REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO. 10 OF 2019

DICKSON CHEBUYE AMBEYI .....PETITIONER

VERSUS

THE NATIONAL POLICE SERVICE .....1ST RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL .....2ND RESPONDENT

PETER SIFUNA WESONGA .....1ST INTERESTED PARTY

MARY KALAKACHA .....2ND INTERESTED PARTY

JUDGMENT

1. The Petitioner, Dickson Chebuye Ambeyi, moved this court by way of a petition, dated 22nd July 2019, for a declaration that his arrest and arraignment in court in Kakamega CMCCRC No. 3334 of 2015 had no legal basis, was malicious and infringed his rights to liberty, privacy, economic and social rights and to equal protection of the law and rights to freedom granted under Article; 29, 31 and 39 of the Constitution; a declaration that the respondent and the interested parties are liable to pay him compensation by way of general damages for violating his rights under Articles 29, 31, and 39 of the Constitution; a declaration that the respondents are liable to pay special damages of Kshs. 369,000. 00.

2. The petition is opposed by the respondents and the interested parties, all of whom submit that the petition does not meet the threshold of a constitutional petition, and pray that the same be dismissed.

3. The main issues for determination in the petition are whether the arrest and prosecution *of* the petitioner was illegal and unlawful or actuated by malice, and whether it was done in violation of the petitioner's constitutional rights; what is the legal competency of this petition; what general damages, if any, is the petitioner entitled to; and what orders should the court make.

4. The petition is anchored on violation of Articles 29, 31 and 39 of the Constitution of Kenya, the foundation being that the petitioner was arrested and charged with an offence, but was later acquitted. It is, basically, a matter of malicious prosecution.

5. Article 29 of the Constitution, in so far as the same is relevant, provides as follows:

> *"29. Every person has the right to freedom and security of the person, which includes the right not to be-*
>
> *(a) deprived of freedom arbitrarily or without just cause*
>
> *(b)…"*

6. Article 31, on the other hand provides:

> *"Every person has the right to privacy, which includes the right not to have—*
>
> *(a) their person, home or property searched;*
>
> *(b) their possessions seized;*

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed."

7. In *Patrick Nyamuke Etori vs. National Police Service Commission & 2 others* [2019] eKLR**,** the court addressed itself to proof of malicious prosecution. It observed:

"That means the petitioner was actually complaining of malicious prosecution in this petition. However, for one to establish a case for malicious prosecution, he must prove that the prosecution had no legal basis and that it was actuated by malice.

26. The position was well stated in the case of Mbowa vs. East Mengo Administration [1972] EA 352, thus;

"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."

27. The court went on to enumerate essential ingredients of the tort of malicious prosecution, namely;

"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 defendant 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."

28. The petitioner was bound to prove the above elements if he expected to succeed even on the basis that his arrest and prosecution was malicious. He did not attempt at all to prove any of the ingredients either against the 1st or 2nd respondents as was required of him by the law. The burden of proof fell on him in terms of sections 107 through 109 of the Evidence Act."

8. In *Sylvanus Okiya Ongoro vs. Director of Criminal Investigations & 4 others* [2020] eKLR, the court said:

"103. What I gather the petitioner to be complaining about is that his prosecution was malicious as it was unjustified.

104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in Murunga vs. Attorney General (1979) KLR, 138 as follows: -

(a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;

(b) The Plaintiff must show that the prosecution terminated in his favour;

(c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;

(d) He must also show that the prosecution was actuated by malice.

105. The four principles were adopted in similar matters as follows: -

(i) J. B. Ojwang, J (as he then was) in Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another (2005) elk;

(ii) Ruth N. Sitati, J in Patrick Muriithi Kukuha vs. Edwin Warui Munene & 5 Others (2005) elk;

(iii) Anashir Visram, J (as he then was) in Kiragu vs. Muriuki & Another (2004) elk;

(iv) D. K. Maraga, J (as he then was) in Zablon Mwaluma Kadon vs. National Cereals & Produce Board (2005) elk.

106. It is my view that the claim for unlawful arrest and detention/false imprisonment and injury of reputation is one and the same

thing as malicious prosecution. This is so because when a person is arrested and detained and not prosecuted, he could claim that that arrest and detention that did not materialize into prosecution was actuated by malice – See Josephat Mureu Gibiguta vs. Howse & McGeorge Ltd) elk HC at Nairobi Civil Case No. 2646 Of 1993 in which Githinji, J (as he then was) stated: -

> *"In my view the arrest, detention and prosecution consists of one transaction which has given rise to the Plaintiff's claim. In the circumstances of this case the cause of action for damages for unlawful arrest and false imprisonment arose only when Plaintiff was acquitted."*

107. The above four ingredients for the tort of malicious prosecution were settled in several cases among them; Kagane and Others vs. Attorney General and Another [1969] EALR 643, Mbowa vs. East Mengo District Administration [1972] EA 352, Murunga vs. Attorney General [1979] KLR 138

108. These elements were summarized by the East Africa Court of Appeal in Mbowa vs. East Mengo District Administration (Supra) as follows;

> *"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."*

9. In *Bethwel Omondi Okal vs. Attorney General & another* [2018] eKLR, it was stated:

> *"21. The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff's favour having been acquitted of the charge laid against him. (See Egbema vs. West Nile District Administration [1972] EA 60)*
>
> *22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. In the present case, the 2nd respondent's duty was to report that the accused was illegally connected to electric energy. The responsibility of investigating, charging and conducting prosecution was that of the police and the 1st respondent.*
>
> *s.23. In this petition, it is true that the petitioner's wife was arrested, charged in Court and prosecuted. It is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited vs. Fungutuli [1988]) elk, the Court of Appeal observed;*
>
> *"It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company."*
>
> *24. In the case of Jediel Nyaga vs. Silas Mucheke 1987 (CA No. 59 of 1987) the Court of Appeal again stated;*
>
> > *"The appellant having reported to the police about the respondent's action of damaging his crops, the police took over the matter to investigate the respondent for a possible offence … Once the appellant gave the report, he ceased to have anything to do with the matter."*
>
> *25. And in the case of Robert Okeri Ombaka vs. Central Bank of Kenya [2015]) eKLR, the Court of Appeal observed;*
>
> > *"In this appeal there is no evidence that the respondent made a "false" report or that the it was actuated by "malice", or that his prosecution was brought "without reasonable or probable cause". That a suspect was acquitted of a criminal case is not a ground for filling a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established."*
>
> *26. A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above are clear that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the complaint was false and that it was full of spite or malice.*
>
> *27. The petitioner also alleged that there was trespass on his privacy and that his wife's arrest was effected at night. The law that*

allows the 2nd Respondent to inspect meters and power lines does not state what time this should be done. However, in the case of meter reading or inspection, one would expect that it be done during the day. The fact that officers visited the Petitioner's premises at night and discovered suspected unlawful use of power could not amount to trespass.

28. Taking the petitioners interpretation of trespass and his contention that no arrest or investigation should take place at night, is adopting a narrow interpretation that would defeat the work of the 2nd Respondent, given that many people who illegally use power are likely to do so at night. I do not therefore see any trespass or violation of the law for arresting Jane Atieno Obila in the evening or even at night.

29. The Petitioner further contended that his family suffered after the arrest of his wife because children were left alone and helpless. The Constitution grants family protection (Article 45) and that of children Article 53). However, where a party pleads that his family's rights were violated, s/he is under obligation to prove how those rights were violated. The Petitioner did not do so in this petition. He made general submissions without actual proof by way of evidence. Furthermore, in the case of children he did not adduce any evidence to show that there were children at home at that time, their ages and how they suffered. It is not enough for one to merely state that rights were violated without showing how and to what extent. The petitioner failed in this respect and left no doubt that there was no precision in the pleadings as required by the principle laid down in Anita Karimi Njiru vs. Republic (No 2) [1979] elk 154, or in the evidence adduced in Court."

10. From the above, it is clear that for this petition to succeed, the petitioner has to prove that there was malice on the part of the respondents and the interested parties. He has not in any way adduced evidence in support of his claim, and as such it is my finding and holding that the same cannot succeed. The petition is accordingly dismissed. Each party shall bear their own costs.

11. The final word. In any claim for general damages, the party claiming must formally prove their claim. It was foolhardy for the petitioner to have assumed that he could establish his claim by way of written submissions, instead of giving testimony to prove his claim. He should have sought to have the matter heard orally. This is a simple claim for unlawful arrest, false imprisonment and malicious prosecution, all of which are torts. At common law, the usual way of prosecuting them is by way of plaint, and formal proof. The mere fact that there are constitutional provisions which cover the same subject, and that there is provision for litigation under the Constitution for redress, besides the usual civil process, does not obviate the need for formal proof. The principles governing what ought to be proved, or the standards of proof, are the same. It would have been wiser for the petitioner to simply mount a civil suit, in common law, by way of plaint, for compensation for the torts of false imprisonment, unlawful arrest and malicious prosecution. Let no one assume that the route of constitutional litigation somewhat provides the parties with a shortcut of sorts in cases of this nature.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020

W MUSYOKA

JUDGE