



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 94 OF 2012

GRACE KIBOI MWIHAKIPLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. The plaintiff *Grace Kiboi Mwiaki* filed suit against the two defendants namely, *The Standard Group Limited* (hereinafter the 1st defendant) and *The Hon. Attorney General* (2nd defendant) seeking special and general damages for malicious prosecution, costs of the suit and interest.
2. In her plaint dated 27th February 2012 filed in court on 29th February 2012, the plaintiff averred that she was employed by the 1st defendant as a senior accountant and that in the course of her duties, she noted anomalies in her employer's petty cash account which she reported to her immediate supervisor. She was subsequently sent on compulsory leave and eventually dismissed from employment on or about 24th September 2007.
3. The plaintiff further claimed that at the instigation of the 1st defendant, she was summoned to CID Headquarters and was later charged in nine counts with the offence of theft by servant contrary to Section 281 of the Penal Code in Criminal Case No. 1811 of 2007 which eventually terminated in her favour.
4. She contended that the 1st defendant's action of lodging a complaint to the police and the 2nd defendant's action of mounting a prosecution against her was reckless and grossly malicious. The particulars of malice attributed to the defendants were pleaded in paragraph 10 of the plaint. It was her case that the actions of the defendants subjected her to severe loss and damage which included loss of her livelihood; that she incurred costs in the sum of KShs.250,000 being legal fees paid to the advocate who defended her in the criminal trial.
5. In its statement of defence dated 28th March 2013, the 1st defendant admitted having lodged a complaint to the police at CID Headquarters after which the plaintiff was arrested and prosecuted in nine counts with the offence of theft by servant. The 1st defendant however denied the plaintiff's claim that the complaint was reckless or malicious and averred that the same was justified given that it was founded on discovery of variations in its petty cash account which resulted in loss of KShs.4,006,302 between 29th May to 16th August 2007. It denied all other allegations in the plaint and put the plaintiff to strict proof thereof.
6. The 2nd defendant on its part admitted that the police arrested and prosecuted the plaintiff but denied that the prosecution was malicious and that the plaintiff suffered any loss or damage as alleged. The 2nd defendant stated that the plaintiff was arrested and prosecuted on reasonable suspicion that she had committed a criminal offence and that in commencing the prosecution, the police were properly exercising their mandate in accordance with the law.
7. During the hearing, the plaintiff testified in support of her case. She did not call any other witness. In her evidence, she reiterated that while working for the 1st defendant as a senior accountant, she discovered that one of the ledgers was not balancing. There was a deficit of KShs.2,700,000 and even after asking a team of four accountants working under her to reconcile this figure, no explanation was advanced to account for the deficit. She reported the matter to a *Mr. Lawrence Njiru* who was the financial controller and her supervisor.
8. The plaintiff recalled that after the apparent loss of money was discovered, she was subjected to some disciplinary process which culminated in her dismissal on 24th September 2007 on claims that money had been stolen during her watch. She was subsequently arrested and charged as the 2nd accused in Criminal Case No. 1187 of 2007 which was determined in her favour on 7th October 2011. She produced the proceedings and judgment in that case as Pexhibit 8. She maintained that her prosecution was malicious and urged the court to award her the reliefs sought in the plaint.

9. Both defendants did not call any witness in support of the averments made in their respective statements of defence.

10. At the conclusion of the hearing, parties agreed to file final written submissions which they did on different dates. The plaintiff filed her final submissions on 30th October 2018 while those of the 1st defendant were filed on 8th November 2018. The 2nd defendant was the last to file its submissions on 28th January 2019.

11. I have carefully considered the pleadings, the evidence tendered by the plaintiff and the written submissions filed on behalf of the parties and all the authorities cited. Having done so, I find that though the plaintiff made reference in her plaint and in her evidence to her alleged unjustified dismissal from the 1st defendant's employment, her claim against the defendants is for special and general damages for malicious prosecution. She has not made any prayer related to her alleged unfair dismissal.

12. As I observed in *Co-operative Bank of Kenya Limited V Patrick Mutuku, Civil Appeal No. 209 of 2017*, the tort of malicious prosecution is designed to provide redress to a person who suffers loss or damage as a result of a baseless and unjustified prosecution. It is now well settled as established by a number of authorities including those of *Murunga V Attorney General, [1979] KLR 138* and *Mbowa V East Mengo District Administration, [1972] EA 352* that in order for a plaintiff to succeed in a claim for malicious prosecution, he or she must prove four essential ingredients of the tort. These are:

- i. That the prosecution was initiated or instituted by the defendant or his agents;
- ii. That the prosecution was instituted without reasonable and probable cause;
- iii. That the prosecution was actuated by malice; and
- iv. That the prosecution terminated in the plaintiff's favour and that he has consequently suffered damage.

13. In *Mbowa V East Mengo District Administration, (supra)*, the East African Court of Appeal which is the predecessor to our Court of Appeal made it clear that the four ingredients must be proved together before a plaintiff can establish a claim for malicious prosecution. Proof of one or some of the ingredients cannot suffice. To emphasize this point, the court expressed itself 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. ...”

14. Applying the above principles to the instant case, it is not disputed that following a complaint to the police by the 1st defendant, the plaintiff was arrested and charged with the offence of stealing by servant in Criminal Case No. 1187 of 2007. It is also not disputed that the prosecution was terminated in the plaintiff's favour as she was acquitted of all the charges under Section 215 of the *Criminal Procedure Code*. What is strongly contested is whether or not the prosecution was initiated and mounted without reasonable and probable cause and whether it was actuated by malice.

15. What constitutes reasonable and probable cause was defined in *Kagane V Attorney General, [1969] EA 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. ...”

16. Put differently, reasonable and probable cause will be established if there was evidence to prove that there were reasonable grounds for the defendant or any prudent man placed in his position to genuinely believe that the criminal proceedings were justified; that there was both factual and legal basis for the belief that the person accused was probably guilty of the offence subject of the prosecution. The test regarding whether a prosecution was commenced or continued without reasonable and probable cause should be objective as opposed to subjective.

17. From the above, it is clear that a prosecution which is commenced on the basis of reasonable and probable cause is presumed to have been lawfully instituted regardless of whether it ultimately determines in the plaintiff's favour.

18. Regarding the requirement for proof of malice, malice can be either express or implied from the totality of facts and circumstances surrounding the prosecution. It will be proved if there is evidence to demonstrate that the criminal proceedings were instituted without good cause with an improper or ulterior motive, that is, with the intention of using the legal process for purposes other than those recognized by the law.

19. Since it is not disputed that the plaintiff was arrested and prosecuted following a complaint made by the 1st defendant or its agents and that the prosecution terminated in her favour, I find that the issues which arise for my determination in this case are two fold, namely:

- i. Whether the plaintiff has proved to the required legal standard that her prosecution was initiated and maintained without reasonable and probable cause and that it was tainted with malice.
- ii. If the answer to issue No (i) above is in the affirmative, whether the plaintiff is entitled to the reliefs sought.

20. As noted earlier, it is not disputed that the impugned prosecution was initiated by the 1st defendant by making a complaint to the police at CID Headquarters regarding loss of money in its finance department. Though the actual nature of the complaint filed with the police was not disclosed both in the evidence tendered by the plaintiff and in the criminal trial, it is nevertheless clear that it is on the basis of this complaint that the investigating officer Chief Inspector *Mary Adema* summoned the plaintiff and subsequently made a decision to commence criminal proceedings against her and her co-accused *Ernest Kibet Tarus*, who used to be her colleague in the 1st defendant's finance department.

21. That said, the question that begs an answer is whether the 1st defendant's complaint to the police was lodged maliciously without good and probable cause.

From the pleadings and evidence tendered by the plaintiff, it is evident that prior to making its report to the police, the 1st defendant had established that it had lost money in its finance department in the form of petty cash which was not accounted for. The plaintiff in her evidence admitted that about KShs.2,700,000 was lost at a time when she was a senior accountant in charge of reconciliation of the petty cash account. In the premises, it is my finding that the 1st defendant's complaint to the police was well founded.

22. The 1st defendant being a corporate citizen had a legal and civic duty to report to the police any information in its possession that gave rise to suspicion that a criminal offence may have been committed in order to facilitate independent investigations by the police or other law enforcement agencies. Once the complaint was made, the 1st defendant's role stopped there and it was upto the police to conduct their investigations to establish the credibility or truthfulness of the allegations or otherwise and decide whether or not to commence criminal proceedings against the suspects. The 1st defendant or any other complainant for that matter would not normally have control over prosecutorial decisions which under the legal regime existing at the material time was the preserve of the 2nd defendant or his authorized agents who included the police.

23. In the absence of any evidence that the complaint made by the 1st defendant was false or was made in bad faith, it is my finding that the complaint in this case was based on good grounds and was therefore justified. The 1st defendant had reasonable and sufficient cause to make the complaint regarding loss of its funds. It is also my finding that the plaintiff did not adduce any evidence to prove or even suggest that the 1st defendant's complaint was actuated by malice. In the circumstances, I have come to the conclusion that the plaintiff has failed to establish her claim against the 1st defendant on a balance of probabilities and the same is consequently dismissed.

24. Regarding the claim against the 2nd defendant, it is important to note that the 2nd defendant, the Hon. Attorney General was sued on behalf of the Director of Public Prosecutions or the Police Department. It is the plaintiff's case that the police instituted criminal proceedings against her for offences of theft by servant maliciously without reasonable and probable cause. The 2nd defendant did not offer any evidence to controvert this allegation or to substantiate its claim that the prosecution was based on reasonable and probable cause and that it was done in execution of his statutory mandate.

25. Considering that the 2nd defendant did not adduce any evidence to substantiate the claims made in his defence or to explain the reasons that informed the decision to arrest and charge the plaintiff with criminal offences, it is my view that the plaintiff's claim that her prosecution was not based on any reasonable and probable cause remained unchallenged as it was not controverted by any evidence to the contrary.

26. In addition, a reading of the proceedings and judgment of the trial court produced in evidence as Pexhibit 8 raises more questions than answers regarding what informed PW6's decision to charge the plaintiff with the aforesaid criminal offences. The 1st defendant's main witness who testified as PW1 confirmed the plaintiff's testimony that she was the one who discovered the anomalies in the petty cash account and reported the same to her boss; that she never did any postings to the account nor did she requisition for any cash. She was also not a signatory to the account in question and she did not have any cheque issued in her favour. None of the witnesses who testified during the trial whose statements had been recorded by the investigating officer (PW6) in the course of her investigations implicated the plaintiff with the theft of any money from the 1st defendant.

27. PW6 in her evidence on cross examination confirmed the above position and went further to explain that the only reason she charged the plaintiff with the nine counts of stealing is because she was her co-accused's immediate boss and not because she had found any evidence to link her with the alleged theft.

28. In view of the foregoing, it is clear that PW6 did not have any reason to believe or even suspect that the plaintiff had been involved in any way with the theft of the 1st defendant's funds. But this notwithstanding, she proceeded to institute and maintain criminal proceedings against her knowing only too well that they were not grounded on any evidence as far as the plaintiff was concerned. It is thus my finding that the plaintiff's prosecution was not based on any reasonable and probable cause and was evidently actuated by malice. The fact that PW6 selectively picked the plaintiff for prosecution yet she had not gathered an iota of evidence linking her to the alleged theft and she left out her colleague *Peter Kamakia* who her investigations revealed had received KShs.45,000 which he was unable to account for is clear evidence of malice on her part. PW6 being a police officer was an agent of the 2nd defendant and the 2nd defendant is thus vicariously liable for her actions.

I am consequently satisfied that on the issue of liability for malicious prosecution, the plaintiff has proved her case against the 2nd defendant to the required legal standard.

29. Having made a finding on liability against the 2nd defendant, I now turn to consider what damages are payable to the plaintiff. The plaintiff in her evidence did not prove the damage she actually suffered as a result of the malicious prosecution but she referred to the length of time the prosecution took which she described as "*four harrowing years*". Although there was no proof of actual damage, it is to be expected that any malicious prosecution will definitely cause some anxiety, distress, psychological torture, expense and inconvenience which is usually associated with criminal trials.

30. In her written submissions, the plaintiff proposed a sum of KShs.8,000,000 relying on the authorities of Michael Kagoma Maina V The Hon Attorney General, [2012] eKLR, where the plaintiff was awarded KShs.6,000,000 and the case of Teresia Wanjiku Njoroge V Standard Chartered Bank Kenya Limited & Another, [2015] eKLR, where the plaintiff was awarded general damages in the sum of KShs.5,000,000. The 2nd defendant on his part proposed a sum of KShs.500,000 relying on the case of Stephen Gachau Githanga & Another V Attorney General, [2015] eKLR.

31. I have considered the proposals made by the parties as well as the authorities cited in support of the proposals.

I find that the facts and circumstances of the plaintiffs in the cases relied on by the plaintiff are different from the facts in this case. Unlike in this case where the plaintiff had been dismissed from employment prior to her prosecution, the plaintiffs in those cases were either interdicted or dismissed from employment as a direct consequence of the malicious prosecution.

32. The circumstances of the plaintiff in Teresia Wanjiku Njoroge V Standard Chartered Bank Kenya Limited & Another, (supra) were unique and there is no evidence to suggest that they are comparable to the circumstances that surrounded the plaintiff in this case. The plaintiff in the Teresia Wanjiku Njoroge case was pregnant during the trial and after conviction, she was forced to raise her daughter in prison. she also complained of injury to her credit, character and reputation which prevented her from securing any other employment. The plaintiff in this case has not made such a complaint. The proposal made by the 2nd defendant is way too low and is unreasonable given the length of time the impugned prosecution took and all other circumstances in this case. Doing the best I can having taken into account all relevant factors, I award the plaintiff KShs.3,000,000 in general damages.

33. The plaintiff had pleaded special damages in the sum of KShs.250,000 being legal fees paid to the advocate who defended her in the criminal trial. The sum was proved by documentary evidence in the form of four receipts produced collectively as Pexhibits 11. The amount was therefore specifically pleaded and strictly proved as required by the law. I do award the plaintiff that sum.

34. In the end, I enter judgment for the plaintiff against the 2nd defendant for a total sum of KShs.3,250,000 with interest at court rates and costs of the suit. The general damages will attract interest from today's date until payment in full while the award of special damages will carry interest from the date the suit was filed until full payment.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 28th day of March, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Goa for the plaintiff

Mr. Wepo Holding Brief for Mr. Echesa for the 1st defendant

No Appearance for the 2nd defendant

Mr. Salach: Court Assistant