



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL SUIT NO. 4 OF 2019**

**PETER KITUKU NGILU.....PLAINTIFF**

**VERSUS**

**HON. ATTORNEY GENERAL.....DEFENDANT**

**JUDGEMENT**

The plaintiff vide plaint dated 18<sup>th</sup> March, 2019 seeks;

- a) General and aggravated damages of Kshs 50,000,000/=.
- b) Special damages of Kshs 400,000/=
- c) Costs
- d) Interest
- e) Further or other relief.

The facts of the case relate to a shooting incident in Sikata Area of Bungoma County where one Michael Sululu Wafula died as a result. The plaintiff was charged with the offence of Murder in Bungoma High Court Criminal Case Number 5 of 2010 and after full trial, he was acquitted on 26/1/2016 for insufficiency of evidence. He avers that upon acquittal, the defendant appealed to the Court of Appeal which also determined in his favour.

The plaintiff pleads that the circumstances surrounding the investigation, arrest and the subsequent arraignment was malicious. He pleads the particulars of malice as *inter alia* rushing to police station to cause the arrest of the plaintiff without ascertaining the truth, insisting the plaintiff being charged without any shred of evidence linking him to the alleged charges, making a false report to the effect that it is the plaintiff who murdered the deceased and detaining the plaintiff in the police cells beyond the time provide for contrary to the law are attributable to the defendant.

The plaintiff avers that as a result, his freedom was curtailed by false imprisonment and malicious prosecution and that his career as a Police Officer was curtailed and reputation diminished.

The defendant filed its statement of defence denying all the allegations and that the plaintiff was arrested, charged and prosecuted after a genuine report was made to the police and the investigation revealed an offence had been committed by the plaintiff.

That the Police Officers were conducting their normal duties as mandated by law when they were presented with a report of commission of an offence which report they are legally mandated to act upon hence they cannot be held liable.

The defence also enumerated the particulars showing that the plaintiff committed the offence for which he was charged with, the police carried out proper investigations, the trial court did not find that the prosecution was malicious and finally that the plaintiff was acquitted on technicalities.

The plaintiff testified on 14/11/2019 as PW1 where he adopted his statement as evidence in chief. The defendant did not call any witness.

He testified that the arrest and being charged affected him and his family since he was interdicted and put on half pay, he developed high blood pressure which as a result affected his sexual life and eye sight. That his neighbours branded him a murderer, his church lost confidence in him and one of his children dropped out of university. He states that the police were malicious because the other 2 police

officers he was with were never charged but transferred out of Bungoma. He stated that the intention of his arraignment was to cover the senior police officers.

That he was arrested and held in custody for 8 days at Kakamega Police Station. He paid the advocate who represented him Kshs 100,000/= in the High Court and Kshs 300,000/= in the Court of Appeal. That no ceremony was held for him by his colleagues when he retired.

On cross examination, he stated that there was an accident involving 3 vehicles, there were 30 armed officers. That there were about 200 members of the public were siphoning fuel. That 2 of his colleagues were not charged. He denied firing 7 rounds of ammunition.

Thereafter, parties filed written submissions. The plaintiff filed on 19<sup>th</sup> May, 2020 and the defendant on 9<sup>th</sup> February, 2021.

Mr. Bw'Onchiri for the plaintiff raised the following issues as pertinent in disposing of this matter;

- i. Whether the proceedings were instituted by the defendants
- ii. Whether the proceedings were actuated by malice
- iii. Whether the proceedings were terminated in favour of the plaintiff
- iv. Whether there was reasonable cause/ jurisdiction to institute the proceedings.
- v. Whether the plaintiff is entitled to the reliefs sought.
- vi. What is the effect of the failure by the defendant to call witnesses?
- vii. Special damages.
- viii. Who is to pay costs.

On the first issue counsel submits that the charge sheet indicates the suit was instituted by a senior principal state counsel on behalf of the defendant.

On the second issue, counsel submits that malice can be confirmed from the particulars enumerated in the plaint. On the 3<sup>rd</sup> one, it is submitted that the High Court matter was determined in the plaintiff's favour while the Court of Appeal matter was withdrawn by the defendant.

Regarding the 5<sup>th</sup> issue, counsel submits that despite filing the defence, the defendant did not call any witness hence the plaintiff's evidence is unchallenged and on the 6<sup>th</sup> issue, it is submitted that the plaintiff has proved his case on a balance of probability.

The case of **Joseph Wamoto Karani vs Dorman Limited & Anor (2019)eKLR**, **Brutus Nandwa Wambunya Vs Inspector general of Police & Anor (2018) eKLR** have been cited in support.

Mrs Were for the defendants submitted and raised the twin issues;

- a) Whether the plaintiff has established a claim of malicious prosecution to the required standard.
- b) Whether he is entitled to the damages prayed for in the pleadings.

Counsel submits that in order for the plaintiff to succeed in his claim, he must prove; the prosecution was instituted by the defendant or someone for whose acts, he is responsible, the prosecution ended in favour of the plaintiff, that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice.

Counsel submits that the 1<sup>st</sup> 2 ingredients have been proved while the 3<sup>rd</sup> and the 4<sup>th</sup> have not.

On whether the prosecution was instituted without reasonable and probable cause, it is submitted that the mere fact that the plaintiff was put on his defence is proof that court believed that the plaintiff had committed an offence. Reliance has been placed on the case of **Murunga vs Attorney General (1979)KLR 138**.

On whether the prosecution was actuated by malice, counsel submitted that no evidence has been adduced to indicate that the defendant was malicious against the plaintiff. The fact that the plaintiff was acquitted is not proof of malice on the defence part as he could have been acquitted on technical grounds but does not mean that a crime was not committed. **SOC Finance Kenya Ltd vs Peter Gachu Kurii Civ. Appeal 395/2000** has been cited.

On the issue of damages, counsel submits that the plaintiff has not adduced sufficient evidence to warrant the award of damages sought. She submits that the plaintiff has not proved that the medical condition is a result of the arrest and prosecution, no evidence was led on the allegation that the child dropped out of school and finally that the plaintiff was paid all his outstanding salary upon acquittal.

The cause of action was triggered by Bungoma High Court criminal case No. 5 of 2010 where the plaintiff was charged with offence of murder contrary to sections 203 as read together with section 204.

After investigation and trial, the plaintiff was acquitted for insufficiency of evidence. The Republic through the Director of Public Prosecutions preferred an appeal to the Court of Appeal but later withdrew the appeal.

The withdrawal of the appeal prompted the institution of this suit where the plaintiff claims against the defendant damages for malicious prosecution.

In a line of authorities from our courts, for one to succeed in action based on malicious prosecution;

- 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;*
- d) *That the prosecution was actuated by malice;*

See *Kagane -vs- Attorney General (1969) EA 643*

This position was affirmed in the case of *Gitau Vs. Attorney General [1990] KLR 13, Trainor, J* had this to say:

*To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness.*

The defendant admits that the first two limbs have been proved. This court is in agreement and what therefore remains is to consider the other two ingredients to establish whether indeed the prosecution was malicious and if so, what the remedies are available to the plaintiff.

As regards reasonable and probable cause; it was defined in *Simba Vs Wambari (1987) KLR 601* as:-

*The Plaintiff must prove that the setting of the law in motion by the Inspector was without reasonable and probable cause..... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not demonstrated that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.*

Similarly, in *Kagane's case (supra), Rudd J. held:-*

*"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...."*

The prosecution's evidence in the trial court briefly was;

*On the 26<sup>th</sup> January, 2010, at about 6.30 p.m a collision occurred between an oil tanker, a lorry and a Matatu along Bungoma-Webuye Road at a place known as Sikata where two people died and several injured. A surging crowd siphoned oil from the tanker and became unruly forcing the police to shoot in the air in a bid to disperse the rowdy crowd. In the process two people were shot by stray bullets, one Michael Sululu died and the other Kevin Muteyo was injured. The deceased was a Red Cross Volunteer assisting those who had been injured in the accident when the stray bullet hit him. It is the case of the prosecution that the bullet that hit the deceased was from the gun in possession of the accused in this matter.*

The plaintiff in his defence stated;

*On the 26<sup>th</sup> January, 2010 at about 6.30 p.m, he received information from a member of the public about an accident that had occurred at Sikata. Shortly thereafter, O.C.S Bungoma Police Station communicated to him via V.H.S Radio and asked to go to the scene with other armed police officers. H got a Patchet Sub machine Gun and issued his two colleagues with G3 Rifles*

each.....

**He heard repeated gunshots near the tanker. As he moved closer to the tanker he met the O.C.S Bungoma Chief Inspector Mugambi who directed them to disperse the crowd that was siphoning oil from the ditch. They cut sticks from the bush and scared the crowd away. There were several officers armed with G3 Rifles. One other had a Patched.**

The plaintiff states that the arrest, detention, arraignment before court over a murder charge that he never committed affected his reputation in the service, his family and community at large. He also enumerated the particulars of malice under paragraph 7 of the plaint to be among others; rushing to police station to cause the arrest of the plaintiff without ascertaining the truth, insisting the plaintiff being charged without any shred of evidence linking him to the alleged charges and framing up trumped up charges against him.

This court is alive to the constitutional mandate of the National Police Service under Chapter 14 of the constitution and the National Police Service Act No. 11A of 2011.

From the testimony in the criminal trial, the Investigating officer, One, IP Jacob Muchai testified as PW-11. His testimony was that;-

**...the bullet head(Exh Q1) was found by the expert to have been fired by KR 2332, the same was issued to No. 32294 Cpl Peter Ngilu. According to his movement register of Ndengelwa Patrol Base which was in operation, he recorded the entry of serial No. 56 of 26.1.10. This was 5 Mg Submachine Gun. He was issued with 25 rounds of ammunition. On return he had expended 17 rounds of 9mm.**

**At the scene of shooting, we collected spent Cartridges and they matched the bullet head which were fired from the firearm issued to Peter Ngilu....**

On cross examination, the witness proceeded; -

**..I arrested the officers who fired. They were Kanake, Mugambi and the accused. After report of the Ballistic Expert only accused was reprimanded. There were 3 witnesses who said a uniformed police officer shot the Red Cross Person. With the evidence, I released Kanake and Mugambi.**

It is clear from the testimony that the Police officers tasked with investigating the matter acted on some evidence; *to wit*, the gun which discharged the killer bullet was in the hands of the plaintiff at the time. The firearm movement register and the Ballistic Examiner's Report also linked the plaintiff's gun to the killer bullet.

The testimony is also clear that two other colleagues who were present with the plaintiff and whose guns had fired were also arrested and subsequently released after further investigations had been conducted.

It was stated in testimony that some 3 witness had informed the investigator that a uniformed police officer had killed the deceased.

The discretion on whether to charge the plaintiff was solely with the prosecutor and his duty was to cross check whether the evidence he had before him sufficiently pointed to a possible commission of a crime linking the plaintiff and whether in his mind, there were factors pointing to ulterior motives in the manner in which the investigation was done.

Applying the test enunciated in the above cases, **this court is unable to conclude that the defendant acted without reasonable and probable cause.**

On the issue of whether charges were preferred maliciously, our courts have held that it is not malicious to charge *per se*.

In *James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] eKLR*, the Court of Appeal held;-

**To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.**

In the instant case, it is not disputed that the criminal charges were determined in the plaintiff's favour. The plaintiff however has not adduced evidence in support of the particulars of malice enumerated under paragraph 7 of the plaint. This court notes that the particulars thereon are merely pretrial procedures undertaken once a suspect has been arrested. Malice for proving malicious prosecution was defined in *Kagane's Case (supra)* that;-

**The plaintiffs have further to prove that the prosecution was instituted with malice on the part of the prosecutor King. In this connection, malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice.'**

In the instant case, there is no evidence that the prosecutor was motivated by a fact other than to ensure justice is served. If any, none was placed before the court.

The plaintiff asserts that the defendant preferred an appeal while aware that it has not complied procedurally. This in no way prejudiced the plaintiff as this was a direct consequence of the plaintiff's acquittal.

In sum total, this court finds no merit in the suit and is thus dismissed with no orders as to costs.

**DATED AT BUNGOMA THIS 24TH DAY OF JUNE, 2021**

**S. N. RIECHI**

**JUDGE**