



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCC NO. 26 OF 2015

JAMES KAHINDI SIMBA..... PLAINTIFF

VERSUS

DIRECTOR OF PUBLIC PROSECUTION..... 1ST DEFENDANT

INSPECTOR GENERAL OF POLICE..... 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Ms. Chepkwony Advocate for the Plaintiff

Ms. Sombo Advocate for the 1st Defendant

Ms. Munyony for the 2nd and 3rd Defendant

JUDGMENT

Background

The plaintiff's claim is for damages for malicious prosecution.

On 2nd February, 2011, the plaintiff was arrested by the police officers from Malindi Police Station at Sailors Restaurant in Watamu. He was arraigned in Court on 15th January 2011 together with nine other persons on allegations that they jointly committed a felony namely injury to life and property contrary to Section 308 (1) of the Penal Code. They were also charged with a second count of conspiring to commit a felony contrary to Section 393 of the Penal Code.

The plaintiff claims that he was falsely charged, unlawfully detained and maliciously prosecuted with the aforesaid offences without any reasonable or probable cause. He avers that the arrest and detention was unlawful. By way of an amended plaint he claims:

(a) special damages to the tune of Kshs.7,105,00/=,

(b) general damages for false arrest, unlawful detention and malicious prosecution,

(c) interest on (a) and (b) above at Court rates, costs of this suit and any other relief this Court deems fit to grant.

The defendant defended, the claim. They asserted in their plea that the plaintiff was arrested on reasonable suspicion that he jointly with other persons committed the aforementioned offences. The defendant maintains that proper investigations had been done and it was well within the bounds of its duty to investigate and prosecute crimes. The defendants further maintains that they had reasonable and probable cause to conduct investigations which established commission of an offence and arrests were effected in accordance with the Law.

Evidence at the trial

The plaintiff testified in his own case. His evidence is as follows. On 2nd February 2011, police visited Sailors Restaurant in Watamu the plaintiff was having lunch with a friend. He was then arrested, and taken to the police. He was then charged and arraigned in Court to answer for the aforementioned charges on the 15/2/2011 together with nine other persons facing aforementioned charges. He was therefore

acquitted of all the said charges after a full trial by the Chief Magistrate at Malindi on 4th of April 2014.

The plaintiff argues that by reason of the foregoing reasons, he suffered severe mental anguish and pain, loss of reputation and self-esteem in the eyes of right thinking members of the public, family, friends and employment colleagues. He claims that the same caused him inconvenience and inability to provide for his young family as the breadwinner and prospects of alternative employment. He also claims that he was charged in Court, he lost his job with Temple Point Resort.

The Defense version of the case

The Defendants deny having prosecuted the defendant with malicious intent but rather the 2nd Defendant had reasonable suspicion that the plaintiff had jointly committed with the other accused persons. The defendants asserted that the plaintiff was presented in Court after a thorough investigation by the 2nd defendant and an offence was disclosed whose evidence was enough to sustain a conviction.

The defendant therefore denies that the decision to prosecute was orchestrated by malice, falsehoods and or unreasonableness. Further, that the decision to prosecute was solely based on evidence presented to it and the same was made independently without any influence. It is argued by the defendants, that an acquittal alone in terms of Section 215 of the Criminal Procedure Code does not demonstrate ill will, spite or unreasonableness on the part of the Defendants. Finally, the defendants maintain that the decision to charge the plaintiff was for as just, lawful and probable cause.

Submissions on behalf of the plaintiff

Ms. Chepkwony for the plaintiff submitted on the basis of the evidence and did urge the Court to assess damages due under the tort of malicious prosecution. On this she referred the Court to the case of **Sammy Tangus v Attorney General {2015} eKLR, Dr. Willy Kaberuka v Attorney General of Kampala HCCS No. 160 of 1993**.

In overall **Ms. Chepkwony** proposed an award of Kshs.800,000/= general damages, exemplary damages of Kshs.300,000/=, special of Kshs.51,000/=.

On the other hand, **Ms. Munyony** for the defendants argued and submitted that the plaintiff was investigated, indicted and tried before the Chief Magistrate on the available evidence by the witnesses. There is no evidence before Court that the defendants, agents or servants in executing their duties of arrest and prosecution were actuated by ill will improper motive or spite against the plaintiff. In support of this **Ms. Munyony** referred to the following cases **David Mungai Kinyanjui & 2 others v Attorney General, Murunga v Attorney General {1983} KLR 138, Gichanga v BAT (Kenya) Ltd {1989} KLR 352, Joseph Gicheru v Moses Kimenju Waigwa HCCA No. 119 of 1999 (Nyeri High Court)**.

For her part **Ms. Munyony**, contended that the circumstances of the plaintiff arrest, and prosecution in this case did not amount to lamentable ingredient of a prosecution instituted without reasonable and probable cause. She placed reliance in **Kagane v Attorney General Hicks v Failkner, Republic v Commissioner of Police & Another ex-parte, Michael Minari & Another {2012} eKLR**. **Ms. Munyony** argued that there was no evidence to maintain the claim for malicious prosecution taken as a whole. This was followed by making reference to the principles in **Kalerega v Attorney General {1973} EA 289, Nzoia Sugar Company Ltd v Fringututi {1988} KLR 399, James Karuga Kiiru v Joseph Mwamburu & 2 others {2001} eKLR**.

In addition to the proposition on the settled Law of evidence required for a successful bid for a malicious prosecution, **Ms. Munyony** also submitted on the claim for assessment of damages with a contrary option reviewing various cases i.e. **Zacharia Waweru Thumbi v Samwel Njoroge CA No. 445 of 2003, Hahn v Singh CA 42 of 1983 KLR 716, Mawenzi Investments Ltd v Top Finance Co. Ltd (Another) HCCC No. 02 of 2013, Dharimishi v Karsan {1974} 1EA. 41** **Ms. Munyony** urged the Court to find that the special claim of Kshs.7,105,000/= has not been specifically proved as required by Law.

One other aspect submitted on by **Ms. Munyony** was on assessment of general damages in endeavoring support her submissions on this issue she cited the principles in the case of **National Land Commission v Estate of Sisiwa Arap Malakwen & Another {2017} eKLR, Mosisili v Editor, Mirror Newspapers & others (Case No. CIV/t/275/2001** into these **Mekenge** of different legal perspectives comes the Courts task to choose between the two possible courses of action with a view to establish if the facts point overwhelmingly to one conclusion.

I have perused the record of proceedings and all the relative documents in support of each party case. The parties have also submitted on the issues raised in the evidence presented above. I shall incorporate the submission in my analysis.

Issues for Determination

- (a) Whether the defendants instituted criminal proceedings against the plaintiff?
- (b) Whether the criminal proceedings were terminated in favour of the plaintiff?
- (c) Whether the prosecution or its continuance was actuated by malice on the part of the defendant (s)?
- (d) Whether the plaintiff is entitled to damages?

Findings, Analysis and Determination

The tort of malicious prosecution is committed in circumstances where a defendant (s) causes the arrest and prosecution of the plaintiff or claimant without reasonable or probable cause. The proceedings so instituted terminate in favour of the plaintiff. The commonly accepted essential ingredients of malicious prosecution are as follows:

(i). The prosecution ought to have been instigated by the defendants.

(ii). That the matter was finalized in the plaintiff's favour.

(iii). The prosecution or its continuance was actuated by malice on the part of the defendants. (See Murunga v The Attorney General {1997} KLR 138)

It would be natural to suppose that the plaintiff in a claim for malicious prosecution ought to demonstrate that there is an intimate connections in initiating an investigations, arrest and subsequent malicious prosecution for the impugned offence yet it is possible to claim that the nature and content of the criminal offence was in every respect motivated by combined factors aimed at an abuse of the Court process. The connection of thread which runs throughout the quest for action of general damages in a malicious prosecution is settled in **Mbowa v East Meno District Administration {1972} EACA (EA) 352**. The outstanding characteristics for consideration by the Court is that the indictment complained of was determined in his favour. That in so prosecuting the plaintiff the defendants did so maliciously. The definition of malice as defined in **Salmon on tort** means,

“the presence of some improper and wrongful motive that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purposes (See Sitre v Waedrum {1952} Lloyd's Rep 431, 451).

The tort also involves circumstances where the defendants in setting in motion the criminal process there was distortion of the truth in order to achieve an unjustified end. Further, it was not even a matter that could sufficiently ended up in a conviction in favour of the prosecution. This is the element commonly referred to that the defendants acted without reasonable and probable cause not only in prosecuting the plaintiff but in subjecting him to an investigations, arrest and detention for purposes of undergoing through the criminal proceedings. In order to succeed the plaintiff case must be brought within the threshold in **Hicks v Faulkner {1878} 8Q.B.D. 167, 171** – where **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 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 same imputed.”

That each of the four essential elements or requirements of malicious prosecution as set out in **Murunga case (supra)** and **Mbawa case** must be fulfilled by the plaintiff in order to succeed for an award of damages against the defendants.

Into this bed of legal and evidential burden the technique by which the plaintiff may end up persuading the Court that the defendants acted maliciously is to balance the forces in the Constitution under Article 245 which gives recognition to the National Police Service to investigate crimes. Further, under Article 157 (6) and (7) of the Constitution the Director of Public Prosecution has been allocated powers to initiate, continue and or discontinue any criminal proceedings against any person save in the case of a Court Martial, without any direction or control from any other person or authority.

These agencies are designed to deliver their mandate conferred upon them exercisable on behalf of the state according to the national values and principles of governance under Article 10 of the Constitution.

As such with this basic constitutional structure it can hardly be denied that the outcome of a criminal trial determined in favour of a plaintiff and the abounds of civil litigation under the tort of malicious prosecution proves so controversial.

An obvious case is where the police and prosecutor acting within the ambit of Articles 245 and 157 of the Constitution end up being overruled by an independent tribunal or Court duly established under Article 50 (1) of the Constitution. There is therefore authority in saying that the burden cast upon the plaintiff is to show by prima facie evidence the difference between the statutory power expressed in the statute accompanied with a duty to exercise it in certain circumstances of the whole statutory context in which the power is given and the alleged act done either maliciously or without reasonable or probable cause.

In these specifics **Murphy on evidence 11th Edition {2009}** expressed the context as follows:

“If the claimant fails to prove any essential element of his claim, the defendant will be entitled to Judgment. The position of the defendant is somewhat different. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial sometimes referred to as an affirmative defence, the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form part of the claimant's case.”

The basis of the plaintiff's claim is that the 1st and 2nd defendants set the law in motion against her without probable or reasonable cause for doing so, and that the 2nd acted without any reasonable belief in the truth of the information received from the first defendant. Throughout his testimony, the plaintiff sought to demonstrate that his arrest was unlawful and it is appropriate at this stage to address the issue of plaintiff's arrest.

It is undisputed that the plaintiff was arrested by the police, locked in police custody and later availed in Court. It is also undisputed that the 1st defendant prosecuted the matter on behalf of the state, which terminated in the plaintiff's favour. He was acquitted in terms of Section 215 of the Criminal Code. At this juncture, it is safe to hold the view that the 1st and 2nd issue for determination was satisfied since the proceedings in question were initiated and prosecuted by the defendants and terminated in the plaintiff's favor.

However, the mere fact that a person has been acquitted of criminal charges does not necessarily entail malice on the part of the defendants. In **James Karuga Kiiru v Joseph Mwamburi & 3 others**, Nrb C.A. No. 171 of 2000, it was held that:

“To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably. The question that the Court has to ponder is whether the prosecution or its continuance was actuated by malice on the part of defendant(s).”

In light of the foregoing, the law is clear that an arresting detail has a right to arrest and detain a suspect where he formulates reasonable suspicion of commission of an offence. A person who arrests a suspect must have sufficient information justifying the arrest of the suspect. The arresting officer is also under a duty to ensure that prior to effecting an arrest on a suspect, he has verified the information or reports he has. The information that he relies on must be sufficient so as to cause a reasonable person to believe that an offence was committed. If he does not properly employ his mind and the report turns out to be false, the arrest becomes unlawful.

A police officer must have an independent opinion of the matter before he arrests and detains a suspect. This makes it unacceptable for a police officer to arrest a suspect in order to conduct an investigation on the matter. He should only effect an arrest where he has reasonable suspicion as regards the commission of an offence. The police are also entitled to arrest and briefly detain a suspect if they suspect that he has committed a crime. The detention may also become unlawful where the suspect is kept in custody for an unreasonable period of time or where force is resorted to during the detention.

The plaintiff maintains the argument that he was maliciously prosecuted. The Director of Public Prosecution is the party charged with the responsibility to prosecute or initiate matters. The next inquiry is whether there was reasonable and probable cause for setting the law in motion. As I have mentioned earlier, a person is said to have reasonable and probable cause to commence or continue the prosecution if he knows the elements of the offence preferred and has a reasonable belief in the report he makes. In other words, reasonable and probable cause means an honest belief founded on reasonable grounds that an institution of proceedings against the plaintiff is justified. The plaintiff has submitted and I believe without justification that the nature of the offence against him was adjudicated without reasonable and probable cause.

From the findings and conclusions which emerged and resolved by the trial Court the complainant initiated the complaint based on the prevailing circumstances at the time.

I have examined the evidence and the authorities cited by both counsels the position as I see it is therefore consistent with the holding in **Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance Ltd {2014} AC 366 Lord Kerr**:

“in demonstrating an absence of reasonable or proper cause ‘requires the proof of a negative proposition, normally among the most difficult of evidential requirements.’ The test for establishing whether there is an absence of reasonable and proper cause requires both a subjective and objective assessment. The subjective test requires an assessment as to whether the claimant honestly believed the defendant was liable in respect of the claims brought. If the Court is convinced as to the subjective state of mind, it should then consider whether, based on the information available to the claimant at the time it initiated proceedings, it was reasonable for the claimant to have reached the conclusion it did in respect of the defendant. Lord Kerr in Crawford considered that there was no reason for proof of malice in the civil context to be any less stringent than in the criminal context. Malice covers not only spite and ill-will, but also improper motive (Gibbs v Rea {1988} AC 786).

Thus, in the instant matter, to escape liability, a defendant placed in this situation should show that he had an honest belief which was based on reasonable grounds that the plaintiff had committed the offence in issue and that the institution of proceedings was justified. He must be aware of the nature and elements of the offence. It must be shown that any reasonable man placed in the position of the defendant would be of the same view that an offence had been committed.

I have perused the proceedings of the trial court in the criminal matter in question. The plaintiff who was charged as PW4 was implicated in the trial court proceedings as one of the persons who organized for the transport which ferried the group of people who attacked the hotel. It was upon reveal of that evidence that the police arrested the plaintiff and the DPP initiated proceedings against the plaintiff. In my view there was reasonable and probable cause for arrest and prosecution of the plaintiff.

The plaintiff based his claim on the contention that his prosecution was malicious because the defendants did feeble investigations in pursuant to the matter he was charged with. In any event, poor investigations are not prima facie evidence of malice. To prove malice on the part of the prosecution, the plaintiff must provide evidence that exhibits a malicious intent/an improper and wrong motive which has an intention to employ the legal process for some other purpose rather than its appropriate purpose. The purpose of the prosecution should be personal and spite rather than for the public interest or benefit. This may also exhibit abuse of Court process. **(See Chrispine Otieno v AG {2014} eKLR).**

In light of the foregoing, the plaintiff failed to provide any shred of evidence which shows malicious intent on the part of the defendants. I have not seen evidence which shows the improper motive that the defendants had when they decided to arrest and prosecute the plaintiff as well as what they stood to gain from it. The best explanation would be that the plaintiff was arrested in response to an attack which had been launched by a group of people at the hotel which saw properties being damaged.

I find that the Director of Public Prosecution has discretion to make the decision as to whether to charge or not to a charge. I found no fault on the part of the police who investigated the plaintiff. Thus, this absolves the police of any liability with respect to issues pertaining to

reasonable and probable cause in the circumstances. In the same breath, a finding cannot be made in favor of the plaintiff since he failed to establish the vital ingredient of malicious intent. The plaintiff, seems to have thought that the fact that he was acquitted was enough to prove his claim in malicious prosecution.

It is of importance to note that the plaintiff has prayed for Kshs.7,100,000/= special damages. This claim though specifically proved I am not able to ascertain from the material the specifics that taken to the nearest would qualify such an award. It must be clear that I would have found it a difficulty task to assess damages in terms of telephone allowance, entertainment allowance, food ration and or travelling allowance. I also suffered the misfortune of not able to come across receipts and cogent evidence in support of this claim.

In view of the Learned counsel and the evidence tendered in Court, its accepted loss of earnings consequent upon malicious prosecution would have been computed subject to the provisions of Article 50 (2) (a) of the Constitution on the right to presumption of innocence. Loss of earnings would be relevant only if the plaintiff demonstrates that the defendant action precipitated suspension of conditions and terms of employment as stipulated in the Employment Act Cap 226 of Kenya.

When it comes to personal damages going by the principles cited in the case of **Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another and Thomas Mutsotso Bishube v Commissioner of Police {2013} eKLR**. The award of monetary compensation appropriate in the circumstances in my view would have been a quantum of Kshs.1,200,000/=.

However unfortunately, in the case at hand the infringement complained of an arrest, indictment and malicious prosecution should be viewed in its true perspective that the necessary ingredients were never discharged by the plaintiff.

In the premises, this Court finds that there was no malice on the part of the defendants. Thus, the plaintiff's claim for damages is not meritorious and therefore demised with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MAY, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Wambui for Chepkwony for the plaintiff