



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 281 OF 2014**

**MARTIN MUNENE MWAI.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his Plaint dated 1<sup>st</sup> September 2014 and filed on 12<sup>th</sup> September 2014, which was supported by a List of Witnesses, Witness statement and List and Bundle of documents, the Plaintiff sought declaration and judgment against the Defendant for:-

- i. A declaration that the arrest, prosecution, sentencing and detention of the Plaintiff for a period of 3 ½ years was malicious, illegal and in breach of the constitution and the Plaintiff's constitutional right to a fair and just judicial and administrative action.**
- ii. That the whole process meted out against the Plaintiff was unlawful and specifically unconstitutional and breached the Plaintiff's constitutional rights as pleaded in Paragraph 18 of the Plaint and that the Plaintiff was entitled to compensatory damages for the breach of his constitutional rights as pleaded.**
- iii. The Defendant be ordered to pay the Plaintiff damages for the breach of his constitutional rights and privileges (sic).**
- iv. That the Defendant be ordered to pay both general and aggravated damages to the Plaintiff on account of the illegal and unlawful arrest, false prosecution, sentence and detention in prison.**
- v. That the Defendant do pay to the Plaintiff damages on account of the loss of business and business opportunities and earning.**
- vi. The Defendant be ordered to pay interest on the awards in (iii)- (v) above.**
- vii. That the Defendant be ordered to pay the Plaintiff's costs of this case.**

2. His Statement of Trial Issues was dated 15<sup>th</sup> July 2019 and filed on 11<sup>th</sup> August 2015. He also attached another Statement of Trial Issues dated 17<sup>th</sup> June 2015 to his Pre-Trial Questionnaire.

3. Pursuant to the court's directions of 6<sup>th</sup> May 2019, the Plaintiff filed a fresh Witness Statement that was cross-referenced to his indexed and paginated Bundle of Documents. The same was dated 3<sup>rd</sup> June 2019 and filed on 4<sup>th</sup> June 2019.

4. The Defendant's Statement of Defence was dated 16<sup>th</sup> June 2015 and filed on 17<sup>th</sup> June 2015. He did not file any documents in support of his case or call any witness to support of his case.

**LEGAL ANALYSIS**

5. The Plaintiff's Statement of Trial Issues listed the following as issues for hearing and determination by the court:-

- i. Was the Plaintiff taken through an unlawful judicial process before Hon Wilkinson Nyagah Njagi in the lower court and Hon Justice Serگون at the High Court?**
- ii. Was the sentence and holdings (sic) of both Hon Nyaga (sic) at the lower court and before Hon Justice Serگون lawful?**
- iii. Was the Plaintiffs (sic) prison sentence and service terminated upon discovery of the illegalities?**
- iv. Was the Plaintiff's arrest, detention, prosecution and prison incarceration lawful?**
- v. Did the Plaintiff suffer any loss and damage pursuant to the actions complained of above?**
- vi. Is the Plaintiff entitled to compensation by the Government of Kenya pursuant to the loss and damages complained of above?**
- vii. Is the Defendant entitled to his prayers in the defence?**
- viii. Who bears the costs of this case?**

6. The Plaintiff adopted his Witness Statement as his evidence-in-chief. The circumstances of his case were that on or about 1999, he was a proprietor of Matimu General Associates, a company that bought and sold land. He received a cheque of Kshs 110,000/=, being purchase price of a parcel of land, from one Wilkinson Nyagah Njagi. At the material time, the said Wilkinson Nyagah Njagi was a Principal Magistrate at Kerugoya Law Courts. When he presented the cheque for encashment, the same was returned unpaid.

7. He tried to follow up the said sum and on 2<sup>nd</sup> March 2002, he was arrested and charged in court with the offence of conspiracy to defraud and obtaining land registration by false pretence contrary to Section 320 of the Penal Code Cap 63 (Laws of Kenya). He was then found guilty and convicted of the latter offence and sentenced to five (5) years imprisonment without the option of a fine. He contended that the sentence was unlawful and illegal as the penalty provided for that offence was a maximum custodial sentence of one (1) year. He served the sentence from 6<sup>th</sup> August 2003 until 24<sup>th</sup> October 2003 when he was released on bail pending appeal. His application to file an appeal out of time was dismissed and his sentence of five (5) years upheld.

8. While in prison, his wife wrote to the Judges and Magistrates Vetting Board (JMVB) complaining about his illegal incarceration. Following the intervention of (Rtd) Chief Justice Willie Mutunga, an order for his immediate release was made on 16<sup>th</sup> April 2013. He stated that he was in prison, court and back in prison from 2<sup>nd</sup> March 2002 and 16<sup>th</sup> April 2013, a period of ten (10) years as a result of which his life came to a standstill and his economic engagements closed down.

9. When he was cross-examined, he stated that he could not have filed the suit herein earlier because he had spent a lot of money on following up the Court of Appeal matter, which was not heard to completion, as he was released before it was heard.

10. He admitted that he had not informed the court what he was earning before he was imprisoned. He also agreed that he had not adduced in evidence a Certificate of Incorporation to show that he was the proprietor of Maendeleo Boys and Girls Centre. He also conceded that he was not a registered estate agent.

11. On being re-examined, he averred that he had a Certificate of Registration for Maendeleo Boys and Girls Centre but not in court and that it was locked in the office of Matimu General Associates after he failed to pay rent on being arrested. He was categorical that he was unable to trace his documents after he came from prison. He told this court that by the time he was released from prison, he had served two (2) extra years beyond the one (1) year he ought to have served.

12. This court was not able to discern from the facts of the case if the Plaintiff's arrest, detention, prosecution and prison incarceration were unlawful. The difficulty was evident because it was not sitting on appeal in respect of the decision of the lower court. It did not also interrogate whether the decision of Serگون J was unlawful as the Plaintiff had contended as that was not an issue that was before it.

13. Having said so, what was evident was that the sentence that was imposed upon him herein was illegal and unlawful. Indeed, his prison sentence was terminated by (Rtd) Chief Justice Willie Mutunga on 16<sup>th</sup> April 2013 upon discovery of the illegalities by the JMVB. This was a fact that was not contested by the Defendant herein.

14. This court did not deem it necessary to interrogate whether or not the said Wilkinson Nyagah Njagi was malicious because the finding of the JMVB was as follows:-

**“37. It was improper and totally unacceptable for the Magistrate to sit in a matter where the accused was someone with whom he has recently had commercial dealings, and who was claiming that the Magistrate owed him money. This was compounded when having sent the accused for a period much longer than that permitted by the law, and after having been made aware of the error, took no steps to rectify the mistake.**

**38. The Board finds the conduct of the Judge (sic) in the handling of the matter totally unprofessional, unbecoming and falling below par. The image of the Judiciary has been tainted by such conduct. The Board finds his conduct inexcusable, and unanimously determine that he is not suitable to serve as a judicial officer.”**

15. There was no clearer way of demonstrating malice on the part of the said Wilkinson Nyagah Njagi as had been set out by the Plaintiff in his Pleint than in the aforesaid finding. This court was therefore not persuaded by the Defendant's submission that the particulars of malice had not been set out. The particulars of malice were evident in the body of the Pleint. Insisting that the particulars ought to have been set out numerically would be to glorify form over substance. In any event, Article 159 (2) (d) of Constitution of Kenya, 2010 provides that courts should administer justice without undue regard to procedural technicalities.

16. Having said so, this court agreed with the Defendant that the Plaintiff's claim was founded on tort and hence could not be sustained as it was time barred. During cross-examination, the Plaintiff admitted that he filed the suit herein one (1) year and five (5) months after the date the order for his release was made on 16<sup>th</sup> April 2013. His evidence was vague as to the exact date he was released. However, his evidence that he spent ten (10) years in the judicial system from 2<sup>nd</sup> March 2002 to 16<sup>th</sup> April 2013 persuaded this court to agree with the Defendant that the cause of action started accruing on 16<sup>th</sup> April 2013 when an order for his release was made.

17. His explanation that he did not have money to file the suit herein as he was following up the Court of Appeal matter was not plausible and must be rejected. Section 3 (1) of the Public Authorities Limitation Act Cap 39 (Laws of Kenya) is couched in mandatory terms and could not come to his assistance.

18. The said Section 3(1) of the Public Authorities Limitation Act stipulates that:-

**“No proceedings founded on tort shall (emphasis court) be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”**

19. His reliefs for general damages, aggravated damages for malice and his claims for loss of business, business opportunities and earnings were for all purposes and intent statute barred and therefore had to fail.

20. However, in the event the court would have found that his suit was not time barred, it would still have found that he failed to discharge the burden of proof as regards his claims for loss of business, business opportunities and earnings. He did not adduce in evidence, any proof that he was actually the proprietor of the aforesaid Maendeleo Boys and Girls Centre and Matimu General Associates.

21. His explanation that he was not able to obtain the Certificates of Registration because they were locked up by his landlord did not hold any water. This is because he could still have obtained the same from the relevant government institutions had he applied for certified copies of the same.

22. Going further, it was evident from his evidence and written submissions, he did not lay any basis for his claim for loss of business, business opportunities and earnings. He appeared to have abandoned the said claims as he concentrated on the award of general and aggravated damages which he put at Kshs 10,000,000/= for each head. On his part, the Defendant had urged this court to dismiss the aforesaid claims were not proven but nonetheless submitted that in the event this court was inclined to award any damages, then it should only award him a sum of Kshs 1,500,000/=.

23. The above notwithstanding, this court noted that the Plaintiff had also sought declarations and damages for breach of his constitutional rights and privileges. It mulled on whether the Plaintiff should have sought relief from the constitutional court in respect of his claim for constitutional breaches.

24. Notably, Article 22 (1) of the Constitution of Kenya states that:-

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”**

25. Article 25(c) of the Constitution of Kenya also provides that:-

**“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—the right to a fair trial”**

26. Article 23 (1) of the Constitution of Kenya further provides as follows:-

**“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**

27. Indeed, under Article 23 (3) (e) of the Constitution of Kenya, it is stated that:-

**“In any proceedings brought under Article 22, a court may grant appropriate relief, including an order for compensation.”**

28. Bearing the aforesaid provisions in mind, Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya) which provides that **“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”** and the gross violation of the Plaintiff's right to fair trial, this court could not turn its head away and leave him to hang dry despite the proceedings not having been instituted as a constitutional reference. Notably, Article 159(2) (d) of the Constitution of Kenya mandates courts to administer justice without undue regard to procedural technicalities.

29. Article 22 (3)(d) of the Constitution of Kenya frowns on glorifying form over substance. It stipulates that:-

**“The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities”**

30. This court took the view that where there is so much injustice to a party and he had brought reliefs that cut across (2) divisions of the court, a division that was not administratively designated as a constitutional one was called to rise to the occasion and do justice to that aggrieved party where he had demonstrated in his pleadings that his constitutional rights had been breached. As was stated, Article 159 (2) (d) of the Constitution of Kenya mandates courts to administer justice without undue regard to procedural technicalities.

31. This court therefore determined that a sum of Kshs 3,000,000/= would be reasonable compensation within the province of Article 23 (3) (e) of the Constitution of Kenya.

#### **DISPOSITION**

32. For the foregoing reasons, this court’s decision was that the Plaintiff’s suit was partially merited and the same is hereby allowed as follows:-

**1. THAT there be a declaration that the arrest, prosecution, sentencing and detention of the Plaintiff for a period of 3 ½ years was malicious, illegal and in breach of the constitution and his constitutional right to a fair and just judicial and administrative action.**

**2. General damages in the sum of Kshs 3,000,000/=.**

**3. As this claim should have ideally been filed in the Constitutional Division at Milimani Law Courts Civil Division having been statute barred under the Public Authorities Limitation Act and the Defendant herein is the Hon Attorney General, there will be no order as to costs.**

33. It is so ordered.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of September 2020**

**J. KAMAU**

**JUDGE**