



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 582 OF 2011

VICTOR ODHIAMBO ORUKO.....1ST PLAINTIFF

SRI INTERNATIONAL LIMITED.....2ND PLAINTIFF

VERSUS

THE OFFICE OF THE PRESIDENT

(MINISTRY OF STATE FOR INTERNAL SECURITY).....1ST DEFENDANT

COMMISSIONER OF POLICE.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

DIAMOND TRUST BANK KENYA LIMITED.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. In their Complaint dated and filed on 20th December 2012 which was supported by a List of Witnesses, Witness statement and List and Bundle of documents, the Plaintiffs sought judgment against the Defendants, jointly and severally for:-

a. General damages for malicious prosecution, for breach of contract, malicious falsehood, injury to name, person, property and business and costs of defence in NBI CR CASE NO 1651 OF 2009.

b. Aggravated and exemplary damages.

c. Interest from the date of filing suit till payment in full.

d. Costs.

2. Pursuant to leave granted on 24th July 2012 on the basis of their Notice of Motion application dated and filed on 2nd July 2012, on 7th August 2012, they filed an Amended Complaint dated 31st July 2012. In addition to the aforesaid prayers, they sought judgment against the Defendants, jointly and severally, for:-

a. Kshs 2,440,172.46 for loss of business with interest from 15th October 2009.

b. Kshs 200,000/= for loss of legal fees in NBI CR CASE NO 1651 OF 2009.

3. The Hon Attorney General entered appearance for the 1st, 2nd and 3rd Defendants herein on 13th December 2012 while the 4th Defendant entered appearance on 17th January 2012. On 6th February 2012, the Plaintiffs requested for judgment against the 4th Defendant for having entered appearance but having failed to file a defence.

4. On 2nd March 2012, they filed a Notice of Motion application dated 6th February 2012 seeking entry of interlocutory judgment against the 1st, 2nd and 3rd Defendants herein. On 24th May 2012, they filed a Notice of Withdrawal of the said application. They also filed a

Supplementary List of Documents and Supplementary Witness Statement both dated 31st July 2012 on 7th August 2012.

5. On 22nd August 2012, they filed another Request for Judgment of even date seeking entry of interlocutory judgment against the 4th Defendant herein. On 31st August 2012, the DR Hon A.K. Ndung'u (as he then was) entered interlocutory judgment against it as had been prayed in the aforesaid Amended Plaint. The costs were to await the judgment after the matter had been fixed for formal proof.

6. Notably, the Agreed Issues which were duly signed by the Plaintiffs advocates and those of the 1st, 2nd and 3rd Defendants was dated 5th September 2012 and filed on 11th September 2012. The 1st, 2nd and 3rd Defendants filed their List of Documents dated 9th October 2012 on 10th October 2012.

7. On 5th November 2012, the Plaintiffs and the 4th Defendant entered into a consent in which the interlocutory judgment that had been entered against the 4th Defendant was set aside. The 4th Defendant was to file its defence, witness statement and list and bundle of documents within twenty one (21) days of that date.

8. Pursuant to the said consent, the 4th Defendant's Statement of Defence, List of Witnesses, Witness Statement and List and Bundle of Documents were all filed on 26th November 2012. It also filed another Witness Statement of Peter Kimani Kanyiri (hereinafter referred to as DW 1") and Supplementary List and Bundle of Documents on 14th December 2012 and 24th April 2013 respectively.

9. The hearing proceeded on 16th April 2013 when Onyancha J (as he then was), took the evidence-in-chief of the 1st Plaintiff herein (hereinafter referred to as "PW 1"). When the matter came before Aburili J on 7th December 2012, she directed that the matter be heard *de novo* as PW 1 had not yet been cross-examined. She did not hear the matter.

10. On 20th July 2017, Mwongo J took PW 1's and DW 1's evidence-in-chief. He declined to close the 1st, 2nd and 3rd Defendants' case and directed that they be served with a Hearing Notice. The matter came up in court several times thereafter but the matter was adjourned because the 1st, 2nd and 3rd Defendants were not ready.

11. This court became seized of the matter when the same came up for hearing on 3rd July 2019. It noted that the 1st, 2nd and 3rd Defendants had failed to attend court several times and in particular on that date and because they could not continue holding the Plaintiffs hostage, it closed their case and directed parties to file their respective written submission at their request. It also directed that the 1st, 2nd and 3rd Defendants be served with the order of the court for purposes of filing Written Submissions in the matter herein. On 25th September 2019, the 1st, 2nd and 3rd Defendants filed their Written Submissions dated 16th September 2019.

12. The Plaintiffs' Written Submissions were dated and filed on 7th August 2019 while those of the 4th Defendant's Written Submissions were dated 4th October 2019 and filed on 7th October 2019. Its List and Bundle of Authorities was also dated 4th October 2019 and filed on 11th October 2019.

13. The Judgment herein is therefore based on the said Written Submissions which they relied upon in their entirety.

THE PLAINTIFF'S CASE

14. PW 1 was the 2nd Plaintiff's Director. He adopted his Witness Statements dated 20th December 2011 and 31st July 2012.

15. His evidence was that on 8th September 2009, he was detained at the 4th Defendant's premises at Tom Mboya Branch when he went to deposit a sum of USD 25.05 into the 2nd Plaintiff's business account until officers from Banking Fraud Investigation Unit (BFIU) arrived. He was arrested in the presence of DW 1, the 4th Defendant's Audit Manager, and then handed over to the BFIU at Harambee Avenue.

16. He was then transferred to Kileleshwa Police Station where he was detained until the following day when he was taken to court and charged in **Cr Case No 1651 of 2009** with stealing USD 95,969. It was his evidence that he was subsequently acquitted on a no case to answer after the Prosecution called seven (7) witnesses to testify against him.

17. His further testimony was that he opened the account on 20th November 2008 and that within a month, he had made withdrawals of USD 60,000. He stated that the said account was frozen for about five (5) months and as at the time of freezing of the account, it had USD 35,182 which was released to his advocates on 1st March 2011 after he was acquitted. He pointed out that he paid his advocate Kshs 200,000/= to defend him in the criminal case.

18. He stated that he was claiming compensation for malicious prosecution, breach of contract, general and special damages.

19. On being cross-examined by the 1st, 2nd and 3rd Defendants, he stated that that he had sued the 3rd Defendant for unlawful arrest and the 4th Defendant for unlawfully freezing his account. He averred that the 4th Defendant informed him that they were investigating a particular issue without disclosing to him what it was and then froze his account. He told the Trial Court that he had gone to pay the USD 25 at the 4th Defendant as the Manager had informed him that the account was dormant and needed to be activated. His evidence was that it was at the point of depositing the monies that BFIU arrested him.

20. He said that the money had been deposited into his account from the United States of America (USA) and that the 4th Defendant did not

query him where the money came from. He stated that the person who remitted the money did not testify in the matter herein.

21. He was emphatic that he lost a lot of business and that he had got a contract from a company called Kitenchide Limited to supply it an assortment of goods but he could not do so because he could not access the account. He said that he was due to get thirty (30%) per cent of the sum of USD 101,294, which was approximately, Kshs 2,44,172.46. He was categorical that the 4th Defendant was not justified to call him a thief.

22. During Cross-examination by the 4th Defendant, he admitted that Clause 14 of its Bank's Terms and Conditions gave it the liberty to freeze accounts. He said that Deloitte Consulting sent the money to Standard Chartered which then sent a notice to the 4th Defendant informing it that the funds were fraudulent and should be cancelled. He averred that the 4th Defendant ought to have investigated if he was involved in a fraud that appeared in a Newspaper article before it froze his account.

23. On being Re-examined, he stated that he was never informed who remitted the money from Standard Chartered, that that person never testified and that the Newspaper article was undated and did not refer to any newspaper (**sic**). He added that the 4th Defendant's Terms and Conditions stated that it could freeze an account if there was a dispute, which he was not aware of and if it was in doubt who should operate the account.

THE 4TH DEFENDANT'S CASE

24. On his part, DW 1 adopted his Witness Statement dated 13th December 2012 as his evidence-in-chief. He stated that he was the Head of Group Internal Audit. He said that he was alerted by the 4th Defendant's Branch Manager, Leila Premji, of the account which had received a lot of money but that the same had had very little activity. It was his evidence that she tried to call PW 1 many times to go to the bank to explain but that he always gave excuses why he could not go to the bank. He told the Trial Court that the said Leila Premji had since left the employ of the 4th Defendant.

25. He stated that they called the Central Bank of Kenya (CBK) Money Laundering and informed them of their concern of three (3) quick withdrawals because they looked suspicious. He pointed out that Standard Chartered was their correspondent bank and that Deloitte, who was the remitter of USD 95000, ordered for the recall of the monies but that by that time, a substantial amount had already been withdrawn. It was his testimony that PW 1 had been called to go to the bank because it could not refund the money itself.

26. He added that the 4th Defendant froze the Plaintiff's account based on CBK Anti-money laundering laws. In this regard, the 4th Defendant urged this court to dismiss the Plaintiffs' case.

LEGAL ANALYSIS

27. The Plaintiffs and the 1st, 2nd and 3rd Defendants relied on thirteen (13) Agreed Issues for determination by the court. Having considered the said issues, it appeared to this court that the issues that had really been placed for determination were as follows:-

- a. Whether or not PW 1's prosecution in the criminal case was malicious?**
- b. If so, whether the Defendants were jointly and severally liable for PW 1's arrest and malicious prosecution.**
- c. Whether the 4th Defendant was justified in freezing the Plaintiffs' account.**
- d. If not, whether or not, the Plaintiffs suffered injuries to their names, person, property and business.**
- e. Whether or not the 2nd Plaintiff's business collapsed and as a result suffered the damages of Kshs 2,440,172.46 for loss of reputation, business, malicious falsehood, malicious prosecution and breach of contract.**

28. The court was of the considered view that the issues were intertwined. Since parties submitted on issue (a) hereinabove first, this court therefore deemed it prudent to determine the question of whether the Defendants were culpable of malicious prosecution or falsehoods as had been contended by the Plaintiff herein.

29. The Plaintiffs submitted that the 4th Defendant ascribed to itself the role of a complainant in the criminal case yet the remitter of the funds Deloitte Consulting Corporation and its TCF Bank Minnesota had never made a single complaint regarding the monies that were remitted to the 2nd Plaintiff's account with the 4th Defendant.

30. They blamed the 4th Defendant for not having sought authority from them in respect of the demand for a refund of the monies when it urged its corresponding bank not to debit its account but that instead, it opted to prefer a charge of theft against PW 1 and further that the 4th Defendant caused him to be arrested without proper investigations having been done. They were emphatic that the 4th Defendant could only freeze customers' accounts as it had stated in its testimony and not in any other circumstances.

31. They added that under CBK Prudential Guidelines to Banks, banks were only required to report suspicious activities and transactions in an account, which had been verified and not frivolous, but not to freeze the account. It was therefore their contention that there was no reasonable or probable cause for arresting, detaining and charging PW 1 and consequently, his arrest was accentuated by malice.

32. They placed reliance on the case of **Daniel Njuguna Muchiri vs Barclays Bank of Kenya Limited & Another [2016] eKLR** where the court therein found that the state agencies were culpable for malicious prosecution and detention of the plaintiff therein.

33. They also referred to the case of **Francis Oyatsi vs Wachira Waruru & Another [2010]eKLR** where the defendant was found liable for the tort of defamation/libel and malicious falsehood on account of false publications made by the defendant therein.

34. They stated that a case for malicious prosecution was made out if the following could be demonstrated:-

a. That the defendant made a statement to a third party;

b. That the statement was made with malice, that is without just cause or excuse, and or with some indirect, dishonest or improper motive or knowing that the statement was false or if the statement was reckless;

c. That the plaintiff has suffered damage as a result of the defendant's statement.

35. On their part, the 1st, 2nd and 3rd Defendants submitted that PW 1 was not subjected to unlawful confinement for more than twenty four (24) hours as they acted on a justified report and hence, the Plaintiffs' case for unlawful confinement was baseless. They added that PW 1 was not subjected to malicious prosecution because the police had no ill will or spite against him and only performed their prosecutorial duties in the administration of justice and that they were justified to believe the communication that was transmitted to the 4th Defendant by Standard Chartered Bank New York regarding the fraudulent deposits in the 2nd Plaintiff's bank account.

36. In this regard, they placed reliance on the case of **Gitau vs Attorney General (1990) KLR 13** which was cited with approval in the case of **NAIROBI CA No 52 of 2016 Anthony Shiveka Alielo vs Kenya Post Office Savings Bank & Another** where it was held that if a person to whom a complaint was made genuinely believed the fact and acted upon them, being satisfied that a probable crime has been established, then the arrest and subsequent prosecution would be justified.

37. The 4th Defendant relied on the definition of "injurious falsehood" in the **Halsbury's Laws of England Libel and Slander (Volume 28 (Reissue))** where it was stated as follows:-

"At common law an action will lie for written or oral falsehoods which are published maliciously and are calculated in the ordinary course of things to produce, and do produce, actual damage. Such an action is not one of libel or of slander, but an action for damage wilfully and intentionally done without lawful occasion or excuse. At common law, special damage is always necessary, but this rule has been modified by statute."

38. It therefore submitted that for the Plaintiffs to succeed in their claim, they had to specifically plead in their Complaint and demonstrate the following:-

a. That there was a written or oral falsehood which was published;

b. That the publication was made maliciously and was calculated in the ordinary course of things to produce and produced actual damage without lawful excuse.

39. It further submitted that the claim for malicious falsehood could not be sustained as it was statute barred under Section 4 (2) of the Limitations of Actions Act Cap 22 (Laws of Kenya) as defamatory claims could not be brought at the end of twelve (12) months. It contended that since it reported the Plaintiffs to the 2nd Defendant on 4th September 2009, then they could only have brought their claim for malicious falsehood by 4th September 2010.

40. It is important to point out that both the Plaintiffs and the 1st, 2nd and 3rd Defendants submitted on the issue of malicious prosecution while the 4th Defendant concentrated on the Plaintiffs' claim for compensation for malicious falsehoods. Their respective submissions were correct. The only task that was left for the court was to establish whether or not the Plaintiffs had demonstrated that the circumstances of their cases fell squarely within the ingredients of what constituted malicious prosecution and/or malicious falsehoods.

41. In establishing these two (2) torts, the court found it necessary to establish whether or not there were circumstances that led the 2nd Defendant to believe that he could sustain a case against the Plaintiffs herein. It could only do so by considering the circumstances under which PW 1 was arrested.

42. The court noted that although the 1st, 2nd and 3rd Defendants had filed a List and Bundle of Documents, it could not rely on the same for the reason that they were not produced as evidence during trial. They were therefore inadmissible and irrelevant in the circumstances of the case herein. It therefore only relied on the Plaintiffs' and the 4th Defendant's documents in making its determination herein.

43. A perusal of the remittance dated 31st March 2009 from TCF Bank Minnesota in the 4th Defendant's Bundle of Documents showed that a sum of USD 95,994 was remitted to the 4th Defendant by Deloitte Consulting Group. The beneficiary customer name was Sri International Limited. The bank was indicated as Diamond Trust Bank Kenya Limited.

44. In a swift advise stamped 25th April 2009, instructions were issued by Standard Chartered Bank New York asking for cancellation of the aforesaid remittance. It read as follows:-

“SRI INTERNATIONAL LIMITED REMITTER REQUEST CANCELLATION OF PAYMENT DUE TO PAYMENT IS FRAUDULENT PROVIDE OUR DEBIT AUTHORIZATION IN CANCELLATION URGENTLY. PLEASE ADDRESS ALL CORRESPONDENCE CONCERNING THIS INVESTIGATION TO UNDERSIGNED QUOTING REFERENCE USP090424-000694”

45. In its response to the said swift advise, the 4th Defendant stated that:-

“REF YR MT 199 DATED 24.04.09 RECALLING USD 95,959.00 PLEASE NOTE THAT BASED ON YR MT 103 DATED 31.03.09 FUNDS WERE APPLIED TO BENEFICIARY ACCOUNT ON 1.04.09.

WE NOTE THAT THE BENEFICIARY HAS ALREADY UTILIZED A SUBSTANTIAL AMOUNT OF THE REMITTANCE. WE HAVE CONTACTED THE BENEFICIARY IN REGARDS TO YR RECALL REQUESTING FOR FUNDING AND DEPOSIT AUTHORITY UPON WHICH WE WILL REFUND ONCE GRANTED.

PLEASE ENSURE NOT TO DEBIT OUR ACCOUNT UNTIL WE PROVIDE SUITABLE DEBIT AUTHORITY.”

46. There was also a newspaper article showing that a Kenyan woman in the USA had defrauded an auditor’s office of about USD 2,000,000 which was equivalent to Kshs 160,000,000/= using names similar to Deloitte Consulting LLP. The court also noted that the Learned Trial Magistrate determined that there was a discrepancy in the name of the remitter in the Charge Sheet which was Deloitte Consulting Group and the Deloitte Consulting LLP that was defrauded.

47. The 4th Defendant was under a duty to alert BFIU of any suspicious activities in their customers’ accounts. Notably, an accused person does not have an automatic right to compensation merely because the Prosecution did not provide a water tight case in a criminal case. In the chain of administration of justice, the police are required to present facts which they reasonably believe can prove their cases beyond reasonable doubt. Being a party to the proceedings, the Prosecution cannot therefore be certain that the facts they present before a trial court will meet the threshold of proof. Only a court which is also in the chain of administration of justice can determine who between the parties before it has presented to it a case that is cogent and believable.

48. A clear analysis of the documents that were adduced by the Plaintiffs and the 4th Defendant showed that indeed as the Learned Trial Magistrate, the Prosecution had to demonstrate the nexus between the complainant and the remitter and the Prosecutor having failed to do so and/or to call crucial witnesses from the Standard Chartered Bank, Deloitte Consulting LLP and TCF Bank Minnesota, the criminal case could not be sustained. Indeed, the standard of proof was beyond reasonable doubt. The burden did not shift to PW 1 to demonstrate that he was innocent.

49. Having said so, a similar situation obtained herein. The burden was now on PW 1 to demonstrate that the Defendants were malicious in their prosecution in the said criminal case. The standard was lower. It was on a balance of probability. Having perused the 4th Defendant’s documents showing that monies were recalled and that the same had been remitted following fraudulent activities and PW 1’s admission that the 4th Defendant could freeze customers’ accounts, this court was satisfied that the 4th Defendant acted as a prudent banker would in a bid to protect itself from being debited by Standard Chartered Bank New York.

50. The fact that it called BFIU to investigate PW 1 did not therefore imply that it was malicious. The police also acted on documentation they received from the 4th Defendant which they believed was genuine in prosecuting PW 1. The fact that the Learned Trial Magistrate acquitted PW 1 on a no case to answer did not imply that the Prosecution was malicious. The Prosecution presented its case to court and it was up to the court to decide whether it had proved the same beyond reasonable doubt.

51. Accordingly, having considered the evidence that was adduced by the Plaintiffs and the 4th Defendant, this court came to the firm conclusion that the Plaintiffs did not prove that the Defendants were malicious when charges were preferred against PW 1 in the criminal case or there were any malicious falsehoods. In addition, the Plaintiffs did not demonstrate how the freezing of their account caused them to suffer loss of business. Special damages must be specifically proven. Where they are not, the court is called upon to dismiss that claim.

DISPOSITION

52. For the foregoing reasons, this court’s decision was that the Plaintiffs’ suit was not merited and the same is hereby dismissed with costs to the 4th Defendant. The court did not award costs to the 1st, 2nd and 3rd Defendants as they are part of the Executive. It would be punitive and unreasonable for a civilian to pay a government costs.

53. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of February 2020

J. KAMAU

JUDGE