



REPUBLIC OF KENYA



KENYA LAW
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**Odembo & 7 others v Attorney General (Civil Suit 719 of 2007)
[2022] KEHC 10261 (KLR) (Civ) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT 719 OF 2007
JK SERGON, J
JULY 25, 2022**

BETWEEN

**ELKANA ODEMBO 1ST PLAINTIFF
KEPTA OMBATI 2ND PLAINTIFF
CYPRIAN ORINA NYAMWAMU 3RD PLAINTIFF
WILFRED KOITAMET 4TH PLAINTIFF
EVANS OSEGO OWITI 5TH PLAINTIFF
PAUL ONGERA ANGWENYI 6TH PLAINTIFF
SHEIKH AHMED RAMADHAN 7TH PLAINTIFF
KELI CHRISTANT MUSYOKA. 8TH PLAINTIFF**

AND

ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The plaintiffs in the present instance filed the plaint dated 11th October, 2007 and sought for judgment against the defendant in the following manner:
 - a. Special Damages in the sum of Kshs.303,000/=
 - b. General damages for unlawful arrest, wrongful detention and malicious prosecution.
 - c. Aggravated, exemplary and punitive damages



- d. Costs of this suit.
- e. Interest on (a) to (d) from the date of arrest.
2. The plaintiffs pleaded in their plaint that on 21st July 2005 at about 2.00 pm whilst the plaintiffs were lawfully, peacefully and in an orderly manner walking along City Hall Way in Nairobi, a squad of police officers led by the Lang'ata Police Division OCPD accosted the plaintiffs, despite the plaintiffs' protests of innocence, they were forcibly arrested, taken to the Central Police Station, and detained.
3. The plaintiffs further pleaded in their plaint that after being temporarily detained at the Central Police Station in Nairobi, the plaintiffs were unlawfully and without legal justification deported and transferred to the Coast Province, where they were held overnight at the Inland Cargo Container Deport Police Station along Mombasa Road. The plaintiffs claim that the aforementioned squad of police officers had no reasonable or legal justification to approach, arrest, or detain them.
4. It was also pleaded by the plaintiffs in their plaint that whilst at the Inland Cargo Container Deport Police Station the Plaintiffs were unlawfully and in disregard of their fundamental rights they were held incommunicado, denied access to their families, lawyers and friends, locked –up in inhuman and degrading conditions, starved, denied food, water, medicines and medical attention.
5. It was further pleaded by the plaintiffs that on July 22, 2005, police officers from the Central Police Station in Nairobi charged the plaintiffs with two criminal offenses—creating a disturbance likely to cause a breach of the peace and refusing to allow their fingerprints to be taken—without any legal or reasonable justification. On the same date, they were arraigned before the Chief Magistrate's Court in Nairobi in Criminal Case Number 1623 of 2005.
6. The plaintiffs pleaded in their plaint that the police unlawfully, without any lawful nor reasonable justification whatsoever continued to maliciously prosecute the plaintiffs in the said criminal case until 13th October 2006 when the trial court acquitted the plaintiffs under section 210 of the Criminal Procedure Code for want of a case to answer.
7. The plaintiffs aver that their arrest, detention and prosecution was unlawful, in flagrant violation of their fundamental rights enshrined in the Constitution as to freedoms of association, assembly, expression and movement and the arrest, detention and prosecution were actuated by malice, highhandedness and not legally justifiable whatsoever.
8. The defendant entered appearance upon service of summons and filed its statement of defence on 7th June, 2011 to deny the allegations brought out in the plaint.
9. The defendants stated that the plaintiffs arrest was lawful, having assembled unlawfully and behaved in a manner likely to cause of breach of peace and that the arrest was in public interest and necessitated by the desire to maintain peace.
10. At the hearing, two plaintiffs testified to support their case while the defendant did not call any witness.
11. Cyprian Orina Nyamwamu who was PW1 adopted his signed witness statement as evidence and produced the plaintiffs' list and bundle of documents as exhibits.
12. The witness stated that there was no illegal assembly since they were peaceful, the OCS refused to provide them a copy of the notice when they asked for one, they were kneeling when the police caught up with them, and they were unarmed.
13. The witness further stated that they did not resist arrest, as they surrendered to the police and were charged with the offence of creating disturbance in a manner likely to cause a breach of the peace.



14. It was the testimony of the witness they appeared in court for the aforementioned criminal case 15 times after entering a not guilty plea, and despite knowing the charges against them were unfounded, the police continued to pursue the plaintiffs until their acquittal on October 13, 2006, in accordance with section 210 of the Criminal Procedure Code.
15. On cross examination, the witness stated that they had more than 150 individuals, but eight of them were imprisoned since they were leaders and could not flee instead, they knelt while others stood.
16. The witness further stated that their rights were violated as they were denied medical attention as some of them were diabetic and had blood pressure too.
17. On re-examination, the witness stated that the petition 136 of 2006 was dismissed for want of prosecution due to the fact that they were exonerated on October 13, 2006, and that the lawsuit was brought up before the year's expiration.
18. Koitamet Ole Kina who was PW2, stated that he was the immediate former Vice Chair of Bomas Constitutional Conference but he is now the director at KIPRA (Kenya Institute for Policy and Research Authority). He further stated that all the plaintiffs were members of a lobby group called Katiba watch united in the quest to better the constitution.
19. It is the testimony of the witness that he was living in Narok County at the time when the Criminal case was on going and would at times come a day before but he did not keep receipts and sometimes he used to drive himself since he did not have a home in Nairobi at that time.
20. On cross-examination, the witness stated that they were transferred to Central Police Station, but it was decided not to detain them there. He appeared in court fourteen times, but only had a copy of the ruling and no copies of the criminal proceedings.
21. Upon close of the hearing, this court gave directions for the parties to file their written submissions. At the time of writing this judgment the defendant had not filed its submissions.
22. The plaintiff vide its submissions dated 4th April 2022 gave brief facts of the matter and identified six issues for determination to be as follows:
 - i. Whether the suit is time barred
 - ii. Whether the arrest and detention of the plaintiffs was justifiable in law
 - iii. Whether the plaintiffs were treated inhumanely by the police upon and during their arrest and in police detention
 - iv. Whether the criminal trial of the plaintiffs was unjustified, without probable cause and malicious prosecution
 - v. Whether there is a tenable defence to the suit
 - vi. Whether the plaintiffs are entitled to the reliefs sought including costs of the suit and interest on the awards and what is the appropriate quantum
23. On the first issue, the plaintiff submitted that the lawsuit was timely filed, that they were exonerated of all accusations on October 13, 2006, and that the date the statute of limitations began to run against them was trite. The plaintiffs also argued that since the lawsuit was filed on October 12, 2007, the day before the 12-month period expired, the defense of statute of limitations did not apply.



24. On the second issue, the plaintiffs contend that the issue of lawfulness of the arrest and their detention was resolved by the learned magistrate while acquitting them under section 210 CPC after a thorough analysis of the prosecution evidence and the law.
25. The plaintiffs further contend in opposition to the course that the constitutional reform process was then heading, they had uncontested proof that they had informed the appropriate police station about the demonstration before beginning the peaceful march to the parliament buildings. It is evident that the plaintiffs had not committed any offence that would have called for their arrest and custody until trial.
26. On the third issue, the plaintiffs submitted that they were denied police bond and detained at the Inland Cargo Container Depot Police Station, where they detained in a cold, mosquito infested cell, with no beddings, without toilet, facilities, food, medicines and were held incommunicado detention and also denied access to their advocates.
27. On the fourth issue, it is the plaintiffs' submissions that the prosecution was founded and flowed from the unnecessary curtailment of their constitutional liberties must be construed to be without probable cause, unjustifiable and thus, a malicious prosecution.
28. The plaintiffs relied on the case of *Emmanuel Kuria Wa Gathoni v Commissioner of Police & Another* (2017) eKLR it was stated that:-
- “The Criminal proceedings must have been instituted by the Defendant, that is, he was instrumental in setting the law in motion against the Plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the Plaintiff or a person arrests the Plaintiff and takes him before a judicial authority.
- ii. The Defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the Defendant genuinely thought that the criminal proceedings were justified.
- iii. The Defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than, than its legally appointed and appropriate purpose.
- iv. The criminal proceedings must have been terminated in the Plaintiff's favour, that is the plaintiff must show that the proceedings were brought to a legal and that he has been acquitted of the charge... the Plaintiff, in order to succeed has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must 'unite' in order to create or establish a cause of action.”
29. The plaintiffs contend that the police never bothered with the noble cause for which they were assembled and peacefully marching nor did the police bother about the fact they were exercising their fundamental rights as to the police the plaintiffs side of story noble, conscientious and patriotic as it was did not matter.



30. On this argument, the plaintiffs relied on the case in Nairobi HCCC No.1729 of 2001 – *Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another*;

“unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.” I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”

31. On the fifth issue, the pointed out that save for filing a statement of defence the defendant neither filed witness statements nor called any witness to counter the plaintiffs’ suit and defendant’s statement of defence remains a lifeless shell of mere allegations, as such, the issues of fact and the evidence of the plaintiffs’ are not controverted.
32. The plaintiff therefore submits that all the particulars of malice, unlawfulness and highhandedness on the part of the police as pleaded and particularized in the plaint are satisfied, uncontroverted and proved to the required standard of a balance of probability.
33. On the sixth issue, the plaintiffs submit that they are more than deserving of the reliefs sought as they have suffered injury, loss and damage and have proved it on a balance of probability.
34. On prayer (a) the plaintiffs pray for special damages of Kshs.303,000/= being legal defence fees for the criminal case of Kshs.240,000/= supported by receipts and costs of travel to attend court of Kshs.63,000/= which the plaintiffs did not avail receipts for the claim, however the plaintiffs urge the court to take judicial notice that this is a cost that was necessarily incurred and the amount claimed is reasonable and the necessity for strict proof is not obligatory for this claim.
35. On prayer (b) the plaintiffs prayed for general damages for unlawful arrest, wrongful detention and malicious prosecution which they had been proved that their arrest and detention were unlawful, and their prosecution was without probable cause and was malicious, the plaintiffs therefore are thus entitled to awards of damages to compensate for these violations.
36. The plaintiff relied on several authorities including the case of
- a. Isaiah Ngotho Kariuki v The Commissioner of Police (1998) eKLR

“I find that after three defendants had the plaintiff charged and convicted after a trial of one year that the very same defendants conceded to the appeal and as a result the plaintiff was acquitted on his changes.

It is of common knowledge that this was during the dawn of multiparty political system and this is not used as a reason for supporting the appeal. I am satisfied and find that the plaintiff was maliciously prosecuted. That such prosecution was politically motivated. He has therefore suffered loss, ill treatment and torture. In the words of Kwach, JA.

“The purpose of damages is not to punish a defendant but to afford a plaintiff a reasonable compensation or the loss or injury he has suffered.” I hereby find that



the plaintiff is entitled to Damages. I enter judgment for the plaintiff on the prayer for General damages. I believe that Kshs.2 million is a reasonable award in the circumstances.”

b. Emmanuel Kuria Wa Gathoni v Commissioner of Police & Another (2017) eKLR

“ . All considered, the court finds that a sum of Ksh. 5 Million is reasonable under this head.” This court finds that the Plaintiff is entitled to aggravated damages taking into account the Defendants insistence on proceeding with the case when there was no sufficient evidence to sustain the trial. This is borne out by the letters exchanged between the Defendants which were produced as exhibits 2(a)-2d. The court awards a sum of Ksh.2 Million under this head.....”

37. The plaintiffs therefore propose an award of Kshs.6,000,000/= in general damages to each plaintiff for unlawful arrest, wrongful detention, inhuman conditions in pre-arraignment police detention and malicious prosecution.
38. On prayer (c), the plaintiffs prayed for aggravated, exemplary and punitive damages given the egregious, arbitrary, oppressive, highhanded, unconstitutional and malicious violation of the rights of their rights by the police as found by the learned magistrate. The plaintiffs therefore propose an award of Kshs.1,500,000/= .
39. The following issues arose for determination:
- i. Whether the plaintiffs have 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.
40. Regarding the first issue, the term ‘malicious prosecution’ was appropriately defined by the court in the case of *Stephen Gachau Gitthaiga & 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.”
41. 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:
- i. The plaintiff must show that the 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 probable cause; and
 - iv. That the prosecution was actuated by malice.
42. It is incumbent upon the plaintiffs to establish all the above elements in order for their claim to succeed.
43. On the first principle, it is not in dispute that the arrest and prosecution of the plaintiffs was instigated by the police and the prosecution who represented the State in the criminal process. Furthermore, the



law sets out that the Attorney General, who is the defendant in this instance, shall represent the State in civil proceedings. Resultantly, the first principle has been established.

44. Concerning the second principle, upon my perusal of the Criminal court ruling, it is evident that the criminal proceedings terminated in favour of the plaintiffs by way of an acquittal under Section 210 of the *Criminal Procedure Code*.

45. The third principle touches on the subject of probable/

reasonable cause.

46. 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...”

47. Upon my examination of the evidence tendered, I note that the plaintiffs were charged with the offence of creating disturbance with a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the *Penal code* and refusing to permit fingerprints to be taken contrary to section 21 (3) of the *Police Act*.

48. It is also noted from the criminal proceedings that the charge was not sustainable on the evidence on record as the conduct of the accused and other protesters can also be examined against the rights guaranteed every person by *the constitution* in tending with the democratic nature of the Kenyan state.

49. Furthermore, the criminal court found on count 2 on the issue to decline to be fingerprinted adduced by the said police officers, that there was no single disinterested witness who was called to testify in the matter. There must have been other police officers or people at the said police station who witnessed the refusal.

50. For the foregoing reasons, I am of the view that the plaintiffs have shown by way of credible evidence that there was no probable cause behind their arrest and prosecution.

51. In relation to the fourth principle on malice, the trial court found that as a fact that the arrest of the plaintiffs was an unnecessary curtailment of their constitutional liberties.

52. The trial court further found that the plaintiffs were wrongfully detained by the police in a place and under conditions that violated their rights, particularly the right to legal counsel, and that the police took advantage of these conditions to accuse the plaintiffs of the count 11 even though there was no formal complaint about their alleged failure to provide fingerprints that was recorded in the OB.

53. In view of the foregoing, I am convinced that there was presence of malice in the prosecution of the plaintiffs and the fact that the court acquitted each of the accused persons in each count under section 210 of the CPC.

54. Consequently, I find that the plaintiffs have proved their case for malicious prosecution and/or wrongful arrest and detention on a balance of probabilities

55. I will now address my mind to the third issue on whether the plaintiffs are entitled to the reliefs sought.



56. Having found that the claim for malicious prosecution has been proved, I find that the plaintiffs are entitled to an award of general damages on the same.
57. I have considered the following other cases:
- a. 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.
 - b. *Crispus Karanja Njogu v the Attorney General* [2008] KLR where the court made an award of Ksh.800,000/= as general damages.
 - c. *Thomas Mutsoto Bisembe v Commissioner of Police & another* [2013] eKLR, the court awarded the plaintiff Ksh.800,000/= for general damages for malicious prosecution.
 - d. *Chripine 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.
58. In regard to general damages, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. In *Joseph Wamoto Karani v C. Dorman Limited & another* [2018] eKLR Kshs 2,000,000/- was awarded as a global sum for malicious prosecution. I therefore award the said sum of Kshs 2,000,000/= as general damages for malicious prosecution for each plaintiff.
59. As regards aggravated damages the plaintiffs in their submissions contend that in addition to the numerous court attendances at his criminal trial, they were also mistreated in the police cells, thereby causing them financial strain as well as mental anguish and embarrassment. In the circumstances, the plaintiffs are proposing Kshs.1,500,000/= as aggravated damages.
60. In determining an award on this head, I am persuaded by the analyses presented in the case of *Geoffrey Gitbiri Kamau v Attorney General* [2015] eKLR and that of *George Ngige Njoroge vs= Attorney General* (supra) and more specifically, the factors to be taken into account, as follows:
- a. The defendants’ motives, conduct and manner of committing the tort.
 - b. Whether the defendants acted with spite or in a high-handed, insulting or aggressive manner.
 - c. The defendants’ conduct up to the conclusion of the hearing.
61. Consequently, and given the plaintiffs’ standing in society, the nature of the offence they were associated with alongside its impact on the public. I am satisfied that this is a good case for aggravated damages to be awarded. In that case, I find the sum of Kshs.500,000/= to be reasonable.
62. The plaintiffs in their plaint pleaded special damages to a tune of Kshs.303,000/= being expenses paid to the advocate and travelling expenses. The receipts for legal fees were tendered in court but the travelling receipts were not tendered in court and therefore the special damages were partially proved. I therefore award the sum of Kshs.240,000/= as special damages.
63. In the end, judgment is entered in favour of the plaintiffs as against the defendant and each plaintiff is awarded as follows:
- a) Special damages Kshs. 240,000/=
 - b) General damages for



malicious prosecution Kshs.2,000,000/=

- c. Aggravated exemplary and
punitive damages Kshs. 500,000/=

Total Kshs.2,740,000/=

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
25TH DAY OF JULY, 2022.**

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

