



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO. 18 OF 2018

JOSECK SIMIYU PRICHANI.....1ST PLAINTIFF
VINCENT SISELA.....2ND PLAINTIFF
MARTIN BARASA.....3RD PLAINTIFF
JACK KARONYA.....4TH PLAINTIFF
CHARLES KHAMALA.....5TH PLAINTIFF
SOLOMON WEKESA.....6TH PLAINTIFF
PATRICK MAKOKHA.....7TH PLAINTIFF
MARGARET CHONGANA.....8TH PLAINTIFF
RICHARD SIMIYU.....9TH PLAINTIFF
DISHON WAFULA.....10TH PLAINTIFF
IRENE NASIPWONDI.....11TH PLAINTIFF
NGOYO MALI MULIRO.....12TH PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT
IBRAHIM NYONGESA.....2ND DEFENDANT
DAVID WASILWA.....3RD DEFENDANT

J U D G M E N T

1. By an amended plaint, amended on 18/6/2001, the plaintiffs filed this suit against the defendants for special damages, general and exemplary damages and costs of the suit. The basis of this that the 1st defendant is the Attorney General of the Republic of Kenya appearing on behalf of the Kenya Police Service. The 2nd defendant, Ibrahim Nyongesa and the 3rd defendant David Wasilwa were members of Kenya African National Union. On or about 6/1/1992, the 2nd and 3rd defendants reported to the police at Kimilili Police Station Unit that the 1st plaintiff Joseck Simuyu Prichani and the 11 plaintiffs were holding a meeting without a licence as a result of which the plaintiffs were arrested and charged in Criminal 36/1992 with an offence of holding a meeting without a licence contrary to Section 5(3) of the Public Order Act Cap 56. Upon the matter being heard, the plaintiffs were acquitted under Section 210 of the Criminal Procedure Code on 14/9/1992.

2. The 1st Defendant filed a defence on 10/8/2001 denying the plaintiffs claim. It was argued that the plaintiffs' suit was bad in law and should be struck out with costs to the defendants.

3. The 2nd -11th plaintiffs did not after directions file witness statement nor appear for hearing. Their claim was therefore marked as

abandoned. This matter proceeded in respect of the 1st plaintiff, Joseck Simiyu Prichani only.

4. The suit proceeded to full trial whereupon the plaintiff called one witness whereas the defendants did not call any witness.

5. The 1st plaintiff, **Joseck Simiyu Prichan** testified as PW1. He adopted his written statement dated 26/4/2019 as his sworn in evidence in chief. He claims that he was arrested on 6/1/1992 by police officers from Kimilili Police Station on allegations that he held meeting without a license.

6. He was later charged in Bungoma Resident Magistrate's Court Criminal Case No 36 of 1992 with one count of holding a meeting without a licence contrary to Section 5 (3) of The Public Order Act Cap 56 Laws of Kenya. The 1st plaintiff claims that he was remanded from **6th January 1992 2010** to **8th January 1992** when the court released him on a personal bond of Kshs 50,000. After trial, the court in **Bungoma C.R case No. 36 of 1992** acquitted him under **Section 210 of the Criminal Procedure Code**. He stated that he lost his job as a teacher, lost his export business of cement and paper in Uganda and lost farming business and tractor business. That as a result of the wrongful arrest and being confined in the cells, he lost freedom of movement, working and exposed to hard life missing to associate with his family. He therefore brought this claim for malicious prosecution seeking for general damages and special damages, costs and interest against the defendants jointly and severally.

Evidence tendered by the parties.

7. The 1st Plaintiff, **Joseck Simiyu Prichani** testified on oath as (PW1) on his own behalf in support of his case and relied on his witness statement filed in court. He produced the a bundle of documents which included; auditor's report , proceedings in Bungoma Criminal Case No 32 of 1992, letter of interdiction by TSC, monthly staff returns, staff meetings, students report forms, request for reinstatement, letter of employment from TSC and notice of intention to sue.

8. During cross examination, he stated that this was a case of malicious prosecution. He further stated that he stayed at the police station for 5 hours before they were taken to court at 8 pm. They were released on 8/1/1992 around 6 pm. After acquittal, he was not re-arrested; the other plaintiffs were re-arrested. The auditor's report was from the year 1991 to 2000. He added that he was interdicted because of the criminal case. He used to farm and had sold his tractor. He did not attach the title deed of his land or the death certificate of the auditor. He was arrested by two police officers; Partick Lorim and Caxton Karani.

9. The defendants did not call any witnesses.

10. Parties filed written submissions. The 1st plaintiff written submissions dated 9/8/2019. 14. He framed one issue to be determined by this court; **(a) is the plaintiff entitled to compensation arising from the unlawful arrest and malicious prosecution, loss of employment and businesses?** He submitted that he was entitled to special damages of Kshs 7,808,819,158.09. He further submitted that he was entitle to general damages of Kshs 20,000,000. Reliance was placed on the following cases Benjamin **Muema v Attorney General & 2 others [2006] eKLR**, where the court awarded he plaintiff Kshs 71,406,504, **Edward Akong'o Oyugi v Attorney General [2019] eKLR** where the plaintiff was awarded general damages of Kshs 46,000,000, **Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR** where the court awarded him Kshs 15,000,000 general damages, Kshs 471,664,228.50 for loss of business and Kshs 18,146,631.52 for medical expenses.

11. The 1st defendant filed written submissions dated 13/11/2019. The first defendant framed two issues for determination: -

(a) Whether the 1st plaintiff has satisfied the conditions for grant of damages for malicious prosecution,

(b) Whether the 1st plaintiff is entitled to be awarded special damages as prayed in the amended plaint.

The 1st defendant argued that the principles that govern the tort of malicious prosecution were set in the case of **Murunga v Attorney General (1979) KLR 127** quoted with approval in the case of **Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR** as follows;

(a) that 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 was terminated in his favor.

(c) the plaintiff must demonstrate that the prosecution was institute without reasonable and probable cause,

(d) that the prosecution was actuated by malice.

It was submitted that the 1st plaintiff had satisfied the first two principles and that he had failed to prove malice on the part of the 1st defendant, no particulars of malice against the 1st defendant were pleaded in the amended plaint. Reliance was placed on the case of **James Karuga Kiiru v Joseph Mwamburi and 3 others NRB CA No 171 of 2000**. In **Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR**, the court held that acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious law suits. It was submitted that there was reasonable and probable cause of arrest of the 1st plaintiff.

12. It was submitted that the 1st plaintiff is not entitled to special damages because he failed to prove that he owned any business, that the audit report relates to loss since 1991 when he had not been arrested and 1993 when he had already been acquitted, no bank statements were produced to show how much he was earning. It was argued that being in the cells from 6/1/1992 until 8/1/1992 could not have occasioned him loss of his business. It was further argued that the authorities relied on by the 1st plaintiff relate to different set of facts and cause of

actions. There was no proof of torture and he should have filed a Constitutional Petition for violation of his rights and freedoms as claimed. That he should have sued the TSC for loss of his job and not the 1st defendant.

13. I have considered the parties pleadings, evidence and submissions by both parties. This is a case of malicious prosecution. I consider the following to be the issues to be determined by this court;

i. Whether the respondent proved his case against the appellant to the required standards.

ii. Whether the appellant is liable to compensate the respondent in damages for malicious prosecution and if so, what orders should be made for the said award of damages.

iii. Who should bear the costs of this suit?

14. The law on malicious prosecution is well settled. The principles that govern a claim founded on malicious prosecution were laid down by Cotran, J in the case of **Murunga vs Attorney General, [1979] KLR, 138** as follows:

i. The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible.

ii. The plaintiff must show that the prosecution terminated in his favour.

iii. The plaintiff must demonstrate that the prosecution was instituted without reasonable probable cause, and

iv. He must also show that the prosecution was actuated by malice.

15. According to the authors of **Clerk and Lindsell on Torts, 18th Edition** at page 823, the essentials of the tort of malicious prosecution are as follows;

“In an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving every one of this is on the claimant.

Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts.”

16. The Court of Appeal of East Africa expressed itself on the same subject in the case of **Mbowa vs East Menjo District Administration [1972] E.A 352** as follows:

“The action for damages for malicious prosecution is part of the common law of England.. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. It’s essential ingredients are:

(1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

(2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds the defendants genuinely thought that the criminal proceedings were justified;

(3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and

(4) the criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...

The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action,

would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could not have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal”.

17. From the above foregoing, it is now settled law that the 4 conditions to be met in a claim for malicious prosecution are:

- a) *Criminal proceedings must have been instituted against the plaintiff.*
- b) *The defendant must have acted without reasonable or probable cause.*
- c) *The defendant must have acted maliciously in instituting the criminal proceedings.*
- d) *The criminal proceedings must have been terminated in the plaintiff's favour.*

18. I now turn to question whether the requirements for a malicious prosecution claim have been met. The first and second limbs requisite in proving a claim for malicious prosecution are not contested and I am quick to find and hold that they have been proven. There is no doubt that the prosecution of the 1st plaintiff in Bungoma Principal Magistrates Court Criminal Case No. 36 of 1992 was instituted upon arrest of the plaintiffs by the 2nd and 3rd defendants who were agents of the 1st defendant. It is also not in question that the prosecution in Court Criminal Case No. 36 of 1992 was terminated in favour of the plaintiffs by a ruling delivered on 14/9/1992. The plaintiffs were acquitted under Section 210 of the Criminal Procedure Code. What follows is the important issue of whether the actions of the defence were undertaken without reasonable or probable cause and were hence a product of malice on the part of the prosecution.

19. The test for determining whether a defendant, in a case of malicious prosecution, acted with reasonable or probable cause was discussed in the case of **Kagane & Others vs Attorney General & Another (1969) E.A. 643** as follows;

“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...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough evidence to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution. In as much as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example, a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possible, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

20. Trainor J in **Gitau vs. Attorney General [1990] KLR 13** stated that:

“To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.

Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told

him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not.”

21. In this case, the 2nd and 3rd defendants arrested the plaintiffs following a tip from the public who complained of being disturbed by the meeting. PW 7, Patrick Lorim was a police officer attached to Kimilili Police Station. He was in the company of the 2nd and 3rd defendants during the arrest of the plaintiffs. During cross examination, he stated that the plaintiffs were not in a public meeting because they were in a private place and therefore, they did not need a licence. If the meeting was being held in a public place, there would be need of a licence. I, therefore, find that the prosecution of the plaintiffs was instituted without reasonable and probable cause.

22. Whether the prosecution was actuated by malice, the Court of Appeal in **Robert Okeri Ombeka vs Central Bank of Kenya, Civil Appeal No. 105 of 2007 [2015] eKLR** referred to its decision in **Jediel Nyaga vs Silas Mucheke, (CA NO. 59 OF 1987 (NYERI) (UR)** where it was stated:

“It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. “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. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.”

23. Since no evidence was tendered by the defendants on how the decision to arrest and charge the plaintiffs was arrived at the Court has no option but to find that there was no probable and reasonable cause. The police officers acted on the information from the public without carrying out investigations.

24. Having found that the 1st plaintiff was justified in his claim for damages for malicious prosecution, I now turn to the issue of quantum of damages. The general principle is that the assessment of damages is within the discretion of the trial court. The law is very clear that special damages must be specifically pleaded and proved. There must be evidence of earnings by way of receipts or pay slips. In this case it is not in dispute that the 1st plaintiff’s employer was Teachers Service Commission (TSC).

25. The 1st plaintiff claimed for Kshs 516,594,827 as special damages arising from loss of export business, loss of employment, loss from farming, tractor ploughing business and general expense incurred. This claim for special damages must not only be pleaded but also strictly proved. In **Hahn v Sighn 1985 KLR 716**, The Court of Appeal held that;

“Special damages must not only be specifically pleaded but also strictly proved... for they are not the direct or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”

26. The plaintiff in a claim for special damages must demonstrate that he actually made the payments or suffered the specific loss or injury before judgment can be entered. In this case, the plaintiff states that his business suffered as a result of the arrest. He produced audited accounts. The plaintiff was arrested on 6/1/1992 and released on bond on 8/1/1992 and therefore was in custody for only a few days and thereafter he was free to conduct his business. He has not demonstrated how the few days detention caused his export business made a loss of Kshs 347,706,973, farming Kshs 87,727,408, tractor business Kshs 8,478,557, Co-operative Membership Kshs 26,965.96 and employment over Kshs 64 million. The plaintiff having failed to prove that he would have made a profit of over Kshs 340 million from export business in less than a week or Kshs 87 million from farming or any of the items claimed, I find this claim not proved and is therefore dismissed.

27. With respect to general damages for malicious prosecution, the Court must take into account the applicable principles as was held in the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** that:

“The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant’s servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff’s feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant’s conduct. The plaintiff’s status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”. [emphasis added].

28. The 1st plaintiff claimed for Kshs. 20 million general damages for malicious prosecution and relied on several decisions.

29. Taking into account all the circumstances of this case including the status of the plaintiff as a teacher and the number of days in custody, I award the plaintiff a global sum of Kshs.1,000,000.00 general damages for malicious prosecution.

Dated, signed and delivered at Bungoma this 18th day June, of 2020

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S N RIECHI

JUDGE