



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 3008 OF 1989

HARTWELL J.M. MWAZIGHE.....PLAINTIFF

-VERSUS-

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. The plaintiff in the present instance filed the plaint dated 14th June, 1989 and sought for judgment against the defendant in the following manner:
 - a. General damages.
 - b. Special damages in the sum of Kshs.69,175/=.
 - c. Costs of the suit.
 - d. Interest on (a), (b) and (c).
2. The plaintiff pleaded in his plaint that he was at all material times an employee of the Ministry of Finance in the Department of Customs and Excise, stationed in Mombasa and having been employed on 1st November, 1973.
3. The plaintiff further pleaded in his plaint that the defendant through its agent/employee maliciously and without probable cause preferred charges against him of conspiring to defeat justice contrary to Section 117(a) of the Penal Code in Criminal Case No. 1683 of 1984, which charges resulted in an acquittal of the plaintiff on 17th December, 1985 under Section 210 of the Criminal Procedure Code.
4. The defendant entered appearance upon service of summons and filed its statement of defence on 20th July, 1993 to deny the allegations brought out in the plaint.
5. At the hearing, the plaintiff testified while the defendant called one (1) witness to support its case.
6. The plaintiff adopted his executed witness statement as evidence and produced his list and bundle of documents as P. Exhibit 1.
7. The plaintiff stated that he is claiming damages for unlawful termination from employment since he was not given an opportunity to be heard or given proper reasons for such termination.
8. In cross-examination, it was the testimony of the plaintiff that the letter of interdiction dated 8th June, 1984 bore the reasons for his termination.
9. It was also the testimony of the plaintiff that he did not forge the material receipts as alleged and that he is claiming his salaries from the period of termination as well as his pension.
10. The plaintiff gave evidence that he was also seeking general damages for malicious prosecution.

11. Kenneth Odhiambo who was DW1 adopted his signed witness statement as evidence and produced the defendant's list and bundle of documents as exhibits.

12. The witness stated that he was the Deputy Director-Human Resource Management and Development in the National Treasury.

13. The witness further stated that reasons were given for the termination of the plaintiff from employment and that there was no malice on the part of the prosecution in preferring charges against him.

14. It was the evidence of DW1 that the plaintiff was taken through the disciplinary process prior to his summary dismissal for gross misconduct.

15. In cross-examination, the witness testified that the interdiction letter did not set out the specific irregularities that led to the interdiction of the plaintiff and that the plaintiff was entitled to be supplied with the grounds for dismissal.

16. The witness also testified that the criminal court noted that there was overwhelming evidence of forgery by the plaintiff but acknowledged that he was not charged in relation to the forgery.

17. In re-examination, it was the statement of DW1 that the disciplinary process in respect to the plaintiff was followed throughout.

18. Thereafter, the parties exchanged written submissions.

19. The plaintiff on his part contends that the letter of dismissal which was served upon him did not contain the grounds for the dismissal and that the defendant did not serve upon him a notice to show cause.

20. On quantum, the plaintiff submits that he is entitled to special damages in the sum of Kshs.56,267/= being the salary arrears from the date of dismissal on 26th February, 1984 up to June, 1988 when his appeal was dismissed.

21. The plaintiff also urges this court to award the sum of Kshs.3,000,000/= being general damages for unlawful arrest and malicious prosecution, and cites the case of **Lucas Omoto Wamari v Attorney General & another [2014] eKLR** where the court awarded a sum of Kshs.500,000/= on general damages for malicious prosecution and a sum of Kshs.2,000,000/= for violation of constitutional rights.

22. In reply, the defendant submits that the plaintiff's claims for malicious prosecution and unlawful termination ought to be dismissed for lack of evidence to support them.

23. The following issues arose for determination:

i. Whether the plaintiff has made a case for malicious prosecution against the defendant;

ii. Whether the plaintiff has made a case for unlawful termination against the defendant; and

iii. Whether the plaintiff is entitled to the reliefs sought; and

iv. Who should be made to bear the costs of the suit.

24. Regarding the *first* issue, the term 'malicious prosecution' was appropriately defined by the court in the case of **Stephen Gachau Githaiga & 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.”

25. 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:

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; and

d. That the prosecution was actuated by malice.

26. It is incumbent upon the plaintiff to establish all the above elements in order for his claim to succeed.

27. On the first principle, it is not in dispute that the arrest and prosecution of the plaintiff were 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.

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

29. The third principle touches on the subject of probable/ reasonable cause.

30. 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...”

31. Upon my examination of the evidence tendered, I note that the plaintiff and other persons not before this court were charged in relation to some irregularities that arose in some receipts purported to have been handled by the accused persons and prepared by the plaintiff.

32. It is also noted from the criminal proceedings that while it is apparent that the criminal court found that the prosecution had not established the charge against the parties, the court found there to be prima facie evidence of forgery of the material receipts which were prepared by the plaintiff and handled by his co-accused persons.

33. Furthermore, the criminal court found there to be overwhelming evidence relating to the purported forgeries but concluded that the prosecution had brought wrong charges against the plaintiff and his co-accused and hence the acquittal.

34. For the foregoing reasons, I am of the view that the plaintiff has not shown by way of credible evidence that there was no probable cause behind his arrest and prosecution.

35. In relation to the fourth principle on malice, I reiterate that the criminal court indicated in the judgment that there was prima facie evidence of forgery linked to the plaintiff, even though the purpose of the forgery had not been established and the specific case made against the plaintiff had equally not been established in order to warrant his defence. As earlier noted, the criminal court pointed out that the prosecution brought wrong charges against the plaintiff and his counterparts.

36. From my examination of the evidence, I observed that the purported irregularities are said to have taken place in the Taita Taveta station being the area where the plaintiff worked as a clerical officer-Accounts Department and which could explain the decision by the police and prosecution to charge the plaintiff.

37. In view of the foregoing, I am not convinced that there was any presence of malice in the prosecution of the plaintiff notwithstanding the fact that he was acquitted of the offence of conspiring to defeat justice contrary to Section 117(a) of the Penal Code.

38. Consequently, I find that the plaintiff has not proved his case for malicious prosecution and/or wrongful arrest and detention on a balance of probabilities and that claim is hereby dismissed.

39. The *second* issue for determination relates to the claim for unlawful termination.

40. Upon my examination of the pleadings and evidence on record, I observed that the plaintiff was initially appointed by the East African community to the office of Accounts Clerk vide the letter dated 1st November, 1973 and was confirmed as pensionable.

41. The evidence shows that the plaintiff was subsequently absorbed as a clerical officer by the Ministry of Finance and Planning by way of the letter dated 24th October, 1977 and earning a salary of Kshs.642/= p.a with increments from 1st July, 1978.

42. Going by the evidence, following his arrest, the plaintiff was interdicted with effect from 20th May, 1984 and was put on half salary.

43. Subsequently, the plaintiff was dismissed from employment vide the letter dated 26th February, 1988 and with effect from 17th February, 1988. The dismissal order resulted in an appeal by the plaintiff and which appeal was disallowed on 24th June, 1988.

44. Upon my study of the record, it is apparent that no credible evidence was presented to ascertain whether the disciplinary procedure was properly followed prior to the dismissal and further, that no credible evidence was presented to show that the plaintiff was either granted sufficient time to prepare for his defence or granted an audience before the dismissal decision was arrived at.

45. In the circumstances, I am convinced that the plaintiff has successfully proved his case for unlawful termination from employment.

46. I will now address my mind to the *third* issue on whether the plaintiff is entitled to the reliefs sought.

47. Having found that the claim for malicious prosecution has not been proved, I find that the plaintiff is not entitled to an award of general damages on the same. However, I am enjoined to make a finding of the sums I would have awarded under different circumstances.

48. Upon considering the nature of work that the plaintiff was engaged in prior thereto and the experiences he underwent as a result of the prosecution, in addition to taking into account comparable awards made in cases involving plaintiffs in a relatively similar standing in society as the plaintiff in this instance, I would have awarded the sum of Kshs.500,000/= under this head, upon considering the case of **Julius Okang'a Omulando v The Attorney General, Nairobi CMCC No. 1663 of 2016** where the court in the year 2018 awarded the sum of Kshs.310,000/= on general damages for malicious prosecution to the plaintiff who was a Chief Accounting Officer.

49. On the special damages sought for unlawful termination, I will award the plaintiff the sum of Kshs.39,765/= being the half salary from 20th May, 1984 when he was interdicted to 17th February, 1988 when he was dismissed from employment. I will also award the plaintiff one (1) month's salary in lieu of notice which amounts to the sum of Kshs.2,410/=. The total award comes to the sum of Kshs.42,175/=.

50. In the absence of credible proof to justify the claims sought for housing allowance, severance pay and advocates fees for the criminal case, I decline to award any sums under those heads. In any event, severance pay would ordinarily be awarded where a party has been declared redundant, which is not the case here.

51. Accordingly, judgment is hereby entered in favour of the plaintiff against the defendant on the claim for unlawful termination as follows:

a. Special damages **Kshs.42,175/=**

TOTAL **Kshs.42,175/=**

b. The plaintiff shall also have the costs of the suit and interest on the special damages at court rates from the date of filing the suit until payment in full.

c. The claim for malicious prosecution is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant