REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL CASE NO. 63 OF 2014

DAVID SILAS OBUHATSA.....PLAINTIFF

VERSUS

KROP LIPA.....1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND DEFENDANT

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

JUDGEMENT

1. Vide a plaint dated 18.12.2014 as amended on an unknown date in 2015, the plaintiff instituted this suit against the defendants for recovery of Kshs 100,000/- being legal fees in defence of a criminal charge, a declaration that the charge and proceedings in CRM 542 of 2012 were malicious, general damages, exemplary damages, interest and costs of the suit.

2. It was pleaded that on or about the 19th of March, 2012, the 1st defendant made a false and malicious claim that the plaintiff had given false information to him and which led to the plaintiff being arrested and detained at Machakos Police station. It was pleaded that on or about the 23rd March, 2012, the 2nd defendant negligently preferred charges at the **Machakos Law courts under Criminal Case 542 of 2012** and upon the matter being heard, it was held that there was no false testimony given to the 1st defendant; the exhibits were not produced and the plaintiff ought to be acquitted. It was pleaded that the prosecution were actuated by malice of the 1st and 2nd defendant respectively as pleaded in paragraph 6 and 7 of the plaint and as a result the plaintiff incurred costs of Kshs 100,000/- as legal fees.

3. The 2nd and 3rd defendants in their joint defence denied malice. In the alternative, they pleaded that they acted in pursuance of statutory duty as particularized in paragraph 4 of their joint defence by receiving a report, arresting a suspect, holding onto a suspect for further investigations and arraigning the suspect in court. They denied negligence and averred that the arrest and confinement of the plaintiff was lawful hence the plaintiff was not entitled to the remedies sought. The defendants urged the court to dismiss the suit with costs.

4. The evidence in the trial court was as follows. Pw1 was the plaintiff who sought to rely on his statement filed on 4.10.2017 and urged the court to grant him compensation for the loss he suffered. In the said statement he stated that he reported to the police that he was swindled some money but however the tables were turned and instead he was arrested and charged with the offence of giving false information to a person employed in the public service contrary to Section 129(a) of the Penal Code. He stated that the criminal matter was ruled in his favour. On cross examination, he testified that he was still working in the same school that he was working and that his friends had defrauded him of Kshs 1m/-. He testified that he reported that he was defrauded and the suspects were arrested and locked but however he was maliciously prosecuted by the police. On reexamination, he testified that he wanted compensation. The plaintiff closed his case and the defence was given an opportunity to present its case.

5. Dw1 was Duncan Ochieng who sought to rely on his witness statement dated 24.1.2019. He testified that the plaintiff approached him for printing of polo t-shirts and the said t-shirts were printed but however the plaintiff did not pay for them. He testified that he was arrested at the instance of the plaintiff whom he learnt had lodged a report to the effect that Dw1 was extorting money from him. He testified that after both parties gave their version of their story, it was realized that the plaintiff was not truthful hence he was released and the plaintiff was charged with giving false information. On cross examination, he testified that he was the complainant in Criminal case 542 of 2010. He confirmed that he received Kshs 400,000/- and later Kshs 791,000/- from the plaintiff in respect of goods that were handed over to the plaintiff on 18.8.2010. The defence closed their case.

6. The suit was canvassed vide submissions. Learned counsel for the plaintiff cited the cases of **Murunga v A.G.(1979) KLR 138 and Mbowa v Easy Mengo Administration (1972) EA 334** that listed the essential ingredients of malicious prosecution. Counsel submitted that the complaint was instituted by the 1st defendant as evidenced by the charge sheet; that the plaintiff was acquitted of the charges vide ruling delivered on 24.12.2013. Counsel submitted that the prosecution was instituted without reasonable cause and that the same was actuated by malice because the claim was false. Reliance was placed on the case of **David Njuguna Muchiri v Barclays Bank of Kenya & Another (2016) eKLR.** Counsel sought a total of Kshs 16m/- and included false imprisonment that was not pleaded.

7. Vide submissions filed on 20.11.2019 and in placing reliance on the case of **Murunga v A.G.(1979) KLR 138** defence counsel submitted that whereas there was a prosecution, the same is part of a process that was legally instituted in accordance with Section 24 of the National Police Service Act. counsel in placing reliance on the case of **Robert Okeri Ombeka v Central Bank of Kenya** where it was observed that "*Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits"* and submitted that there must be proof that the prosecution was instituted without reasonable and probable cause. Counsel submitted that the evidence that came out during trial in the trial court was that the plaintiff reported that he had been swindled yet the persons he alleged swindled him were pursuing him due to his failure to honor payment that he had contracted their services. Counsel submitted that there was no proof of malice and as such the plaintiff had not proved its case. In the alternative, counsel submitted that an amount of Kshs 300,000/- would be sufficient to compensate the plaintiff for malicious prosecution and for aggravated damages; that the plaintiff was not entitled to aggravated damages or to special damages.

8. Before delving into the merits of the case, the Public Authorities Limitation Act Cap 39 Laws of Kenya provides that a cause of action against a Public Authority ought not to be brought outside one year, save with leave of court. From the pleadings herein, the cause of action was stated to have arisen in 2012. However, because of the nature of the tort of malicious prosecution proceedings, a litigant has to await the outcome of the trial process before commencing such a suit. Hence the plaintiff is excused because the decision of the court was rendered in December, 2013 and this suit was filed in December 2014 meaning that the same was not caught up by the law of limitation.

9. Having considered the evidence on record, the issue for determination is whether the tort of malicious prosecution has been proven to the required standard. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice.

10. According to Odunga's Digest on Civil Case Law and Procedure page 5276, the essential ingredients to prove malicious prosecution are as follows:

a. The criminal proceedings must have been instituted by the defendant

b. The defendant must have acted without reasonable or probable cause

c. The defendant must have acted maliciously

d. The criminal proceedings must have been terminated in the plaintiff's favor.

11. In this case, there is no doubt that Dw1 and the defendants instituted criminal proceedings against the plaintiff which proceedings were terminated in the plaintiff's favor hence proving two of the essential ingredients of malicious prosecution.

12. The plaintiff was charged with giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code before Machakos Chief Magistrates Court vide ***Criminal Case No. 542 of 2012***. Has it been proved that the defendants' acted with reasonable and probable cause? Reasonable and probable cause has been defined in the case of **Glinsk v Mclver [1962] AC 726** *where Lord Devlin* held that;

> "***reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction…***"

13. According to the charge sheet, the plaintiff was charged with giving false information to a person employed in the public service. According to the particulars of the said offence;

> "***the plaintiff …informed the 1st defendant, a person employed in the public service….that people were trying to obtain money from him and that he had reported the matter at Machakos police station vide OB 97/5/3/2012 a fact he knew to be false."***

14. The learned trial magistrate noted that the OB extracts from the police station were not produced in court and were necessary as the charge was dependant on the actual information said to have been given by the plaintiff. The learned magistrate acquitted the plaintiff under Section 210 of the CPC.

15. I find that that the plaintiff failed to present evidence to show that the police investigations and available evidence was too shallow to make a right thinking person like a police officer to think that the plaintiff was not guilty. From the available evidence, the charges were premised on a report that was made by the plaintiff to the police that he admitted making and there was nothing presented from which it can be implied that the prosecution was malicious. There is evidence that Dw1 and the plaintiff were called to the police station to explain themselves and this was what informed the charges that were levelled against the plaintiff. The defendants then proceeded to institute criminal proceedings against the plaintiff who was acquitted of the charges due to failure to produce the OB extract by the police. Had the same been produced, the result would probably have been different. It is obvious that the plaintiff was not happy after tables were turned against him yet he had been the first one to lodge a report to the police about having been swindled by DW1. The actions by the police to

prefer charges emanated from the statement by DW1 which revealed that the plaintiff owed substantial amount of money to him for goods supplied. Under those circumstances the police could not be said to have acted out of malice in prosecuting him for the alleged offence.

16. I see nothing that convinces me that the defendants acted without reasonable or probable cause in what resulted in the decision to institute criminal proceedings against the plaintiff.

17. I shall address the element of malice**. In Gwagilo v Attorney General [2002] 2 EA 381 (CAT),** malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the appellant could prove malice by showing for instance that the prosecution did not honestly believe in the case which they were making that there was no evidence at all upon which a reasonable tribunal could convict; that the prosecution was mounted by a wrong motive and show that motive. Relating that to the present circumstances, it turns out that the defendants met both the plaintiff and Dw1 and after hearing them decided to institute criminal proceedings and detain the plaintiff. Therefore, in this case the defendants could not have been said to have been actuated by malice for any cautious and prudent person would have come to the same decision as that made by the defendants. In any case the plaintiff failed to present the police with the evidence of the alleged extortion by DW1 and thus his arraignment in court because there was already a complainant in the name of the 1st defendant who was then the OCS and who had received the false information from theplaintiff.

18. Basing on all the above, the plaintiff has not fulfilled the essential ingredients to prove malicious prosecution being malice, lack of reasonable and probable cause. The suit therefore must fail for want of proof.

19. Even though the suit failed, the court is obligated to assess damages that it would have awarded had the matter succeeded. The plaintiff pleaded for special damages, general damages and costs of the suit. The law relating to special damages is settled. In ***Bonham Carter v. Hyde Park Hotel Ltd (1948) 64 TL P 177*** the guiding principle is that special damages must be specifically pleaded and strictly proved. See also ***Hassan v Hunt [1964] EA 201.***

20. The plaintiff in the plaint pleaded special damages to a tune of Kshs 100,000 being expenses paid to the advocate. The receipts were tendered in court and therefore the special damages were proved.

21. With regard to general damages, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. In **Joseph Wamoto Karani v C. Dorman Limited & another [2018] eKLR** Kshs 2,000,000/- was awarded as a global sum for malicious prosecution. I would have allowed the same as general damages to assuage the plaintiff for the trouble and any injury or loss suffered.

22. In the result it is my finding that the plaintiff has not proved his case on a balance of probabilities. The suit is dismissed. Each party to bear their own costs.

Dated and delivered at **Machakos** this **29th** day of **May, 2020**.

D. K. Kemei

Judge