



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 289 OF 2011

WILLIS OTIENO OCHAR PLAINTIFF

VERSUS

R.T. EAST AFRICA LTDDEFENDANT

JUDGMENT

The plaintiff is a former employee of the defendant. He was employed as an accountant. On or about 24th March, 2007 while in the course of his employment, he was accused of forging some pay sheets belonging to the defendants purporting them to be genuine. Following that allegation, he was arrested, detained and subsequently prosecuted at Makadara Law Courts vide Criminal case No. 1616 of 2007. On 12th April, 2010 he was acquitted.

By dint of a plaint dated and filed on 26th July, 2011 the plaintiff sued the defendant for damages for malicious prosecution contending that, the loss of his freedom and subsequent institution of the prosecution was without reasonable and probable cause, instituted with malice and therefore constituted false imprisonment and malicious prosecution for which he claimed damages.

During the trial process, his services with the defendant were terminated allegedly without any notice. The defendant in the statement of defence dated 6th and filed on 7th September, 2011 denied the plaintiff's claim and pleaded that, whereas it was true the defendant reported the matter to police it is the police who commenced their own investigations and that the act of arresting, confirming and prosecuting the plaintiff was done by the police upon conducting investigations, of which the defendant did not have any hand.

Whereas it is admitted that the plaintiff was acquitted, that alone is not sufficient ground for malicious prosecution. In any case, the defendant pleaded, in reporting the matter to the police it was only driven by the honest belief that the plaintiff was guilty of the offence and that it was not in any way motivated by spite, ill will or improper motive.

The termination of the plaintiff's employment was said to be lawful as the act of forging the pay sheets amounted to gross misconduct and therefore the defendant was justified to dismiss him summarily under Section 44 (4) (g) of the Employment Act, 2007. Only the plaintiff gave evidence in support of his pleadings. The defence did not offer any evidence in support of their defence. Both parties have filed their submissions.

I observe at this point that submissions are not evidence. However, having participated in the trial through counsel, the defence was right in filing submissions after the conclusion of the case. On the other hand, the plaintiff is supposed to prove his case in line with his pleadings to justify judgment in his favour.

Several authorities have been cited to aid the court in arriving at a just conclusion of this matter. A tort of malicious prosecution has to meet a certain threshold to justify a judgment in favour of a litigant. – see **Susan Mutheu Muia vs. Joseph Makau Mutua** (2018) e KLR, **Mbowe vs. East Menjo District Administration**. The plaintiff was charged with four criminal offences in the lower court. These were

- i) forgery contrary to section 350 of the Penal Code
- ii) making a document without authority contrary to section 357 (a) of the Penal Code
- iii) Altering a document with intent to defraud contrary to Section 357(b) of the Penal Code and stealing contrary to Section 281 of the Penal Code.

I have looked at the charge sheet and the complainant is the defendant herein. The witnesses listed for the prosecution were all employees of the defendant. After a period of four years coupled with several adjournments at the instance of the prosecution for reasons that the police file was not available, the prosecution asked yet another adjournment which was declined by the trial court.

The prosecutor then moved to withdraw the charge against the plaintiff under Section 87 (a) of the Criminal Procedure Code. This was opposed by the plaintiffs' counsel and the court having noted that the prosecution had been given the last adjournment, rejected that move.

The court in a brief ruling noted that, no evidence had been adduced against the plaintiff and proceeded to dismiss the case under Section 210 of the Criminal Procedure Code, resulting in the acquittal of the plaintiff. For the plaintiff to succeed he was bound to show that the prosecution was instigated by the defendant or by someone for whose acts it is responsible, that the prosecution was instituted without reasonable or probable cause, that the prosecution was actuated by malice and that it was terminated in the plaintiff's favour.

Before the plaintiff was arrested he was summoned by the Finance Manager and confronted with the allegations of forgery of some documents. That was the first time this was alleged against him. It is the Finance Manager one Mr. Ajit Rane, who called the police to arrest the plaintiff. He was then arrested and did not have time to see the documents the Finance Manager was talking about. It is clear at this point that, he was not given an opportunity to be heard before he was arrested. He was detained for two days in police custody and arraigned before the court charged with the above offences. There were no prosecution witnesses who attended the court for over 3 years that this case remained in court. The proceeding he has produced in evidence confirm this position. He added that the complainant never appeared in court. It is on that basis that he said his prosecution was malicious.

Among his duties were the preparation of financial statements, posting bank reconciliation and any other duties assigned to him from time to time, which included preparing payroll sheets for staff. It was his evidence that payroll sheets were prepared monthly for permanent staff but for casual workers it was done by someone else.

The accusations levelled against him were in relation to weekly payments which were not his responsibility. He testified that he never handled cash in the administration of the payroll because payments were transferred directly to the bank. Although it is the police who conducted the investigations leading to the charging of the plaintiff, this would not have happened had the Finance Manager not reported the matter to the police. In the case of **Zablon Mwaluma Kadori vs National Cereals & Produce Board (2005) e KLR Maraga J** (as he then was) said,

“It is enough if it can be shown that it (the defendant) was actively instrumental in putting the law in force.The defendant cannot therefore be heard to say it did not institute the prosecution of the plaintiff. I find that it did.”

The plaintiff has testified that there was no reason for him to be reported to the police. That brings me to the consideration of whether or not there was reasonable and probable cause to believe that he was guilty of the allegations. The evidence clearly does not support this – see **Kagane Vs. Attorney General & Another, 1969 EA 643.**

The defendant had several witnesses listed in the charge sheet filed in the lower court. Those witnesses did not attend court for over 3 years the case remained in court. In present proceedings the defendant filed a defence but failed to call evidence in support thereof.

They were aware of the proceedings and the attempt to secure an adjournment was correctly opposed by counsel for the plaintiff. The totality of the evidence confirms that it is the defendant's manager who made the allegations leading to the report and arrest of the plaintiff by the police. There were no documents produced in the criminal trial or in this court to show that the plaintiff was involved in any forgery, altering or making a false document leave alone theft of any money belonging to the defendant. In fact other than the statement of defence filed herein, no documents were provided. The list reads “NIL”.

There was therefore no reasonable or probable cause that called for the prosecution of the plaintiff. Malice can be inferred and the conduct of the defendant in this case including his dismissal points to malice against the plaintiff. The ruling of the lower court in the criminal trial confirmed that the prosecution ended in favour of the plaintiff. I am persuaded that the plaintiff has proved his case against the defendant to the required standards.

On quantum, I consider that the plaintiff was arrested without any reasonable or probable cause, was detained for two days at the instance of the defendant, and it took over 3 years to have the case determined in his favour. I agree, with respect, that a sum of Kshs. 1 Million is adequate compensation for the malicious prosecution that he endured. There was no claim for damages for his dismissal and I make no award in that respect. Accordingly, there shall be judgment for the plaintiff in the sum of Kshs. 1 Million general damages plus costs and interest at court rates.

Dated, signed and delivered at Nairobi this 30th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE