



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 215 OF 2008

PETER ROUSSEL AMENYA &1ST PLAINTIFF

THEOPHELIUS OCHOLI OMUTEKU.....2ND PLAINTIFF

-VERSUS-

MAURICE OTUNGA.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. On the 29th of May 2008, the late Ford Amenya Aseka (the deceased) filed his plaint against the defendants jointly and severally. Regrettably, he died on June 8, 2017, before this lawsuit could be heard and decided. As a result, the Plaintiffs in this case, the deceased's sons, petitioned for and were granted letters of administration intestate in respect of the deceased's estate, and were formally replaced as Plaintiffs on the 15th of October, 2018.

2. Consequently the plaintiffs in the present instance filed the Amended plaint dated 19th May, 2020 and sought for judgment against the defendants in the following manner:

a) General damages

b) Punitive and exemplary damages.

c) Kshs.100,000/= as special damages

d) Costs and interests on both general and special damages at court rates.

e) Any other or further relief deemed appropriate.

3. The plaintiffs pleaded that on or about November 2, 2006, the first defendant caused the police at Shauri Moyo Police Station, in particular Inspector Kinyango, to arrest the deceased and charge him before the Chief Magistrate Court Makadara with the capital offence of robbery with violence contrary to Section 296 (2) of the Penal Code in Criminal Case No.6116 of 2006, which was consolidated with Criminal Case No.6116 of 2006.

4. The plaintiffs further pleaded that on or about 3rd November, 2006 the deceased duly appeared before the Chief Magistrates court and after trial he was acquitted of the said charge on the 19th day of September 2007 after being held for 322 days.

5. The Plaintiffs pleaded that deceased was not only maliciously prosecuted, but also falsely imprisoned for the 322 days he was held in custody from November 2nd, 2006 to September 19th, 2007, and that as a result of the matters aforesaid, his reputation was harmed and he was subjected to considerable trouble, inconvenience, anxiety, and expense, as well as loss and damages.

6. The 2nd defendant entered appearance upon service of summons and filed its Amended statement of defence on 5th June, 2020 to deny the allegations brought out in the plaint.

7. At the hearing, the plaintiff called two (2) witnesses to testify in support of their case while the defendant did not have any witness.

8. The plaintiff (PW1) Peter Rousel, the deceased's son, said that he acquired Letters of Administration of the deceased's Estate alongside his brother Theophilous Ochoi Omuteku. He added that the deceased filed a witness statement on September 19, 2011 and requested that the court consider it as evidence.
9. He further indicated that the deceased submitted a list of papers on September 19, 2011, which he seeks to show as exhibits PEXH1-13, and that he prays for judgment as requested in the Plaintiff.
10. In cross-examination, PW1 indicated that he filed a witness statement on August 29, 2019, and that he wanted to adopt his late father's testimony. He also stated that he filed an Amended Plaintiff.
11. He also stated that he was not present on 29th September 2006 but his mother was present when the promise was given. He further stated that he was not at the scene so he cannot confirm what was stated in the Amended Plaintiff.
12. In re-examination, it is the evidence of the aforesaid plaintiff that he was not present on November 2, 2006, when his father and the second defendant were involved in an incident. He also indicated that he was unaware of his father's sour connection with the first defendant.
13. Miriam Awinja (PW2) the adopted her signed witness statement dated 19th September 2011 as examination-in-chief and stated that she is the widow of Ford Aseka (the deceased).
14. She stated that they were residing in Gorofani Estate in 2006, in a single room with the dead, and that the 1st defendant was their next-door neighbor in the next block. She went on to say that they had lived on the estate for two years and that the relationship between his late spouse and the 1st defendant was initially amicable, but that it deteriorated when the dead was chosen as the estate's chairman.
15. She testified that the two were feuding over control of the estate, and that the deceased was detained and charged with armed robbery. She said he was arrested twice, the second time being in detention until the case was concluded, and that the 1st defendant was the complainant.
16. She testified that the 1st Defendant had claimed the deceased had robbed him and that he had no reason as to why the deceased was arrested and charged.
17. In cross-examination, she stated that her late husband was arrested on claims that he had bought a stolen blanket but was released and arrested again for the offence of robbery with violence, it was at this point that the said OCS Kinyango threatened to teach the deceased a lesson.
18. In re-examination, she stated that between the years 2002 and 2006 the deceased was living with her and that he was not on run.
19. At the close of the hearing, this court invited the parties to file and exchange written submissions. At the time of writing this judgment, only the plaintiffs and the 2nd defendant had filed their submissions.
20. For their part, the plaintiffs submitted that the key facts are undisputed, namely that the deceased and 1st defendant were both inhabitants of Gorofani Estate in Nairobi at all relevant times, and that they were excellent friends until they fell out and became implacable adversaries. Furthermore, on the morning of April 26, 2002, a crowd assaulted the 1st Defendant, who was injured but not robbed. After four years, when acting Inspector Kinyango became OCS of Shauri Moyo Police Station, the deceased was prosecuted with the offence of robbery with violence, tried, and acquitted.
21. The plaintiffs contend that they have proved the elements associated with the tort of false imprisonment and malicious prosecution as shown in the case of **Murunga v The Attorney General (1979)** Cotran J stated at page 140
- “As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs’ favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.*
- With regard to item (3) I ask myself, within the test laid down in Kagane v Attorney-General (1969) EA 643, whether the material known to the prosecutor, i.e. Inspector Ouma, would satisfy a prudent and cautious man that the plaintiff was probably guilty. I have no doubt in answering this question in the negative”*
22. The plaintiffs argued that the evidence presented to this court demonstrated that the incident on April 26, 2002 did not constitute robbery with violence as defined by Section 296 (2) of the Penal Code, but rather amounted to assault occasioning bodily harm as defined by Section 251 of the Penal Code.
23. They further submit that there was no proper proof that the deceased was involved in the event at all; in fact, the deceased's evidence was that he had departed for work at the Jomo Kenyatta International Airport when the incident occurred.
24. The plaintiff submitted that the said Inspector had no reason for detaining the deceased on a charge of robbery with violence, despite the fact that he confessed that no report had been filed on the matter, and that the OB reports from April 26th and 27th merely indicated assault. They quoted **Salmond on Torts, page 591**, where the author states: **In Hicks v Faulkner Hawkins J said, “I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on 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 the accused, to the conclusion that the person charged was probably guilty of the crime imputed.”

25. They contend that the 1st Defendant and acting Inspector Kinyango's motivation was to utilize the law to keep the deceased in remand jail for as long as the court system would allow, and that they were successful in keeping the deceased in custody for over a year.

26. It is the Plaintiff's submission that the deceased evidence has proved on a balance of probabilities that the only reason he was arrested and charged is that the 1st defendant who was a friend of Inspector Kinyango conspired to punish the deceased for being a nuisance to the 1st defendant.

27. They therefore pray to this Court to find both defendants are jointly and severally liable to the deceased for having been falsely imprisoned and maliciously prosecuted and award the plaintiffs the total sum of Kshs.9,100,000/=.

28. In reply, the 2nd defendant argued that the arrest was lawful and came after a valid robbery with violence complaint had been filed with adequate details with the police, and that the plaintiffs' claim for general damages should be dismissed since it was misconceived.

29. As a result, the 2nd defendant asks the court to dismiss the plaintiff's suit, claiming that the fact that the deceased was acquitted does not suggest that the police went beyond their statutory duty of assisting in the administration of justice.

30. The following issues arose for determination:

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

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

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

31. 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.”

32. 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.

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

34. On the first principle, in this case, there is no doubt that the 1st defendant reported the plaintiff and criminal proceedings against the plaintiff were instituted against the plaintiff. That there were terminated in the Plaintiff's favor hence proving two of the 4 essential ingredients of malicious prosecution.

35. 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 215 of the Criminal Procedure code.

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

37. 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 & Another [1969] E.A 643** 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...”

38. Upon my examination of the evidence tendered, I note that the plaintiff and other persons not before this court were charged in relation to

Robbery with violence contrary to section 296 (2) of the Penal code.

39. 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.

40. Furthermore, the criminal court found that from the evidence adduced there was no robbery with violence as alleged and there was demonstration during which the complainant said he was assaulted and two grill door damaged.

41. It is the court assertion that the accused should have been charged with assault causing bodily harm and malicious damage to property.

42. For the foregoing reasons, I am of the view that the plaintiff has shown by way of credible evidence that there was no probable cause behind his arrest and prosecution.

43. 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 assault causing bodily harm and malicious damage to property linked to the plaintiff, and the specific case made against the plaintiff had equally not been established in order to warrant his defence.

44. From my examination of the evidence, it is not in dispute that the occurrence book entries of April 26 and 27 2002 indicated an offence of assault and not robbery which is clear that someone had tampered with the charges.

45. In view of the foregoing, I am convinced that there was 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 states that:**

Any person who— (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or is guilty of an offence and is liable to imprisonment for five years.

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 been proved, I find that the plaintiff is entitled to an award of general damages on the same.

48. Upon considering the experiences he underwent as a result of the prosecution, in addition to taking into account comparable awards made in cases involving plaintiff in a relatively similar standing in society as the plaintiff in this instance, I will award the sum of Kshs.800,000/= under this head, upon considering the case **Thomas Mutso Bisenbe v Commissioner of Police & another [2013] eKLR**, the court awarded the plaintiff Ksh.800,000/= for general damages for malicious prosecution on general damages for malicious prosecution.

49. Punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant's action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. (See the Court of appeal exposition in **Obongo & another v Municipal Council of Kisumu [1971] EA 91**) approved the principles set out by the **House of Lords in Rookes v. Barnard (1964) AC 1129** in respect of making awards of exemplary damages by restricting them to those tortfeasors, who are servants/employees of the government. By doing so, other tortfeasors who are equally blame worthy are exempted from punitive awards being made against them.

50. In the case at hand, I am of the view that an award of Ksh.800,000/= general damages and a composite figure Ksh.500,000/= as exemplary, aggravated and punitive damages is reasonable. Special damages claimed and proved is Ksh.100,000/=. The total comes to Ksh.1,400,000/=.

51. Consequently, I enter judgment for the Plaintiff against the Defendants jointly and severally for the sum of Ksh.1,400,000/=.And costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant