchasing and supplies office.
 4. On 28th June 2000, the 1st defendant engaged the plaintiff as a supplies clerk earning a salary of kshs.20,215 per month. The plaintiff rose in rank over time and eventually was appointed as a supplies assistant at a salary of kshs.41,388 per month.
 5. The plaintiff remained in the position of supplies assistant over years but with appropriate annual cost of living adjustments until 17th October, 2005 or thereabouts when with the sanction of the 1st defendant, the plaintiff proceeded on an emergency leave so as to be able to bury the remains of his late sister-in-law at Sengera within Gucha district, Kisii county and arrange for the welfare of the orphans (the children of the deceased) as the husband of the late sister-in-law, the elder brother of the plaintiff had passed on in 2001. The late sister-in-law in issue passed on, on 12th October 2005.
 6. Prior to the death of the plaintiff's sister-in-law and the plaintiff proceeding to his rural home as detailed in paragraph 5 herein and as is the practice within the 1st defendant's office and in particular that its annual year ends on the last day of each September, the annual stock-taking was done in all stores.
 7. With respect to the purchasing and supplies store (stationery store) where the plaintiff worked, the stock-taking was concluded on 1st October 2005 or thereabouts and everything was found in order and the plaintiff continued discharging his normal duties without any query whatsoever.
 8. The plaintiff after attending to the burial of his sister-in-law returned to Nairobi on 7th November 2005 and on 8th November 2005 reported for duty only to be stopped at the gate by the 1st defendant's security detail who informed the plaintiff that they had strict instructions not to allow the plaintiff into the 1st defendant's premises. The security details did not give any reasons.
 9. The plaintiff subsequently telephoned his boss who referred the plaintiff to the Human Resource Department which department requested the plaintiff to report back on 10th November 2005.
 10. The plaintiff duly reported at the gate of the 1st defendant's offices and the security detail handed to the plaintiff a sealed envelope which on opening turned out to be a brief letter from the human Resource Department clearly indicating that there were on-going internal investigations in respect of the plaintiff's work station and that the plaintiff should await the outcome and that if the investigations resulted into a court action, the plaintiff to await the outcome.
 11. The 1st defendant then and without any appropriate and/or legal notice stopped the plaintiff's salary with effect from the month of November 2005 through to-date.
 12. The plaintiff avers that at no time during the pendency of the alleged internal investigations did the 1st defendant call upon the plaintiff to render any explanation (if any) was needed and/or comply with the rules of natural justice and/or accounting procedures.



13. Indeed the alleged internal auditor had not gotten conversant with the operations of the plaintiff's working station to the extent that the presence of the plaintiff during the said exercise (if truly any such exercise took place which is doubtful) was imperative.
14. To this extent the plaintiff contends that this whole process was flawed and unlawful.
15. While the plaintiff awaited the outcome of these skewed investigations, on 6/3/2006 the plaintiff received a cell phone call from the in charge of security of the 1st defendant's office requesting for a meeting.
16. Indeed for almost the entire week prior to this date the same security officer was making very friendly calls to the plaintiff.
17. When the plaintiff arrived at the appointed place and time, the plaintiff was arrested by police officers who identified themselves as Cpl Munguti and Mucheru attached to C.I.D Langata police division who later put the plaintiff in police cells for two days where upon the plaintiff was released on a police bond.
18. While at the said Langata police cells and when investigations allegedly were on course, it emerged that the 1st defendant through its Human Resource manager, Mr. Kibe had laid a report with the Criminal Investigations department, Langata police division and in particular to Mr. CPL Munguti which is reproduced verbatim herebelow;

“OB29/2/06 at 9.00am Report Made; To station is one Michael Kibe the Human Resources manager AMREF Kenya Country office and now reports that one by the name Richard Ombui who used to be supplies assistant stole from the organization toner cartridges worth kshs.3.9 million. This was realized after an internal audit was done. Before the theft was reported the suspect had absconded duties and ran away. His known place of residence is Githurai Kimbo but the actual house is not known. The reportee wants investigations to be carried out to establish the theft. Also handed over to the investigating officer are several documents which were compared/recovered in the suspect's office. The reportee pledges to bring witnesses to record statements in support of the claim together with the internal auditor's report signed by CPL Munguti”.
19. The plaintiff averred that the criminal case facing the plaintiff commenced with the arraignment of the plaintiff in court in mid-March 2006 and proceeded through to April 2011 when after the prosecution having called several witnesses and caused numerous adjournments (indeed the 1st defendant also contributed/caused some of the adjournments) closed its case.
20. Subsequently on 8th April 2011 the trial court ruled that the plaintiff had no case to answer and proceeded to acquit the plaintiff in terms of section 210 of the *Criminal Procedure Code* Cap 95 of the Laws of Kenya for lack of evidence and without putting the plaintiff on his defence.
21. The necessary notice to the second defendant in terms of the *Government Proceedings Act* was duly made and served.
22. The 1st defendant filed a defence to the amended plaint dated 24/5/2016 denying the plaintiff's claim.
23. The 1st defendant averred in his defence that the plaintiff absconded duty and ceased to be an employee of the 1st defendant.
24. The 1st defendant denying allegations of malicious prosecution and stated that they acted reasonably by reporting loss of their property to the police for investigations.



25. The 2nd defendant also filed a defence dated 12/4/2016 denying the plaintiff's claim and further stated that if the plaintiff was arrested and charged, the same was done after a legitimate complaint was made to the police and that an acquittal under Section 210 of the Criminal Procedure Code does not amount to malice.
26. The plaintiff's evidence in summary that while working with the 1st defendant as a supplies officer, he lost a sister-in-law and on 12/10/2005 he asked for compassionate leave to attend the funeral which was on 21/10/2005.
27. The plaintiff left his place of work on 17/10/2005 to attend the funeral. On 8/11/2005 when he went back to the place of work he was stopped at the gate and told to report on 10/11/2005.
28. On 10/11/2005 when the plaintiff reported on duty he was given a suspension letter dated 2/11/2005. His benefits and salary were stopped on 1/11/2005.
29. The plaintiff was arrested in 2006 and charged in court with the charges stated in the charge sheet.
30. On 8/4/2011 the plaintiff was acquitted under Section 210 of the Criminal Procedure Code.
31. The 1st defendant called one witness Mr. John Mwangi (DW 1) who adopted his written statement dated 13/8/2020 as his evidence in chief.
32. In it he stated that he is a human resource officer at the 1st defendant and on 30th September, 2005 the 1st defendant conducted its year end stock take at its offices wherein an unexplained discrepancy in the stationery store between the general ledger balance and the physical stock values was discovered.
33. As a consequence, an audit investigation was carried out which revealed that stationery worth approximately Kshs. 3,930,637 was missing from the store.
34. The 1st defendant reported the missing stationery to the police on 29th February 2006 and they carried out their own independent investigations. They later arrested the plaintiff and on 15th March 2006 the plaintiff was charged in the chief magistrate's court in criminal case No. 491 of 2006 with various counts of theft from the 1st defendant. The trial magistrate however acquitted the plaintiff.
35. DW1 stated that the 1st defendant did not arrest, charge or prosecute the plaintiff and in turn did not defame the plaintiff in any way and that his salary was stopped after he failed to attend work.
36. He said in his oral evidence in court that the plaintiff was working for the 1st defendant as supplies assistant and was responsible for receiving goods on behalf of the 1st defendant.
37. DW 1 said following an audit report which revealed that the 1st defendant had lost stock, the plaintiff was arrested and charged with criminal offences.
38. DW 1 said the report showed the organization had lost stock. He said there was a discrepancy in the documents held by the 1st defendant and police took stock and they relied on the report by the internal audit before they charged the plaintiff. He said several documents contained erasers.
39. The parties submitted as follows; the plaintiff submitted that in 2005 he attended the burial of his sister-in-law and that it was untrue for the 1st defendant to claim that he had absconded work. In support of his position the plaintiff provided, a burial permit, daily nation advert and a letter from the chief.
40. The plaintiff further argued that it was clear that the suspension letter was served upon his return from official leave which indicated that if the investigations were unfounded the plaintiff was entitled to reinstatement with full pay and benefits. It was the plaintiff's submission that a court of competent



jurisdiction vindicated the plaintiff and, in the circumstances, he is entitled to full pay, benefits or reinstatement.

41. On malicious prosecution the plaintiff submitted that the 1st defendant did not reveal the basis in which there was a discrepancy on the stock take and ledger. The internal auditor did not participate and the absence of the stock take report was critical. It was the plaintiff's argument that the 1st defendant's witness could not explain why the report was missing and it implied that the complaints against the plaintiff were instigated by ulterior motives. The annual stock take was done the last day of September 2005 and nothing untoward was detected.
42. Further, Mr. Kibe the country director, finance and the internal auditor said the report unearthed a loss of Kshs. 3,930,637 but the auditor's report gives the total estimated loss as Kshs. 2,952,342. The question that therefore arises is why did he give the police the wrong figure?
43. It was the plaintiff submission that on the part of the police they did not find out the basis of the claim, the presence of the auditor's report, whether the plaintiff absconded duties and whether the plaintiff's duties overlapped with others in the office. It was his argument that there were critical areas to be covered by the police which were ignored and that resulted in charges being pinned on the plaintiff. This was further stressed by the trial court which in its ruling found that there was insufficient evidence to prosecute the matter.
44. On defamation the plaintiff submitted that the defendants acted improperly and illegally and in the process the plaintiff was detained and the defamation spanned over a period of six years which period the plaintiff was repeatedly defamed. The plaintiff suffered loss to his esteem and suffered anxiety due to litigation.
45. The 1st defendant in its defense submitted that the plaintiff has not satisfied the ground for finding malicious prosecution. It submitted that it did not institute the criminal proceedings against the plaintiff. Instead, they made a report to the police based on reasonable and probable suspicion that the plaintiff was responsible for the missing stationery following discrepancies that were noted. That once the report was made the police took over and thereafter the matter was entirely out of the 1st defendant's control.
46. The 1st defendant submitted that the criminal proceedings against the plaintiff were instituted with reasonable and probable cause. the 1st defendant submitted that it had reasonable cause to file a report with the police as the plaintiff took part in the stock take but went missing when the internal audit investigation was commenced.
47. Further, the purchase requisition orders had alterations, the plaintiff collected the stationery items from Elite Book Centre Limited and received by him without following the proper procedure. Therefore, in the circumstances, of the case pointed to the plaintiff as the suspect.
48. The 1st defendant submitted that there was no malice in its action of reporting the matter to the police. That there was no element of spite or ill will and any reasonable person would have exercised his civic duty to report the missing items to the police. It was the 1st defendant's submission that the criminal case was solely dismissed on account of lack of evidence on the alterations from the document examiner. The prosecution had sought an adjournment to bring the document examiner as a witness but the same was not granted.
49. On defamation the 1st defendant argued that the report and statements made in the criminal proceedings were privileged and do not warrant an action for defamation and in support cited Amos



K. C. Kale & Another v Rebecca Gesora & Another [20171 eKLR, the Court cited with approval the Westlaw's Canadian Encyclopedic Digest that:

“No action of libel or slander lies, whether against judges, counsel, witness or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. Those statements are absolutely privileged, the immunity resting upon grounds of public policy and convenience, with the object of securing the free and fearless discharge of high public duty in the administration of justice.”

50. On the claim of salary arrears and reinstatement the 1st defendant argued that the court herein does not have jurisdiction to hear the same as jurisdiction to determine employment claims are vested in the Employment and Labour Relations Court according to Article 165(5) of the *Constitution*.
51. The 2nd defendants submitted that the police took up the case after the matter was reported to them. They did their investigations and the plaintiff was charged. The 2nd defendants contended that it was not in dispute the prosecution was terminated in favor of the plaintiff however the suit was not instituted without reasonable and probable cause.
52. The 2nd defendant honestly believed that an offence had been committed which was supported by the auditor and other individuals that worked with the plaintiff.
53. The 2nd defendant submitted that the plaintiff needed to prove malice in fact and that the lack of reasonable and probable cause does not show malice. The prosecution was not motivated by something more than a desire to vindicate justice and was forced to close their case due to a request for adjournment being denied. The plaintiff did not indicate that the report given to the police was false or actuated by malice and the acquittal of the plaintiff does not indicate malice on the part of the prosecution.
54. The 2nd defendant argued that the plaintiff's have not established a case against the 2nd defendant as they have failed to establish the tort of wrongful arrest, unlawful detention, malicious prosecution and defamation. The plaintiff did not demonstrate how his reputation was injured and therefore failed to meet the ingredients of defamation. The statement was a fair comment on what had happened and the same cannot amount to falsehood.
55. The 2nd defendant submitted that Under the *Civil Procedure Rules 2010* order 2 rule 7(1) provides for the same. This rule provides that where in an action for libel or slander the Plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense. In the Present suit the Plaintiff did not specifically plead their claim for defamation as it is required under Order 2 rule 7(1) of the *Civil Procedure Rules* 2010 and as such they are not entitled to damages for libel and slander.
56. I have considered the evidence adduced in this case together with the submissions filed by the parties. It is the duty of the plaintiff to prove his case.
57. The standard of proof in civil cases is on a balance of probabilities. I took over the case after all the parties had testified before Hon. Justice Serگون.
58. The 2nd defendant made an application dated 17/11/2022 seeking to recall the plaintiff and the 1st defendant's witness for cross-examination.
59. The issues for determination in this case are as follows;



- i. Whether the plaintiff is entitled to a declaration that he is entitled to salary arrears and resumption of duty with the 1st defendant.
 - ii. Whether the 1st and 2nd defendants are liable for the torts of false imprisonment and or detention, malicious prosecution and defamation against the plaintiff.
 - iii. Whether the plaintiff is entitled to exemplary and/or punitive damages.
 - iv. Whether the plaintiff is entitled to costs for defending criminal case no. 491 of 2006.
 - v. Whether the plaintiff is entitled to the special damages he is claiming.
 - vi. Who pays costs of this suit?
60. On the issue as to whether the plaintiff is entitled to a declaration that he is entitled to salary arrears and resumption of duty, I find that the proper forum to seek that remedy is at the ELRC division.
 61. On the issue as to whether the 1st and 2nd defendants are liable for the torts of false imprisonment and or detention, malicious prosecution and defamation against the plaintiff, I find that there is evidence that the plaintiff asked for compassionate leave to attend a funeral and when he returned back to work, he was denied access to his place of work.
 62. He was later arrested and charged with stealing by servant but he was acquitted under section 210 of the *Criminal Procedure code*.
 63. The 1st Defendant's evidence that the plaintiff absconded from duty was not true and the same was malicious since the 1st Defendant knew that the plaintiff was on compassionate leave at that time.
 64. It was the 1st Defendant that made a report to the police before the plaintiff was arrested and charged.
 65. I find that the 1st defendant relied on the internal audit report which showed that there were discrepancies in the stock to which the plaintiff was the custodian.
 66. I find that the 1st defendant did not seek an explanation from the plaintiff who was their employee before making a report on the matter to the police.
 67. The police arrested the plaintiff and charged him in court and the trial ended in an acquittal.
 68. I find that in the circumstances, the 1st and 2nd defendants are liable for the torts of false imprisonment and malicious prosecution against the plaintiff.
 69. The tort of false imprisonment is defined as follows in *Halsbury's Laws of England* 4th Edition page 606;

“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification.”



70. The tort of malicious prosecution is defined as follows; *Black's Law Dictionary* 10th Edition defines it as:

“The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires an adversary to prove four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; and (4) favorable termination of the lawsuit.”

71. For an action to succeed in malicious prosecution, certain conditions must be demonstrated. The legally acceptable criteria was set out by Cotran, J. in the High Court decision of *Murunga v The Attorney General* (1979) KLR 138 as well as by Rudd, J in the *Kagane v Attorney General* [1969] EA 643 as follows: -

- 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 favor.
- c) That the prosecution was instituted without reasonable and probable cause;
- d) That the prosecution was actuated by malice;”

72. I find that the plaintiff has proved to the required standard that the 1st and 2nd Defendant are liable for the torts of false imprisonment and or detention and malicious prosecution.

73. The Defendants have no valid defence against the plaintiff's case.

74. On the issue as to whether the Defendants are liable for the tort of defamation, I find that there is no evidence that the Defendants published the said issue.

75. The tort of defamation is defined as follows; In the 7th Edition of *Salmond on the Law of Torts*;

“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification”.

76. The elements of the tort of defamation are equally well settled. For a litigant to succeed in a claim of defamation, the following elements must be proved in the affirmative: -

- a. That the statement tends to lower the Plaintiff's reputation in the estimation of right-thinking members of society generally either in their natural and ordinary meaning or by innuendo;
- b. That the statement refers to the Plaintiff;
- c. That the statement was published by the Defendant;
- d. That the statement is false and/or malicious.

77. I find that the 1st and 2nd defendants are not liable for the tort of defamation against the plaintiff for the reason that the plaintiff did not prove that the Defendants proved that the matter was published by the Defendants.

78. On the issue as to whether the plaintiff is entitled to the remedies he is seeking against the Defendants, I find that the answer is in the affirmative.



79. The plaintiff was acquitted under Section 210 of the *Criminal Procedure Code* for reasons that there was no evidence that he is the one who did the alterations in the documents held at the 1st defendant company.
80. I find that the issue that the plaintiff had absconded duty was not accurate and that the same was actuated by malice since it was the 1st Defendant's instructions that barred the plaintiff from accessing his duty station.
81. Further I find that the plaintiff was arrested at the behest of the 1st Defendant and charged with an offence he did not commit.
82. I find that the plaintiff has proved his case to the required standard in civil cases that is on a balance of probabilities on the torts of false imprisonment and or detention and malicious prosecution.
83. However, the plaintiff has not proved the tort of defamation and the same must fail.
84. On the issue of costs, I find that it is trite law that costs follow the event.
85. On the issue of special damages, I find that the plaintiff pleaded special damages as follows;
- (a)Accommodation ksh. 98,000/=
 - (b)Transport ksh.196,000/=
 - (c)Food ksh. 49,000/=
- Total ksh.343,000/=
86. The plaintiff also claimed the costs of defending criminal case no 491 of 2006 and costs incidental thereto.
87. However, the plaintiff did not specifically plead the same and I find that the costs of defending the criminal case are special damages and the same ought to be specifically pleaded and proved.
88. In the case of *Provincial Insurance Co. EA Ltd v Mordechai Mwangi Nandwa*, (KSM Civil Appeal No 179 of 1995,) the court stated as follows;
- “It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead”.
89. I award the plaintiff general damages of kshs 500,000 for false imprisonment and Kshs 5,000,000 for malicious prosecution.
90. On the issue as to whether the plaintiff is entitled to exemplary and/or punitive damages, I find that the answer is in the affirmative.
91. In the case of *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR
- “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”.

92. I find that the plaintiff suffered deprivation of lawful employment and I award him exemplary and punitive damages of Kshs. 1,000,000.
93. Special damages of Kshs.343,000/= were pleaded and proved and the same are awarded.
94. Judgment be and is hereby entered in favor of the plaintiff against the Defendants jointly and severally in the sum of Kshs 6,843,000 together with costs and interest at court rates from the date of this judgment until payment in full.

Orders to issue according

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
16TH DAY OF AUGUST, 2023.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the 1st Defendant**

..... **for the 2nd Defendant**

