



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 697 OF 2007

NEWTON NDIRANGU GICHEHAPLAINTIFF

VERSUS

THE HON ATTORNEY GENERAL1ST DEFENDANT

EVANS STEPHEN WAINAINA GICHIA 2ND DEFENDANT

JUDGMENT

1. *Newton Ndirangu Gicheha*, the plaintiff herein sued the defendants, the *Hon. Attorney General* and *Evans Stephen Wainaina Gichia* seeking general damages for false imprisonment and malicious prosecution. He also sought special damages in the sum of KShs.1,109,400 together with costs of the suit and interest thereon.

2. In his plaint filed on 4th October 2007, the plaintiff averred that on or about 11th May 2005, the 2nd defendant maliciously and without probable cause lodged a complaint at Karuri Police Station in which he accused the plaintiff of theft of computers from a locked room. That acting on the said information, police at Karuri Police Station arrested him on 11th May 2005 and kept him in police custody till 19th May 2005 when he was arraigned before Kiambu Principal Magistrate's Court in Criminal Case No. 1706 of 2005 in which he was charged with two counts with the offence of theft of computers from a locked room contrary to *Section 279* of the *Penal Code* and an alternative charge of failing to prevent commission of a felony contrary to *Section 392* of the *Penal Code*.

3. It is the plaintiff's case that the criminal proceedings terminated in his favour as he was acquitted of all the charges on 28th March 2006; that as a result of the false imprisonment and malicious prosecution, he was injured in his reputation and suffered loss and damage as he was put to considerable trouble, inconvenience, anxiety and expense.

4. Regarding the claim for special damages, the particulars supporting the same were enumerated in paragraph 8 of the plaint. The claim was based on loss of income from May 2005 to the date of filing suit at the rate of KShs.2,150 per day. The plaintiff also sought for loss of income from the date of filing suit to the date of judgment.

5. In their separate statements of defence, the defendants denied all the allegations leveled against them by the plaintiff and put him to strict proof thereof. In its defence dated 22nd October 2007, the 1st defendant challenged the competence of the suit claiming that it was statutorily time barred by dint of *Section 3 (1)* of the *Public Authorities Limitation Act*. In the alternative, the 1st defendant contended that if the plaintiff was arrested, confined or prosecuted which was denied, the arrest, confinement and prosecution was based on reasonable and probable cause; that the same was not motivated by malice.

6. The 2nd defendant filed his statement of defence on 6th November 2007 asserting that though he filed a complaint at Karuri Police Station through his servant/agent regarding loss of computers, computer accessories and theft of motor vehicle parts from his business premises on the night of 10th May 2005, he was not responsible for the plaintiff's prosecution; that his role in the criminal proceedings was limited to his appearance as a prosecution witness. He also challenged the validity of the plaintiff's suit claiming that it was bad in law and ought to be struck out.

7. Hearing of the suit proceeded before me on 17th September 2018. The plaintiff testified in support of his case but did not call any other witness. The 1st defendant chose not to call any witness while the 2nd defendant testified as DW1 in support of his case. During the hearing, the plaintiff was represented by learned counsel *Mr. F. N Wamalwa* while *Mrs Makori* appeared for the 1st defendant. Learned counsel *Ms Kibebo* held brief for *Mr Mutua* for the 2nd defendant.

8. In his evidence, the plaintiff narrated how he was arrested, detained in police cells for eight days and subsequently charged with the

aforesaid criminal offences which were allegedly based on the 2nd defendant's false complaint that he was his employee. He asserted that he was self employed at Banana where he guarded and cleaned private vehicles on a road reserve for a fee; that his prosecution in the criminal proceedings was malicious as after trial, he was acquitted of all the charges for lack of sufficient evidence; that as a result of his prosecution, his business suffered as people presumed he was a thief.

9. On being cross examined by counsel for the defendants, PW1 admitted that he did not have any grudge with the police officer who arrested him nor the 2nd defendant and that he did not have any evidence to prove that he was unlawfully detained by the police for eight days. He also admitted that he did not have evidence to prove his claim for loss of income at the rate of KShs.2,150 per day.

10. In his evidence, the 2nd defendant (DW1) stated that he was a shareholder of Printers College which was located in a building which was among the premises the plaintiff was contracted to guard. The plaintiff was manning the building's gate at a fee; he was the one opening the gate to give people including DW1 access to the building's interior.

11. DW1 recalled that on the evening of 10th May 2015, he left the plaintiff guarding the premises. On the following day, he received a call from his wife reporting that his rented premises had been broken into the previous night and several properties had been stolen; that the incident had already been reported to the police at Karuri Police Station by his drivers.

12. After receiving this report, DW1 went to the police station at 11am and found that the police had started their investigations and had already identified the plaintiff as their suspect. He denied that he is the one who named the plaintiff as a suspect. He denied any liability maintaining that as a person who had lost property when the building in question was broken into, he reported the theft to the police in good faith without any malice and that he testified as a prosecution witness in compliance with a police bond served on him. He produced the police bond as D exhibit 1. Finally, DW1 admitted that after the trial, the plaintiff was acquitted of the charges.

13. At the close of the hearing, parties agreed to file their written submissions. The 1st defendant was the first to file his submissions on 11th October 2018 followed by the plaintiff who filed his submissions on 17th October 2018. The 2nd defendant was the last to file his submissions on 28th January 2019.

14. After a careful consideration of the pleadings, the evidence tendered during the trial as well as the parties' written submissions and authorities cited, I find that three main issues emerge for my determination in this case. These are:

- i. Whether the plaintiff's claim against the 1st defendant is invalid for being statute barred;
- ii. Depending on the outcome of issue number (i) above, whether the plaintiff has established his case for false imprisonment and malicious prosecution against the defendants; and lastly,
- iii. Whether the plaintiff is entitled to the reliefs sought.

15. Turning to the first issue, the 1st defendant has maintained that the suit against it is bad in law as it is statute barred by virtue of the provisions of *Section 3 (1) of the Public Authorities Limitations Act* which provides that proceedings against a Government or Local Authority founded on tort must be instituted within a period of 12 months from the date the cause of action arose.

The 2nd defendant in his defence also made a general allegation that the plaintiff's suit was bad in law but he did not indicate the context in which the allegation was made.

16. The plaintiff in his written submissions did not address the weighty issue raised by both defendants regarding the alleged invalidity of his suit.

17. Having stated the import of *Section 3 (1) of the Public Authorities Limitations Act* (hereinafter the Act), I think it is important to define what constitutes "proceedings" for purposes of the Act.

18. *Section 2 (1)* defines proceedings as follows:

"Proceedings mean civil proceedings in the High Court or a subordinate court."

Section 2 (2) proceeds to provide that:

"For purposes of this Act –

Proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such."

19. It is an established fact that a claim for false imprisonment and malicious prosecution are actions in tort. False imprisonment and malicious prosecution are two independent causes of action which must be proved separately. It is thus possible for a plaintiff to succeed in one of them and fail in the other.

20. In this case, it is alleged in the plaint that the plaintiff was arrested on 11th May 2005 and was detained in police custody till 19th May

2005 when he was arraigned in court. If the court were to accept these allegations as facts, it would mean that the period in which the plaintiff was unlawfully detained was between 11th and 19th May 2005 since if he was detained thereafter, it was with the sanction of the court. The plaintiff's cause of action would then have accrued between 11th and 19th May 2005.

21. Regarding the claim for malicious prosecution, the cause of action arose when the criminal trial was concluded. The record shows that the trial came to a close on 28th March 2006 when the plaintiff was acquitted. The plaintiff's cause of action for the claim of malicious prosecution therefore accrued on 28th March 2006.

22. The question that now begs determination is whether the claims for false imprisonment and malicious prosecution were instituted against the 1st defendant within the time prescribed under *Section 3 (1)* of the Act. The Act is silent on the formula to be followed in the computation of the time limited under *Section 3 (1)* and in the circumstances, in computing the time within which the plaintiff ought to have commenced proceedings against the 1st defendant, the court must fall back on the provisions of *Section 57* of the *Interpretation and General Provisions Act Chapter 2* of the *Laws of Kenya* which provides a general criteria to be followed in the computation of time where no express provision for that purpose is given in a statute. *Section 57* states that:

“In computing time for the purposes of a written law, unless the contrary intention appears—

a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to CAP. 2 Interpretation and General Provisions [Rev. 2014] [Issue 1] I18-24 as excluded days), the period shall include the next following day, not being an excluded day;

c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

23. In view of the foregoing and considering that the plaintiff filed his suit on 4th October 2007, it is quite clear that by the time the instant suit was filed, the time limited for instituting suit against the 1st defendant for recovery of damages for unlawful imprisonment and malicious prosecution had long expired. The suit was thus filed out of time and there is no evidence to prove that leave of the court was sought and obtained before the suit was instituted. There is therefore no doubt that the suit filed against the Hon. Attorney General is bad in law as by the time it was filed, it was statute barred. Having made this finding, the order that would have been most appropriate for me to make if the suit had not proceeded for trial is an order striking out the suit against the 1st defendant with costs but given that the suit has proceeded for trial on its merits and I am satisfied that besides the suit being statute barred, no case had been established against the 1st defendant, the only order left for me to make which I hereby do is that the plaintiff's suit against the 1st defendant is dismissed with costs.

24. Having resolved the 1st issue in the manner stated above, I now turn to consider whether the plaintiff has proved his case against the 2nd defendant to the standard required by the law which is proof on a balance of probabilities.

25. With regard to the claim for false imprisonment, the starting point is a definition of the term. False imprisonment simply means unlawful detention. It will be established if the claimant proves that he was unlawfully restrained by the defendant against his will and without any justification. The facts disclosed in this case in the evidence on record leave no doubt that the plaintiff has not made out a case of false imprisonment against the 2nd defendant. I say so because even on the plaintiff's admission, he was arrested by police officers and detained at Karuri Police Station for six days. He did not claim that the 2nd defendant participated in his arrest and alleged unlawful detention. It is obvious from his evidence that the target of his action was the arresting officers from Karuri Police Station who were represented in the suit by the 1st defendant. He did not adduce any evidence to link the 2nd defendant with his alleged unlawful detention. I am thus satisfied that the plaintiff has failed to prove his claim of false imprisonment against the 2nd defendant.

26. Turning now to the claim for malicious prosecution, this is an action which is meant to provide a remedy to a claimant for baseless and malicious litigation which may be either civil or criminal in nature. I wholly agree with the definition ascribed to the term “malicious prosecution” by *Mativo J* in *Stephen Gachau Githaiga & Another V Attorney General, [2015] eKLR*, where he stated as follows:

“Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion may be held accountable for any damage that results.”

27. It is now well settled that for a plaintiff to succeed in a claim for malicious prosecution, he must prove the following four ingredients of the tort. These are:

- i. That the prosecution was instituted by the defendant or by someone for whose acts he is responsible;
- ii. That the prosecution terminated in the plaintiff's favour;

iii. That the prosecution was instituted without reasonable and probable cause; and

iv. That the prosecution was actuated by malice.

See: Murunga V Attorney General, [1979] KLR 138 and Mbowa V East Mengo District Administration, [1972] EA 352.

28. The law is that the plaintiff must prove all the above four ingredients together. Proof of one or some of the ingredients will not suffice.

29. In this case, the plaintiff claimed in his evidence that the 2nd defendant caused his arrest and prosecution by falsely alleging that he was his employee. The 2nd defendant denied this allegation and asserted that he only made a general complaint regarding the theft of computers and other property in his business premises on the night of 10th May 2005. He denied that he ever named the plaintiff as his suspect. He maintained that it was the police who after their investigations made an independent decision to arrest and commence criminal proceedings against the plaintiff. It was his case that he made his complaint to the police in good faith and without any malice.

30. It is a cardinal principle of the law of evidence that he who alleges must prove. This principle has been codified in *Sections 107 to 109 of the Evidence Act*. It was incumbent upon the plaintiff to prove all the four elements of the tort of malicious prosecution against the 2nd defendant and not for the 2nd defendant to disprove them. To succeed in his case, the plaintiff was required to prove by credible evidence that the 2nd defendant maliciously made a complaint against him to the police without any reasonable and probable cause and that besides making the complaint, the 2nd defendant was instrumental in the making of the decision made by the police to commence and continue his criminal prosecution. The plaintiff did not adduce any such evidence.

31. The facts in this case which are largely not disputed show that the plaintiff used to offer security services to the building in which the 2nd defendant's business premises were located and that he was on duty on the night the theft occurred.

32. The 2nd defendant as a law abiding citizen had both a civic and statutory duty to report the theft to the police. The plaintiff did not avail any evidence either in the form of an extract of the occurrence book of Karuri Police Station to show that the 2nd defendant did not make a general complaint of theft in his business premises but that he falsely reported that the plaintiff was responsible for the theft; that the complaint was made out of spite or ill will. In the absence of such evidence, I am satisfied that the 2nd defendant's complaint to the police was made in good faith and that it was based on reasonable and probable cause.

33. It is not disputed that the criminal proceedings terminated in favour of the plaintiff as he was acquitted under *Section 210 of the Criminal Procedure Code* for lack of sufficient evidence. However, the acquittal of a criminal charge by itself does not mean that the prosecution had been commenced maliciously. I am in full agreement with the holding in *James Karuga Kiiru V Joseph Mwamburi & 3 Others Nairobi, CA 171 Of 2000* where the court opined that to prosecute a person is not *prima facie* tortious but to do so dishonestly or unreasonably is and the burden of proving that the prosecution acted dishonestly or unreasonably rests on the person who was prosecuted. Therefore, besides proving that he was acquitted of the charges, the plaintiff was required to go further and prove that the 2nd defendant knowingly and maliciously influenced the police to make a decision to commence criminal proceedings against him without any factual basis. The plaintiff totally failed to avail such evidence.

34. I believe I have said enough to demonstrate that it is my finding that the plaintiff has failed to prove his case against the 2nd defendant on a balance of probabilities. As I had earlier dismissed the suit against the 1st defendant, this determination means that I have come to the conclusion that the plaintiff is not entitled to any of the reliefs sought in the plaint filed on 4th October 2007. It is thus my finding that the entire suit lacks merit and it is hereby dismissed with costs to both defendants.

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. Wepo for Mr. Mutua for the 2nd Defendant

Mr. Goa for Mr. Wamalwa for the Plaintiff

No Appearance for the 1st Defendant

Mr. Salach: Court Assistant