



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 3 OF 2014

DADHO GADDAE GODHANA.....PLAINTIFF

-VERSUS-

PRINCIPAL SECRETARY-MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST DEFENDANT

SERGEANT ANDOLO MUNGA.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 14th January, 2014 seeking judgment as hereunder:

- a) Special damages in the sum of Kshs. 1,091,471/= as particularized in paragraph 16 of the plaint.*
- b) General damages for malicious prosecution.*
- c) General damages for defamation.*
- d) Compensation for exemplary and aggravated damages against the defendants jointly and severally.*
- e) Costs of the suit together with interest thereon at court rates.*
- f) Any other and further reliefs that the court may deem fit to grant.*

2. The defendants thereafter filed a statement of defence on 26th March, 2014, to which the plaintiff responded with a reply to defence.

3. The background of the suit briefly is that sometime in August, 2012 clashes ensued in Garsen Constituency in Tana River, resulting in the deaths of a number of people. The plaintiff was soon thereafter arrested in relation thereto and charged with the offence of incitement to violence contrary to Section 96 (a) of the Penal Code.

4. Upon close of the prosecution's case, the plaintiff was acquitted under Section 210 of the Criminal Procedure Code.

5. The plaintiff subsequently filed a suit against the defendants, seeking for damages for both malicious prosecution and defamation.

6. In their defence, the defendants claimed that the plaintiff was arrested and charged on the basis of reasonable suspicion,

adding that the publications made cannot be associated with them hence the plaintiff ought to pursue a defamation claim with the relevant parties instead.

7. The plaintiff testified as the sole witness whereas the defendants closed their case without calling any witnesses.

8. In his evidence before this court, the plaintiff adopted his witness statement as evidence and in turn reiterated that his prosecution was malicious in nature since prior to his arrest, no statement was recorded by himself or his witnesses.

9. The plaintiff further stated that the timing of his arrest was suspicious since it came just as he was approaching the end of his term as a Member of Parliament (MP).

10. It was also the plaintiff's testimony that the complaint was filed by Yusuf Haji, then a State Minister and previously the MP of a constituency engaged in a long-standing dispute with that of the plaintiff.

11. Upon the close of his case, the plaintiff and the defendants filed written submissions pursuant to an order issued by this court on 27th March, 2019.

12. I have considered the rival submissions plus the evidence presented by the plaintiff and authorities relied upon by the parties and I think the following issues arose for the determination of this court:

i. Whether the plaintiff has made a case for malicious prosecution against the defendants;

ii. Whether the plaintiff is entitled to the reliefs sought; and

iii. Who should be made to bear the costs of the suit.

13. The term 'malicious prosecution' was well defined by the court in ***Stephen Gachau Githaiga & another v Attorney General [2015] eKLR*** as follows:

“Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without Probable Cause and for a purpose other than that of bringing the alleged offender to justice...Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution.”

14. Further to the above, the elements to be established for a claim of malicious prosecution succeed were articulated in ***Kagane v Attorney General (1969) EA 643*** as cited by the court in ***Kenya Power & Lighting Co Ltd v Maurice Otieno Odeyo & 2 others [2017] eKLR*** as hereunder:

“a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;

b) That the prosecution terminated in the plaintiff's favour;

c) That the prosecution was instituted without reasonable and probable cause; and

d) That the prosecution was actuated by malice.”

15. It is incumbent upon the plaintiff to establish all as opposed to any of the above elements for his claim to sail through. As concerns the *first* element, the plaintiff did submit that his arrest and subsequent arraignment in court were instigated by a complaint made by the then acting Minister for Internal Security, Hon. Yusuf Haji; and that the defendants admitted in their filed defence to having arrested the said plaintiff on the basis of a cognizable offence.

16. It is also the plaintiff's submission that the 2nd defendant in specific conducted the investigations on the ongoing clashes and went ahead to have the plaintiff arrested, charged and prosecuted.

17. On their part, the defendants contend that the police exercised their lawful and statutory mandate of arresting,

investigating and prosecuting the plaintiff for the offence of incitement, adding that their only mandate was to bring the evidence before the criminal court.

18. I am alive to the mandate of the police in investigating, arresting and charging persons accused of committing offences. I am also well aware that the police represent the Republic, otherwise known as the State. It is worth noting that the 2nd defendant is sued as a member of the police force while the 3rd defendant is sued as a representative of the Government. However, the plaintiff has not adduced any evidence to demonstrate that the 1st defendant played any role in orchestrating his prosecution.

19. It therefore follows that the plaintiff has established the first element solely as against the 2nd and 3rd defendants, having shown that the arrest and prosecution were instituted by police who were in essence acting on their behalf.

20. The *second* element points towards termination of the criminal proceedings in favour of the plaintiff. I have perused a copy of the ruling produced by the plaintiff in court as **Exhibit 1**. In the same, the trial magistrate held that the prosecution had not proved a prima facie case against the plaintiff and having determined so, went ahead to acquit the plaintiff under the provisions of Section 210 of the Criminal Procedure Code. There is little debate that this element has been proved.

21. Under the ambit of the *third* element, the plaintiff would be required to establish that his prosecution was undertaken without reasonable or probable cause.

22. It is the plaintiff's submission that the criminal charges preferred against him were proffered following his attendance of a talk show held on 30th August, 2012 with the aim of giving his views on the violence that erupted in the Tana River area.

23. The plaintiff further submits that the statements made by himself in the course of his interview with the media were found to solely constitute a complaint and not incitement, adding that the investigating officer did not carry out any investigations prior to lodging his arrest or produce any statements indicating the plaintiff's guilt.

24. The defendants in reply maintained that the police who arrested and preferred charges against the plaintiff were only discharging their official duties and thus, there was no unreasonableness in their actions.

25. Having taken the above arguments into account, I deem it prudent to point out that from the onset, the burden of proving the absence of probable cause lies with the plaintiff. This was the stand taken in ***Stephen Gachau Githaiga*** (supra) borrowing from the ***Kagane*** case (supra) alongside ***Hicks v Fawkner (1878) 8Q BD*** thus:

“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...”

26. It therefore follows that relevant material and facts ought to be clearly set out prior to the institution of a criminal case and which material and facts would lead any prudent person; including the police and subsequently, the prosecution; to the belief that the person charged is guilty of the offence.

27. I have considered the abovementioned arguments made by the plaintiff, as well as his submission that no statement was recorded by him prior to his arrest, while the statement by Hon. Yusuf Haji was only recorded after the plaintiff had been charged.

28. Moreover, I have perused the ruling delivered the court trying the criminal case. Therein, the magistrate noted that the first statements made by the plaintiff in the interview were largely statements of complaint, hence the investigator ought to have carried out further investigations to determine their truth or lack thereof, but this was not done.

29. I must reiterate that the defendants did not call any evidence to rebut the allegations presented by the plaintiff, neither did they tender any evidence to show that thorough investigations were carried out prior to the arrest and prosecution of the plaintiff.

30. Given that the trial magistrate noted the above and in view of the fact that the burden of proof in criminal cases supersedes that in civil claims, I am satisfied that there was absence of probable or reasonable cause in prosecuting the plaintiff.

31. However, I must reiterate that the plaintiff has not established

the link between the 1st defendant and his claim.

32. In close reference to the above is the element of malice, which equally ought to be established in a claim of this nature. The plaintiff offered the submission that despite the absence of evidence adverse to the plaintiff, the 2nd defendant still went ahead to institute criminal proceedings against the said plaintiff.

33. The plaintiff also raised the argument that in the absence of probable cause, it can be discerned that the prosecution was actuated by malice, citing the analysis in *Kagane* (supra).

34. The defendants stood their ground that the plaintiff has failed to demonstrate any ill-will, spite or malice against them and instead maintained that the police officers were merely performing their lawful duties.

35. Honourable Mr. Justice Mativo in *Stephen Gachau Githaiga* (supra) correctly articulated that an acquittal in a criminal case does not automatically connote malice; he went further to reason that malice can be determined from the circumstances of the case. The judge ultimately held that in the absence of evidence as to the facts relied upon in the prosecution thereof, there was presence of malice.

36. That said, I deem it relevant to restate my finding that in the absence of evidence by the 2nd and 3rd defendants to indicate probable cause in prosecuting the plaintiff, I am entitled to infer that the plaintiff's prosecution was actuated by ill-will, hence, malice.

37. Being satisfied that a case for malicious prosecution has been made by the plaintiff as against the 2nd and 3rd defendants, I now wish to address the limb on whether or not the plaintiff is entitled to the reliefs sought.

38. On quantum, the plaintiff is seeking the sum of Kshs.91,471.00/= as special damages for air travel expenses incurred in the course of the criminal proceedings.

39. On their part, the defendants argue that the plaintiff did not call any evidence or produce receipts as proof of entitlement to the special damages.

40. I have perused the copies of the receipts availed to me and I am satisfied that all the air travel costs incurred have both been pleaded and proved, save for the Kenya Airways receipt for the sum of Kshs.8,600/= which was not proved. Similarly, there is no proof of the legal expenses amounting to Kshs. 1,000,000/= incurred by the plaintiff as pleaded in his plaint.

41. In the premises, I will award **Kshs.82,871/=** under this head. The plaintiff also asked for general damages for malicious prosecution. Under this head, the plaintiff sought for Kshs.20,000,000/= but did not cite any authorities in support of the same. The defendants equally did not offer any comparable awards under this head.

42. In determining general damages I will take into consideration the following factors as stated in *Kenya Power & Lighting Co. Ltd v Michael Murewe & another [2016] eKLR*:

a) Each case should depend on its own facts.

b) An award should not be excessive.

c) *Comparable damages should attract compare awards.*

d) *Inflations should be taken into account*

43. Having noted the above, I make reference to the authorities hereunder:

i) In *Samson John Nderitu v The Attorney General [2010] eKLR*, the court awarded the sum of Kshs.1,500,000/= as general damages for a claim of malicious prosecution.

ii) The court in *George Ngige Njoroge v Attorney General [2018] eKLR* made an award for Kshs.1,000,000/= under this head.

iii) The Honourable Lady Justice Aburili awarded the sum of Kshs.2,000,000/= as general damages for malicious prosecution in *Daniel Njuguna Muchiri v Barclays Bank Of Kenya Ltd & another [2016] eKLR* and *Joseph Wamoto Karani v C. Dorman Limited & another [2018] eKLR* respectively.

44. Upon considering the comparable awards as cited together with the circumstances of this case and the inflationary trends I find the sum of **Kshs.2,000,000/=** to be reasonable under this head.

45. As regards aggravated damages the plaintiff in his submissions contends that in addition to the numerous court attendances at his criminal trial, he was required to attend a Commission of Inquiry set up to investigate the Tana River killings, thereby causing him financial strain as well as mental anguish and embarrassment. In the circumstances, the plaintiff is proposing Kshs.3,000,000/= as aggravated damages.

46. The defendants in opposition thereto have submitted that the plaintiff is not entitled to aggravated damages under this head given that the police acted with good intention and had no ulterior motives. The defendant further submitted that should this court be inclined to grant the same, then an award of Kshs.300,000/= will suffice.

47. In determining an award on this head, I am persuaded by the analyses presented in the case of *Geoffrey Githiri Kamau v Attorney General [2015] eKLR* and that of *George Ngige Njoroge vs= Attorney General* (supra) and more specifically, the factors to be taken into account, as follows:

a) *The defendants' motives, conduct and manner of committing the tort.*

b) *Whether the defendants acted with spite or in a high-handed, insulting or aggressive manner.*

c) *The defendants' conduct up to the conclusion of the hearing.*

48. In my humble view, there is nothing to indicate that the 2nd and 3rd defendants have acted in an aggressive or insulting manner in the course of the proceedings. In fact, they did not even call any witnesses to testify on their behalf. That notwithstanding, I am convinced that there was no reasonable basis for instituting charges against the plaintiff since no proper investigations had been conducted to begin with.

49. Consequently and given the plaintiff's standing in society, the nature of the crime/violence he was associated with alongside its impact on the public. I am satisfied that this is a good case for aggravated damages to be awarded. In that case, I find the sum of **Kshs.500,000/=** to be reasonable.

50. As regards General damages for defamation the plaintiff argues that his image and reputation have been tarnished as a result of the criminal proceedings which were widely reported in the daily local newspapers, therefore he is entitled to the claim. On their part, the defendants contend that the plaintiff has not established the necessary ingredients to establish the tort of defamation against them.

51. I have examined the publications made with regard to the plaintiff in the Daily Nation newspaper in the list and bundle of documents filed by the plaintiff. There is no evidence to prove that either of the defendants participated in the making of such publications but appear were done solely by the respective media houses who are not parties to these proceedings.

52. In the premises, I am unable to grant the plaintiff damages for **defamation**.

53. It is clear from the evidence and submissions that the plaintiff has not proved his case against the 1st defendant. Consequently, the suit against the 1st defendant is dismissed with costs.

54. However, I enter judgment for the plaintiff as against the 2nd and 3rd defendants in the following manner:

a) Special damages Kshs. 82,871/=

b) General damages for

malicious prosecution Kshs.2,000,000/=

c) Aggravated damages Kshs. 500,000/=

Total Kshs.2,582,871/=

d) The plaintiff shall also have the costs of the suit against the 2nd and 3rd defendants.

Dated, Signed and Delivered at Nairobi this 31st day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants