



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 85 OF 2012

PATRICK NJUGUNA KARIUKI.....PLAINTIFF

VERSUS

DEL MONTE (K) LIMITED.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. On 23rd February 2012, the plaintiff, *Patrick Njuguna Kariuki* instituted suit against *Del Monte (K) Limited* and *The Hon. Attorney General* who he named as the 1st and 2nd defendants respectively, seeking the following reliefs:

- a) General damages for malicious prosecution
- b) General and exemplary damages for defamation
- c) Special damages of KShs.121,000
- d) Costs and interest

2. In his plaint, the plaintiff pleaded that at all material times, he was an employee of the 1st defendant who had initially employed him as a foreman but having risen through the ranks, he was promoted to the position of Logistics & Warehouse Manager; that following theft of industrial sugar in its premises, the 1st defendant falsely and maliciously made a complaint to Thika Police Station implicating him with the theft but after investigations, he was cleared of any criminal culpability but this notwithstanding, the 1st defendant proceeded to make another complaint to the Provincial Police Officer, Central Province.

3. The plaintiff further averred that following the 1st defendant's malicious complaint, the Central Provincial Police Officer in conjunction with his Criminal Investigation's counterpart undertook investigations and subsequently initiated his prosecution for the offences of conspiracy to defraud contrary to *Section 317* of the *Penal Code*, stealing by servant contrary to *Section 281* of the *Penal Code* and destroying evidence contrary to *Section 116* of the *Penal Code* in Criminal Case number 1134 of 2009 at the Chief Magistrate's Court at Nyeri; that the prosecution terminated in his favour as he was acquitted of all the counts on 24th February 2011.

4. The plaintiff asserted that as a result of his malicious prosecution, he suffered loss and damage which included expenses incurred when defending himself during the trial which he claimed as special damages. The particulars supporting the claim for special damages are pleaded in paragraph 12 of the plaint.

5. It was the plaintiff's further contention that as a consequence of his widely publicized arrest and transportation from Thika Town to Nyeri in broad daylight, his reputation was tarnished in the eyes of those who witnessed his arrest who included his colleagues as he was depicted as, *inter alia*, a dangerous criminal hence his claim for damages for defamation.

6. In their separate statements of defence, both defendants denied the plaintiff's claim as pleaded and put him to strict proof thereof. In its defence dated 2nd April 2012, the 1st defendant admitted having reported the loss of its industrial sugar to the police for investigations but denied any responsibility for his prosecution. The 1st defendant denied all the particulars of malice leveled against it and pleaded that the plaintiff's claim lacked any legal basis and ought to be dismissed with costs.

7. On his part, the 2nd defendant in his defence dated 30th August 2012 denied the plaintiff's claim but pleaded in the alternative that if the plaintiff was arrested and prosecuted, the prosecution was done in execution of his statutory duty after completion of investigations into a fair

complaint lodged by the 1st defendant. The 2nd defendant also denied the plaintiff's claim for defamation and pleaded that the plaintiff was not entitled to any of the reliefs sought.

8. During the trial, the plaintiff was the only witness who testified in support of his case. The defendants chose not to call any witness to substantiate the claims made in their respective defences.

9. In his evidence, the plaintiff adopted his witness statement dated 17th October 2018 as his evidence in chief and produced the initial bundle of documents filed on 23rd February 2012 and the supplementary list and bundle of documents filed on 18th December 2012 collectively as exhibits 1 and 2.

10. In addition, the plaintiff testified that his prosecution was malicious given that he was detained in two police stations for three days before he was prosecuted in a Nyeri Court instead of the Thika Law Courts; that this was done at the instigation of the 1st defendant's managers who allegedly micromanaged police investigations and influenced the decision to prefer charges against him; that his prosecution affected his professional life since after being dismissed by the 1st defendant, he was unable to get another job due to pendency of the trial.

11. On being cross examined by the 1st defendant, the plaintiff admitted that the trial court had confirmed that industrial sugar had actually been stolen from the 1st defendant's warehouse but insisted that he was in charge of the warehouse for finished products not the one for raw materials from where the industrial sugar was stolen. He also admitted that the 1st defendant did not do anything wrong in reporting the theft to the police for their investigations and that though the manner in which he was arrested was demeaning and humiliating, he did not have evidence to prove that his esteem was lowered in the eyes of the people who witnessed his arrest.

12. On further cross examination by the 2nd defendant, the plaintiff admitted that he did not have evidence to prove the cost of legal representation and travel expenses incurred during the trial. He denied the 2nd defendant's claim that he was arrested and charged because he was reasonably suspected to have committed the offences charged. He however admitted that he was placed on his defence and that he was acquitted under *Section 251 of the Criminal Procedure Code*.

13. In re-examination, the plaintiff reiterated his evidence that the trial commenced on 9th November 2009 and was terminated on 24th November 2011. He recalled that going through the trial was traumatizing because he knew he was innocent but people looked at him differently.

14. At the close of the hearing, parties filed and exchanged written submissions. The plaintiff filed his submissions on 2nd December 2019 while those of the 2nd defendant were filed on 29th January 2020. The 1st defendant was the last to file its submissions on 19th February 2020.

15. Briefly, the plaintiff in his submissions enumerated the essential elements of the tort of malicious prosecution as set out by *Maraga J* (as he then was) in the case of ***John Ndeto Kyalo V Kenya Tea Development Authority & Another, [2005] eKLR*** which I will discuss shortly. Further, the plaintiff submitted that since the 1st defendant had admitted having reported the theft to Thika Police Station, this was sufficient evidence that the prosecution was instituted by the defendants. He referred the court to the judgment of the trial court in Criminal Case. No. 1134 of 2009 as proof of the fact that the prosecution terminated in his favour.

16. Relying on the definition given to the term "reasonable and probable cause" in ***Chrispine Otieno Caleb V Attorney General, [2014] eKLR***, the plaintiff submitted that there was no reasonable and probable cause to prosecute him because, to start with, the stolen industrial sugar was under the custody of the Finance Department yet the head of that department was not arrested and arraigned for the theft; that during the trial, none of the witnesses called by the prosecution linked him to the theft of the sugar; that there was completely no basis for his prosecution.

17. It was the plaintiff's further submission that his prosecution was actuated by malice which is illustrated by, *inter alia*, the fact that he was not responsible for the warehouse in which the theft occurred yet the Finance and Security Managers who were responsible for the warehouse were the ones who were directing investigations and deciding who was to be arrested. In his view, malice was also evident in the way investigations were moved to Central Police Headquarters after ignoring findings made by the Thika Police; and; that the 1st defendant dismissed him from employment before the criminal case was heard and determined.

18. On the claim for defamation, the plaintiff reiterated the particulars of defamation and malice set out in paragraph 14 of the plaint and maintained that the manner in which he was publicly arrested and arraigned in a Nyeri court not only demonstrated malice but was meant to tarnish his good reputation in the eyes of his colleagues and residents of Thika town.

19. On its part, the 1st defendant submitted that the only role it played in the prosecution of the plaintiff was making a complaint to the police concerning the sugar stolen from its premises which it was entitled to do; that it did not have any control in the subsequent investigations or the decision to prosecute the plaintiff; that the complaint was based on good and reasonable grounds and was not actuated by malice since it was not false and there was no evidence that it was motivated by either spite or ill will.

20. Relying on several authorities including the cases of ***Douglas Odhiambo Apel & Another V Telkom Kenya & Attorney General, HCCC No. 2547 of 1998*** and ***Standard Chartered Bank Kenya Ltd V Intercom Services Ltd & 5 Others, CA No. 37 of 2003***, the 1st defendant urged the court to find that the plaintiff had failed to prove all the essential elements of the tort of malicious prosecution and that the same ought to fail.

21. Regarding the claim for defamation, the 1st defendant submitted that the plaintiff's claim is based on the actions of the police in arresting

him while defamation constitutes words or statements as opposed to actions which lower a person's reputation; that the plaintiff did not adduce evidence to show how he had been defamed and that therefore, he had failed to prove his claim for defamation.

22. Lastly, the 1st defendant submitted that the plaintiff's claim for defamation was a duplication of the claim for malicious prosecution and he was not entitled to damages for both claims. For this proposition, the 1st defendant relied on the authority of **Byrum Kenneth Olenja V Michael Opundo & Another, [2011] eKLR.**

23. In his submissions, the 2nd defendant buttressed his denial of liability by submitting that the plaintiff's prosecution was based on reasonable and probable cause; that police investigations had revealed that the plaintiff was reasonably suspected to have been involved in the offences charged and his prosecution was thus justified. In denying the plaintiff's claim that the prosecution was actuated by malice, the 2nd defendant urged the court to find that the plaintiff had not adduced evidence to prove the particulars of malice as pleaded.

24. On the claim for defamation, the 2nd defendant submitted that the police, in execution of their duties are allowed to arrest suspects during the day either in private or in public and the fact that the plaintiff was arrested in public cannot give rise to an action for defamation more so when it was not alleged that in effecting the arrest, the arresting officers uttered defamatory statements in reference to the plaintiff; that in any event, a plaintiff cannot succeed in a claim for defamation made in a suit in which he was also seeking damages for malicious prosecution since both causes of action overlap each other.

25. Having evaluated the pleadings, the evidence on record and the parties' rival submissions as well as all the authorities cited, I find that only three issues crystalize for my determination. These are:

- i. Whether the plaintiff has proved his claim for malicious prosecution against the defendants.*
- ii. Whether the plaintiff has made out a case for defamation against both defendants.*
- iii. Whether the plaintiff is entitled to the reliefs sought.*

I will now proceed to analyse each of the above issues separately and sequentially.

i) Whether the plaintiff has proved his claim for malicious prosecution against the defendants

26. Malicious prosecution is an intentional tort which is designed to provide redress to persons who suffer loss or damage as a result of a baseless and unjustified prosecution either in civil or criminal proceedings. The essential ingredients of the tort have been articulated in several authorities including those of **Susan Mutheu Muia V Joseph Makau Mutua, [2018] eKLR; John Ndeto Kyalo V Kenya Tea Development Authority & Another, [supra]; Murunga V Attorney General, [1979] KLR 318** among others. For a plaintiff to sustain a claim for malicious prosecution, he must prove the following:

- i. That the prosecution was initiated and instituted by the defendant or his agents.*
- ii. That the prosecution was initiated without reasonable and probable cause*
- iii. That the prosecution was actuated by malice, and*
- iv. That the prosecution terminated in the plaintiff's favour.*

27. As held by the Court of Appeal in **Mbowa V East Menjo District Administration, [1972] EA 352**, the above four ingredients must be proved together to establish the claim. In the words of the court:

“.....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. ...”

In other words, proof of one or some of the above ingredients would not suffice to establish the claim.

28. From the evidence adduced by the plaintiff and the rival submissions made by the parties, it is not disputed that the 1st defendant made a complaint to the police regarding loss of industrial sugar in one of its warehouses following which the police arrested the plaintiff and subsequently charged him in three counts with the offences of conspiracy to defraud contrary to *Section 317* of the *Penal Code*, stealing by servant contrary to *Section 281* of the *Penal Code* and destroying evidence contrary to *Section 116* of the *Penal Code*. It is thus not contested that the prosecution was initiated by the police on behalf of the Republic of Kenya which is represented in this suit by the 2nd defendant. It is also not disputed that the prosecution terminated in the plaintiff's favour given that the plaintiff was acquitted of all the charges.

29. What is strongly contested is the plaintiff's claim that the 1st defendant's complaint to the police and his subsequent prosecution lacked reasonable and probable cause and that the same was actuated by malice. This is what informed identification of the first issue listed for this court's determination.

30. I will start addressing this issue by pointing out that it is a cardinal principle of the law of evidence as encapsulated in *Sections 107 to Section 109* of the *Evidence Act* that he who alleges must prove. The question that now begs an answer is whether the plaintiff has proved to

the standard required by the law that the defendants' actions leading to his criminal prosecution lacked reasonable and probable cause and were laced with malice.

31. Reasonable and probable cause was defined in *Kagane V Attorney General, [1969] EA 643* in the following terms:

“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. 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 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.”

32. From the above definition, it is clear that the test for determining whether or not a prosecution was justified or put differently, whether a prosecution was based on reasonable and probable cause is objective and is dependent on the existence of facts which are credible and sufficient to satisfy an ordinary reasonable man that the person accused was probably guilty of the offence charged.

33. I have carefully studied the judgment of the trial court. I find that the trial court found as a fact that two containers of sugar were actually stolen from the 1st defendant's premises at the time alleged. This is what prompted the 1st defendant to make a formal complaint to the police. Having lost its property to theft, the 1st defendant had both a civic and statutory duty to report the matter to the police for investigations to establish how the sugar was stolen and have the perpetrators brought to justice. The plaintiff in his evidence admitted that the complaint to the police did not point to him as a suspect and that in making the said report, the 1st defendant did not do anything wrong.

34. In *Standard Chartered Bank Kenya Ltd V Intercom Services Ltd & 5 Others, [supra]*, the court held as follows:

“... where a complainant reports the commission of crime to police and police upon independent investigations initiate a prosecution, the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously...”

35. In this case, it is evident that the report made by the 1st defendant was both factual and devoid of malice. Secondly, the plaintiff did not adduce any evidence to show in which way the 1st defendant's managers allegedly influenced the course of police investigations and their decision to prefer charges against him. In the absence of any evidence, it is difficult to fathom how the 1st defendant could have directed or controlled activities or decisions of independent organs of law enforcement. In the premises, I am convinced that the plaintiff has not made out a case of malicious prosecution against the 1st defendant.

36. Turning to the claim against the 2nd defendant, I find that the plaintiff's claim that there was absolutely no evidence to connect him to the offences charged and that there was no basis for his prosecution was not controverted and remained unchallenged since both defendants did not adduce any evidence to the contrary during the trial.

37. The trial court in its judgment found that though the plaintiff in his capacity as one of the 1st defendant's managers could have known about loss of the sugar, no specific evidence was offered by the prosecution to prove that the plaintiff was involved in the theft or in any of the offences charged. It is also noteworthy that the trial court also found that the prosecution case was founded on incomplete investigations. The information or facts upon which the 2nd defendant's agents based their decision to prefer criminal charges against the plaintiff were not disclosed to this court since the 2nd defendant chose not to tender any evidence in this case. In the circumstances, this court is left with no option but to find that the decision to prosecute the plaintiff was not based on any reasonable and probable cause.

38. The absence of reasonable and probable cause for purposes of the tort of malicious prosecution connotes malice on the part of the prosecuting arm of the Government which at the time the plaintiff's cause of action arose was the 2nd defendant. I associate myself with the sentiments expressed by *Ojwang J* (as he then was) in *Thomas Mboya Oluoch & Another V Lucy Muthoni Stephen & Another, [2005] eKLR* when he held that:

“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.... I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”

39. In view of the foregoing, I have come to the conclusion that the plaintiff has proved his claim for malicious prosecution against the 2nd defendant to the standard required by the law which is on a balance of probabilities.

ii) Whether the plaintiff has made out a case for defamation against both defendants.

40. The law of defamation is concerned with protection to reputation. Defamation is defined in *Black's Law Dictionary* as:

“... the act of harming the reputation of another by making a false statement to a third person.”

The Court of Appeal in *Musikari Kombo V Royal Media Services Limited, [2018] eKLR* laid down the threshold for proving a claim for defamation by setting out the key elements a claimant must prove to succeed in such a claim. The claimant must prove the following:

a. The existence of a defamatory statement;

b. That the defendant has published or caused the publication of the defamatory statement;

c. That the publication refers to the claimant.

41. In support of his claim for defamation, the plaintiff testified that the humiliating manner in which he was arrested in full view of the public injured his reputation in the eyes of the people who witnessed the arrest. He did not however claim that any defamatory words or statements in reference to him were uttered by the arresting officers to any third party during the arrest.

42. Given the definition of defamation and its ingredients as shown above, it is clear to me that actions alone unaccompanied by defamatory words or statements cannot found a claim for defamation. In any event, the plaintiff did not adduce any evidence to prove the extent or the manner in which his reputation was allegedly injured in the eyes of right thinking members of society.

43. Having found as I have above, it is my finding that the plaintiff has failed to prove his claim for defamation against both defendants to the threshold required by the law and the same is accordingly dismissed.

44. Before penning off on this issue, I wish to comment on a matter that was raised by the defendants to the effect that a plaintiff cannot recover damages for defamation in a claim founded on the same facts as a claim for malicious prosecution.

I wholly concur with the aforesaid submissions mainly because both claims would have sprang from the same transaction and the alleged damage to reputation would have arisen from perceptions of criminal culpability associated with the impugned criminal prosecution. Awarding damages for both causes of action would in the circumstances amount to double compensation which ought to be avoided.

iii) Whether the plaintiff is entitled to the reliefs sought.

45. Having found that the plaintiff has proved his claim for malicious prosecution against the 2nd defendant and that he has not established his claim for defamation against both defendants, I find that the plaintiff is entitled to general damages for malicious prosecution as against the 2nd defendant. He is however not entitled to damages for defamation or to any relief sought against the 1st defendant.

46. Turning to the prayer for general damages, the plaintiff in his submissions proposed a sum of KShs.15,000,000 relying on two authorities, namely, *Michael Kagoma Maina V Attorney General, [2012] eKLR* where the plaintiff was awarded KShs.6,000,000 and *Justus Mike Kitivo V Attorney General, HCCC No. 336 of 2008 (UR)* where the plaintiff was awarded KShs.6.7 million for malicious prosecution.

47. The 1st defendant did not make any proposals on quantum but the 2nd defendant proposed a sum of KShs.1,000,000 relying on *George Ngige Njoroge v Attorney General, [2018] eKLR*.

In the course of my research, I came across the case of *Joseph Wamoto Karani V C. Dorman Limited & Another, [2018] eKLR* in which the court awarded the plaintiff KShs.2,000,000 as general damages for malicious prosecution.

48. Taking into account the plaintiff's evidence regarding the trauma and inconveniences he experienced during the criminal trial which took about two years, and guided by the foregoing two recent authorities namely, *Joseph Wamoto Karani V C. Dorman Limited & Another, [supra]* and *George Ngige Njoroge V Attorney General, [supra]* which were decided two years ago and considering inflationary trends, I find an award of KShs.2,500,000 reasonable in the circumstances of this case and the same is hereby awarded to the plaintiff against the 2nd defendant.

49. Regarding special damages, it is settled law that special damages must not only be specifically pleaded but must also be strictly proved- See: *Coast Bus Service V Sisco E Murunga Ndanyi, CA No. 192 of 1992.*

In this case, though the plaintiff pleaded special damages amounting to KShs.121,000, he did not tender any evidence to prove the same. In the premises, I find that the plaintiff has failed to prove his claim for special damages. That claim therefore fails.

50. The upshot of this judgment is that judgment is entered in favour of the plaintiff against the 2nd defendant in the sum of KShs.2,500,000. The amount will attract interest at court rates from today's date until payment in full.

The case against the 1st defendant is dismissed with costs.

51. As costs follow the event, the 2nd defendant will bear the plaintiff's costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JUNE 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Makori for the plaintiff

Mr. Mutinda holding brief for Mr. Maruti for the 1st defendant

No appearance for the 2nd defendant

Ms. Mwinzi, Court Assistant