



REPUBLIC OF KENYA



KENYA LAW
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**Ohito v Attorney General (Civil Suit 14 of 2015)
[2022] KEHC 16766 (KLR) (Civ) (22 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16766 (KLR)

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

CIVIL

CIVIL SUIT 14 OF 2015

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

SHEM EVANS OHITO PLAINTIFF

AND

THE HONORABLE ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. Shem Evans Ohito, (hereafter the Plaintiff) has sued against The Honorable Attorney General (hereafter the Defendant) seeking *inter alia* special damages in the sum of Kshs 500,000/-; exemplary damages; and general damages for malicious prosecution. The Plaintiff averred that on June 22, 2012 he was arrested and maliciously charged in Kibera Nairobi Criminal Case No 3033 of 2012 with the offence of stealing by servant contrary to Section 281 of the [Penal Code](#). It was further averred that the Plaintiff's trial lasted over two years and caused him both loss, pain, mental anguish, and loss of employment.
2. That at the end of the trial, the Plaintiff was on September 10, 2014 acquitted of the charge because the Defendant had no basis for charging the Plaintiff from the start and as a result of the Defendant's malice and poor investigations, the Plaintiff suffered greatly and continues to pay for the Defendant's malice to date. By reason of the aforesaid the Plaintiff's employment at the Nairobi Hospital was terminated on June 22, 2012 and the Plaintiff was greatly injured in his credit, character, reputation, suffered mental anguish and incurred expenses in defending himself thereby suffered loss and damages.
3. On July 23, 2015 the Defendant filed a statement of defence denying the key averments in the plaint and averred that the said arrest and subsequent prosecution was lawful. In his reply to the defence the Plaintiff averred that had the Defendant weighed the evidence presented by the complainants he would have concluded that it was insufficient to warrant charging the Plaintiff and obviated the need for a



- trial and infringement of the Plaintiff's right to freedom. That the malicious prosecution resulted in his employment being terminated on account of the criminal case initiated by the Defendant.
4. During the trial, the Plaintiff testified as PW1 and was the sole witness to adduce evidence in the matter. He identified himself as a doctor/pharmacist and proceeded to adopt his witness statement filed on January 20, 2015 as his evidence in chief. He also produced a bundle of documents in the list of documents dated January 7, 2015 as PExh1 and a bundle of documents in the list of documents dated July 13, 2018 as PExh2. He prayed for the reliefs in the plaint and costs of the suit.
 5. The Defendant did not call any witness.
 6. Upon the close of the respective parties' cases, submissions were filed on the matter. As a preamble, while placing reliance on *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR counsel for the Plaintiff contended that since the Defendant did not attend hearing and or call evidence in support of its pleadings the Plaintiff's case is uncontroverted. He anchored his submissions on the of-cited decision in *Mbowa v East Meno Administration* (1972) EA with respect to ingredients that need to be established in a claim founded on malicious prosecution.
 7. Addressing the institution of criminal proceedings and whether the same was actuated by malice, counsel called to aid the decisions in *James Karuga Kiiru v Joseph Mwamburi & Others* [2001] eKLR and *Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another* [2005] eKLR. He submitted that the Defendant had no basis for charging the Plaintiff from the start, not having conducted proper investigations prior to effecting the arrest, detention and charge all pointing to the fact that the prosecution was malicious, irregular and an abuse of the office by the police officers.
 8. Concerning whether the criminal proceedings terminated in favour of the Plaintiff and if there was reasonable cause and or justification to make a complaint to the police, counsel cited the decisions in *Samson John Nderitu v The Attorney General* [2010] eKLR, *Kagane v Attorney General & Another* [1969] EA 643 and *Thomas Mutsotso v Commission of Police & Another* [2013] eKLR. He asserted that the Plaintiff having been acquitted under Section 215 of the *Criminal Procedure Code*, the criminal proceedings were terminated in his favour. That in the absence of any evidence as to the facts and circumstances upon which the Defendant relied on, the court ought to conclude that there was no probable and reasonable cause for charging the Plaintiff.
 9. In conclusion , citing decisions in *Geroge Ngige Njoroge v Attorney General* [2018] eKLR and the Ugandan case of *Dr Willy Kaberuka v Attorney General* Kampala HCCS No 160 of 1993 counsel contended that as a result of the malicious arrest and prosecution, the Plaintiff suffered financial loss, mental anguish, loss of employment, embarrassment, tarnished reputation in the eyes of right thinking members of society and within his professional fraternity and the court ought to award aggravated damages and allow the suit as prayed.
 10. Counsel for the Defendant in his submissions responded to Plaintiff's arguments on lawfulness of the arrest, by submitting that in arresting the plaintiff the police were executing their statutory functions under Section 24 of the *National Police Service Act* after receiving a complaint, and carried out investigations that led to a conclusion that an offence was disclosed. He relied on the case of *Keterrenga v Attorney General* (1973) EALR 287, *Gitau v Attorney General* (1990) KLR 13 and *Kagane (Supra)* in support of the argument that the Defendant's agents acted upon a reasonable and probable cause as the information relayed to them was credible enough to satisfy a prudent and cautious man that the Plaintiff was guilty of the offence. Hence the charges were preferred against the Plaintiff.
 11. The Defendant contended that the onus was upon the Plaintiff prove malice in fact but he failed to adduce evidence demonstrative of malice either by spite or ill will or by indirect or improper motive.



That the Plaintiff's prosecution was not motivated by more than a desire to vindicate justice. It was further submitted that the Plaintiff was acquitted under Section 215 of the Criminal Procedure Code after being placed on his defence the court having found that he had a case to answer. Which fact demonstrates that there was reasonable and probable cause to warrant his arrest and prosecution. In conclusion it was argued that special damages if pleaded must be specifically proved and that because the prosecution of the Plaintiff was based on a reasonable and probable cause, his claim in respect of malicious prosecution has not been proved on a balance of probabilities. The court was urged to dismiss the suit with costs.

12. The court has considered the pleadings, evidence at the trial as well as the submissions filed in respect of the matter. It is the court's view that the sole issue for its determination is whether the Plaintiff has established on a balance of probabilities that his prosecution was malicious, without reasonable and or probable cause. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act which provides that;

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side...
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

14. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

15. At the hearing, the Plaintiff testifying as PW1 adopted his witness statement whose key assertions are;
2. I worked at Nairobi Hospital main pharmacy as a pharmacist for over 5 years in the in-patient and out-patient stations.



3. At the main pharmacy, we shared the computer terminals as no one has his/her own terminal. Each person had a log-in identity and a password. If a person logs in at a terminal, the logged in terminal was shared by all the people working in the pharmacy because it was not possible to log out any time you are through with a transaction.
5. In early June 2012 a doctor in the hospital Dr Mary Kiarie asked me if I had transferred medicines to Aga Khan Hospital, Kenyatta Hospital and Mater Hospital which I had no idea of. She told me that my identity, P41 had done the transactions to the said hospitals.
7. On June 16, 2012 I was terminated from my employment at Nairobi Hospital and arrested on June 22, 2012 and released from police custody on payment of cash bail of Kshs 10,000.00. I was arraigned in court to take pleas on June 27, 2012 on a charge of Stealing by servant contrary to Section 281 of the [Penal code](#).
11. I was out of employment and I could not get employment due to the criminal case that I was undergoing. No pharmacy could employ me because word had spread around the Pharmacists fraternity that I had stolen the drugs.
12. My family suffered financially. My reputation amongst my friends, peers and family was also diminished and I was generally shunned by the society.
13. Even though I was acquitted of the charge by the court, I will never be able to regain the confidence people had in me and pray that the court grants me the relief sought.” (sic) impetus
16. There is no dispute that the prosecution of the Plaintiff was initiated by police officers for whom the Defendant was responsible, and that the charges terminated in his favour. However, the burden of proving that his prosecution in Nairobi Kibera Criminal Case No 3033 of 2012 with the offence of stealing by servant contrary to Section 281 of the [Penal Code](#) was malicious rested on the Plaintiff. The elements to be proved in an action for malicious prosecution are well settled since *Mbowa v East Mengo District Administration* [1972] EA 352, where the East African Court of Appeal summarized the law as follows:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:

- 1) 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;
- 2) 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;
- 3) the defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had, “an intent to use legal process in



question for some other than its legally appointed and appropriate purpose”
Pike v Waldrum [1952] 1 Lloyd’s Rep. 431 at p. 452; and

- 4) 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 end and that he has been acquitted of the charge...”

See also *Murunga v Attorney General* [1979] KLR 138

17. All the above ingredients must be established simultaneously for a plaintiff to succeed in a cause founded on malicious prosecution. The undisputed events leading to Nairobi Kibera Criminal Case No 3033 of 2012 are that pursuant to a complaint by one Dr Mary Nthambi Kisungu to the police, the Plaintiff, at the time employed as a pharmacist at Nairobi Hospital, was arrested and charged with the offence of stealing by servant contrary to Section 281 of the [Penal Code](#). The particulars of the charge alleged that the Plaintiff:-

“On diverse dates between 10th day of March 2012 and 16th day of June 2012 at Nairobi Hospital within Nairobi County being a servant to Nairobi Hospital as a Pharmacists stole assorted drugs as per the attached list all valued at Kshs 1,214,062.30, the property of Nairobi Hospital which came into your possession by virtue of your employment”.

18. Evidently, there is no dispute that the complaint by one Dr Mary Nthambi Kisungu to the police set the ball rolling regarding the criminal proceedings eventually brought against the Plaintiff. Was there reasonable and probable cause for the Defendant’s actions or were the actions malicious? According to [Halsbury’s Laws of England](#), 4th Edition - Reissue, Vol 45 (2):

“ [R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime”.

19. In *Murunga (supra)* the court applied the test in *Kagane & Others v Attorney General* (1969) EA 643, namely that, whether there was a reasonable and probable cause for the prosecution is primarily to be judged on the objective question whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty.

20. In this regard, the court has reviewed the proceedings of the criminal trial produced as P. Exh1 by the Plaintiff. It is apposite to note ab initio that the said proceedings were neither certified nor complete. However, what can be gathered therefrom is that the gist of the prosecution case was that between March 10, 2012 and June 15, 2012 drugs and pharmaceutical products worth Kshs 1,214,062.30/- were transferred or relayed to certain hospitals using login credentials specific to the Plaintiff who was a Pharmacists at Nairobi Hospital at the time. That on the dates in question, the Plaintiff was on duty his login credentials were used in effecting all the transfers under reference.

21. Further, that there was no authorization from Nairobi Hospital for the transfers of the medicine and or drugs to the specific hospitals. That the Plaintiff confirmed upon inquiry, the login credentials that effected the transfers in question belonged to him whereas the said login credentials were ideally only known to him. That the investigating officer inquired from the receiving hospitals in question which denied receipt of the drugs. That having completed the investigations of the complaint, police arrested and charged the Plaintiff.



22. In his evidence before this court the Plaintiff claimed that his log-in credentials were superior having more features for transactions, compared to his colleagues, enabling him for instance to credit transactions. He further admitted that the printout that was presented to him showed that the transfers in question were effected through his login credential. However, he could not tell the identity of the person who transacted using his log in credentials as the terminal was shared and some of the transfers were done when he was not on duty. He however asserted that his prosecution was malicious.
23. In the court's estimation of the evidence before the criminal court, the facts and the reasons leading to the report being made to police, and material collected by the police are such as would satisfy a prudent and cautious man that the Plaintiff was probably guilty of the offence eventually preferred against him. In other words, that there was a reasonable and probable cause for the complaint to police and the prosecution, thereby negating the element of malice. The Plaintiff did not show in the trial before this court that his prosecution was mounted for an ulterior, spiteful, or improper purpose, rather than for the vindication of the public interest.
24. The Court of Appeal in *Hassan Magiya Kiage v Attorney General & Another* [2017] eKLR cited with approval the words of the Supreme Court of Canada in *Nelles vs Ontario* [1989] 2SCR 170 to the effect that:
- “Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”
25. That the Plaintiff was placed on his defence in the criminal trial indicates that the trial court had been persuaded of the substance of the prosecution evidence. No copy of the judgment of the criminal court was tendered in evidence. Nevertheless, the acquittal of the Plaintiff under Section 215 of the *Criminal Procedure Code* does not avail much. In any event, *Nzoia Sugar Company Ltd v Fungututi* [1988] eKLR, the Court of Appeal held that:
- “Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”
26. In the court's view, the Plaintiff failed to discharge the burden of proving the various ingredients of malicious prosecution on a balance of probabilities and his suit must fail. In view of this finding, no useful purpose would be served in the court considering the question of damages. The Plaintiff's suit is dismissed. Parties will bear their own costs, however.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 22ND DAY OF DECEMBER 2022.

C.MEOLI

JUDGE

In the presence of:



For the Plaintiff: Ms. Wambua h/b for Mr. Opiyo

For the Defendant: N/A

C/A: Adika

