



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 331 OF 2013**

**SCHOUTEN CORNELIUS MARIA.....PLAINTIFF**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE INSPECTOR-GENERAL OF POLICE.....2<sup>ND</sup> DEFENDANT**

**CEDAR RUTAKYAMIRA MORGAN.....3<sup>RD</sup> DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff herein brought forth a suit against the Defendants, seeking general and punitive damages on the basis of a claim for malicious prosecution. The Plaintiff also prayed for costs of the suit and interest thereon.
2. By way of the plaint dated 12<sup>th</sup> August, 2013 the Plaintiff pleaded that sometime on or about 4<sup>th</sup> March, 2010, officers of the 2<sup>nd</sup> Defendant acting at the behest of the 3<sup>rd</sup> Defendant falsely arrested and detained both the Plaintiff and his wife at the Kiserian Police Station.
3. It is further pleaded that the Plaintiff was subsequently charged with five (5) counts of improper use of a licensed telecommunication system under Section 29(a) of the Communications Act and refusing to permit the taking of his fingerprints contrary to Section 21(3) as read with Section 63 of the Police Act. More particularly, the plaintiff was alleged to have sent obscene and threatening messages to the 3<sup>rd</sup> defendant via mobile telecommunication on the 9<sup>th</sup> of February, 2010. The plaintiff was eventually acquitted of the charges on 14<sup>th</sup> August, 2012 under Section 215 of the Criminal Procedure Code. The particulars of malice were set out in the plaint.
4. The defendants entered appearance and filed their respective statements of defence. In their statement of defence dated 27<sup>th</sup> August, 2013 the 1<sup>st</sup> and 2<sup>nd</sup> defendants largely denied that the prosecution of the plaintiff was of a malicious nature, claiming that the same was instead done in exercise of their statutory duty.
5. On her part, the 3<sup>rd</sup> defendant vide her statement of defence dated 24<sup>th</sup> September, 2013 stated that the complaint made by herself to the police was in fact genuine and truthful, similarly denying the particulars of malice pleaded in the plaint.
6. At the hearing, the plaintiff (PW1) gave evidence that on the material day, he visited Kiserian Police Station following his wife's arrest and that on arriving there, his wife was released and he was arrested in her place on the basis that he had sent threatening messages to the 3<sup>rd</sup> defendant, reading inter alia, that:  
  
***“Yes Kaburu we are giving you 2 months’ notice to go back to your country, you thief, you have been stealing our contracts here in Kenya...if you do not go back to your country we are going to kidnap your son, rape your wife and castrate you and cut your neck...maybe we get you from your house soon.”***
7. The plaintiff denied threatening the 3<sup>rd</sup> defendant, revealing that he and his wife had known her for a number of years and that their children had attended the same school. He also stated that he sought the help of the 3<sup>rd</sup> defendant in respect to threatening messages he had received on his mobile phone since the said defendant owned a Security Company by the name ‘B.M. Security.’
8. On cross examination, PW1 testified that he had received a total of six (6) threatening text messages and which incident he reported to the police in addition to showing the said messages to his wife. He also clarified that he and his wife opted to seek assistance from the 3<sup>rd</sup> defendant, who advised the plaintiff to forward the text messages to her. The witness went ahead to state that subsequently, the 3<sup>rd</sup> defendant remained unreachable up until such time as his wife contacted him to visit the police station owing to her arrest, upon which he was accused of sending threatening messages to the 3<sup>rd</sup> defendant.

9. It was also PW1's testimony that when the police officers requested for his fingerprints, he indicated that he wished to seek legal advice first, further stating that he was then arrested, arraigned in court and charged with the offences set out hereinabove.
10. PW1 also clarified that he had contacted the 3<sup>rd</sup> Defendant using his personal mobile and that previously, they had spoken on a regular basis and hence she had his contacts. He further stated that during his arrest and in the course of the investigations, he cooperated fully with the investigating police.
11. During re-examination, the Plaintiff maintained that he had reported the incident of the threat messages to the police so they could investigate the same and that in any case, the wording of the threats could not have applied to the 3<sup>rd</sup> defendant since she is a woman.
12. PW2 who is the Plaintiff's wife, Grace Achieng' Schouten, essentially echoed the Plaintiff's account of events save to add that her unlawful arrest caused her great anguish and distress. On cross examination, the witness stated that she was only released when her husband arrived at Kiserian Police Station. The said witness also confirmed that she is not a party to the suit and was only participating as a witness. This marked the close of the plaintiff's case.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not call any witnesses. However, the 3<sup>rd</sup> Defendant (DW1) gave evidence in support of her case. Her testimony was that on the material day, she received a call followed by threatening messages from a number she did not recognize and that the messages were to the effect that somebody would come and kill her and her family, adding that she did not have the plaintiff's contacts in her phone book. She then stated that she reported the matter to the police, who then carried out investigations and later established that the text messages were generated from the plaintiff's phone.
14. The witness also admitted to sharing a friendship with the plaintiff's wife at all material times, adding that she is not the one who charged or arrested the plaintiff but only reported the matter to the police officers concerned.
15. During cross examination, DW1 admitted to knowing the Plaintiff and having met him a number of times though she indicated that the two were not close but that their families were close friends. The witness also admitted to owning the security firm called 'B.M. Security.' She further testified that when she received a call from the phone number in question, she did not recognize the voice on the other end.
16. Upon re-examination, it was her evidence that inter alia, there was no indication that the caller was seeking her help and that she was disappointed to learn that the messages had originated from the plaintiff's phone. The 3<sup>rd</sup> defendant then closed her case.
17. Parties filed written submissions which were then highlighted before this court. In his submission, the Plaintiff contends inter alia that the criminal proceedings were instituted by the 2<sup>nd</sup> Defendant on behalf of the 3<sup>rd</sup> defendant and that he was held in remand at Industrial Area for three (3) days prior to being released on bail.
18. It is also the Plaintiff's submission that the police did not act impartially given that they were quick to investigate the 3<sup>rd</sup> defendant's claim whereas his prior reports made in respect to the same threatening messages were never investigated. Furthermore, the Plaintiff argues that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not tender any evidence to indicate how the investigations were conducted and the manner in which the decision to arrest, charge and prosecute him was arrived at. Various authorities were quoted.
19. In respect to damages, the Plaintiff submits that an award of Kshs.5,000,000/= as general damages and Kshs.5,000,000/= as punitive damages would suffice respectively, taking into account his status as a non-citizen, the period spent in custody and the impact of the proceedings on his business and reputation.
20. *Mr. Taliti* advocate for the Plaintiff adopted the filed submissions while reiterating that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not call any witnesses to rebut the evidence tendered by the plaintiff as well as the fact that the police did not sufficiently and fully investigate the source of the threatening text messages. Counsel also referred this court to the case of ***Chrispine Otieno Caleb v Attorney General [2014] eKLR*** wherein the principles encompassing a claim for malicious prosecution were articulated.
21. In their submissions in reply, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants while citing various authorities, admitted that the prosecution was instituted by them as against the Plaintiff and that the same terminated in favour of the said Plaintiff. Nonetheless, there was a denial that the said arrest and prosecution were done in the absence of reasonable and probable cause for the reason that a proper and valid complaint was lodged. The Defendants further denied malice on their part, adding that the Plaintiff has not shown that his arrest and prosecution were driven by an improper and indirect motive. Consequently, it is the Defendants' contention that the Plaintiff has not proved his case against them and as such, he is not entitled to the reliefs sought.
22. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants emphatically argued that under Section 24 of the National Police Service Act, among the duties of the police is the duty to investigate complaints. She further argued that the police did investigate and determine the source of the threatening messages, thus there was reasonable and probable cause for arresting and prosecuting the Plaintiff.
23. On her part, the 3<sup>rd</sup> Defendant has by and large submitted that the Plaintiff has failed to prove the claim against her since she neither arrested, charged nor prosecuted him; adding that she had every right to lodge the complaint as a lawful citizen and that in no way did she identify the Plaintiff to the police. The said Defendant further supported her counterparts' submission that in any event, the plaintiff has not shown that his arrest and prosecution were carried out without reasonable and probable cause. She too made reference to judicial precedents that have addressed the subject of malicious prosecution. The 3<sup>rd</sup> defendant's submissions were similarly adopted by her counsel on record, *Miss Onyango*, who by and large restated the contents therein.
24. It is well noted that the Plaintiff filed supplementary submissions in reply to the 3<sup>rd</sup> defendant's submissions specifically, arguing inter

alia that though a citizen is entitled to report a matter to the police, this ought to be done in good faith.

25. I have cautiously considered the witness' testimonies and documentary evidence adduced before this court. I have equally considered the rival submissions alongside the vast array of authorities cited. Having done so, I find that the issues requiring my analysis and rendition are two-fold in nature:

- (i) *Whether the Plaintiff has proved a case for malicious prosecution against the defendants herein; and*
- (ii) *Whether the Plaintiff is entitled to the reliefs being sought.*

26. As concerns the first limb, it is correct to state that the law encompassing malicious prosecution is well established. Essentially, the tortious claim for malicious prosecution, as was adequately explained in the East African Court of Appeal case of ***Mbowa v East Mengo District Administration [1972] EA 352***, applies in instances where a party is convinced that his or her prosecution was accomplished without reason or basis. Further to this, the court in ***Stephen Gachau Githaiga & another v Attorney General [2015] eKLR*** came up with the following definition:

***“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.”***

27. The courts have gone further to set out certain principles that ought to be established for a malicious prosecution claim to stand. These were discussed and articulated in ***Kagane v Attorney General (1969) EA 643*** thus:

- 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.***

28. It is therefore incumbent upon the Plaintiff to prove that each of the above elements apply to his circumstances for his claim to succeed.

29. Turning to the first element, it is noteworthy that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not challenge the argument that their agents were responsible for instigating the Plaintiff's arrest and prosecution.

30. It is a known fact that the arrest and prosecution of a person lies purely within the mandate of the police authorities. This was the position taken by the court in ***Gitau v Attorney General [1990] KLR 13*** as follows:

***“To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. “Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station.”***

31. The above position was reinforced in ***Catherine Wanjiku Kariuki v Attorney General & Another [2011] eKLR*** cited by the 1<sup>st</sup> defendant as hereunder:

***“It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground, to have been committed, or being committed, or about to be committed. Once that civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion whether any crime has been committed, is being committed or is about to be committed, and whether to charge anyone with such crime. The further role of any person making the initial report or complaint to the police can only be that of a witness.”***

32. Going by the circumstances of this case as laid out hereinabove, I have come to the conclusion that the 3<sup>rd</sup> Defendant simply lodged a complaint with the police; whatever action was taken thereafter was undertaken solely by the concerned police officers. In any case, her only involvement thereafter was as a witness. In the premises, I am satisfied the first element has not been established against the 3<sup>rd</sup> defendant.

33. The *second* element is not in dispute and in any event, the Plaintiff has adduced evidence to prove that the criminal proceedings terminated in his favour by way of an acquittal under Section 215 of the Criminal Procedure Code. I therefore see no need to dwell any further on this element.

34. This brings me to the third element. On the one hand, the Plaintiff's case stands on the argument that there was no reasonable or probable cause for his arrest and prosecution; on the other hand, the three (3) defendants are in agreement that there was probable and reasonable cause.

35. The High Court in *Thomas Mutsotso Bisembe v Commissioner of Police & Another [2013] eKLR* sought to define the terms 'reasonable' and 'probable' cause while drawing reference from *Kagane v Attorney General (supra)* as quoted hereinbelow:

***“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...”***

36. Looking at the circumstances of this case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are certain that proper investigations were carried out and it was determined that the text messages originated from the plaintiff's phone. Whereas the Plaintiff admitted to having forwarded the messages to the 3<sup>rd</sup> defendant, he clarified that the same was done as per her request and in an effort to seek her assistance. There is no indication that this position was taken into account by the investigating police as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not call any witnesses to shed light.

37. Further to the above, both the Plaintiff and 3<sup>rd</sup> Defendant admitted to knowing one another through the Plaintiff's wife. However, the 3<sup>rd</sup> Defendant testified that she did not recognize the voice of the person calling her, neither did she have the phone contacts to the number from which the threatening text messages originated and only came to learn that the number belonged to the plaintiff through the police. In my humble view, these constitute circumstances that ought to have been investigated further.

38. The other issue concerns the report alleged to have been made by the Plaintiff in respect to the threatening text messages. The Plaintiff did not tender any documentary evidence to confirm that he had truly made a report to the police.

39. That notwithstanding, the 3<sup>rd</sup> Defendant in her testimony as a witness for the prosecution stated that she assumed the text messages did not apply to her given their content and it was only upon receiving continuous messages that she grew worried. The Plaintiff communicated that the messages had been sent to him by an unknown number and he only forwarded them to the 3<sup>rd</sup> defendant so that she could assist, given that she owned a security company.

40. Moreover, upon perusal of the criminal proceedings, I noted that neither of the investigating officers were called as witnesses to give evidence. Instead, the prosecution called as the second witness Acting Inspector Martin Luther who is a forensic investigator. This witness confirmed that the messages from both the Plaintiff's and 3<sup>rd</sup> Defendant's phones were incoming messages. My understanding of this is that the messages from the Plaintiff's phone were possibly received from a separate contact. There is nothing to indicate that this angle was investigated further so as to ascertain the plaintiff's account of events prior to arresting and prosecuting him.

41. The above circumstances were considered by the criminal court and which court also noted that the police from Kiserian Police Station where the Plaintiff was arrested did not testify.

42. In view of the foregoing, it is thus my humble view that the police did not undertake conclusive investigations so as to determine with certainty the original source of the controversial text messages, given that the Plaintiff claimed the same did not originate from him. As such, I am satisfied there was no probable or reasonable cause for his prosecution by the agents of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

43. The *fourth* element of malice closely relates to the third and hence, I would arrive at a similar finding, save to add that I found it strange that the police officers at Kiserian Police Station chose to first arrest the Plaintiff's wife and use her as bait to secure his arrest. If anything, this is a clear indication of malice on their part and I find as such.

44. However, I must mention that it remains unclear whether the Plaintiff and 3<sup>rd</sup> Defendant had some falling out. In that case and in the absence of any evidence to show that the 3<sup>rd</sup> Defendant acted maliciously in making a complaint with the police, I am satisfied that such complaint was made in good faith.

45. Having settled the first limb, I will now deliberate on the damages to award. I have taken into account the awards made in the following cases cited by the Plaintiff:

a) *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another [2005] eKLR* where the court awarded Kshs. 300,000/= as general damages to the respective Plaintiffs for malicious prosecution.

b) In *Crispus Karanja Njogu v Attorney General & another [2008] eKLR* the plaintiff was awarded general damages of Kshs.800,000/= as well as exemplary damages of Kshs.300,000/=.

c) *Thomas Mutsotso Bisembe v Commissioner of Police & Another (supra)* where an award of Kshs.800,000/= was made for general damages.

d) *Chrispine Otieno Caleb v Attorney General (supra)* where the court awarded **Kshs. 1,000,000/=** and **Kshs. 500,000/=** as general and exemplary damages respectively.

46. I have taken into account the above-cited authorities as well as the plaintiff's proposal of **Kshs. 5,000,000/=** which to my mind is on the higher side. I thus find the sum of **Kshs. 800,000/=** to be a reasonable award on general damages.

47. In respect to exemplary/punitive damages, the Plaintiff equally proposed the sum of **Kshs. 5,000,000/=** under this head. I have taken into account the plaintiff's anguish resulting from his wife's arrest, his consequential arrest and detainment in custody for about (1) week or

so. I have also considered the above awards cited and move to award **Kshs. 200,000/=** under this head.

48. Consequently, it is my rendition that the Plaintiff has on a balance of probabilities proved a case for malicious prosecution against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and award **Kshs. 800,000/=** as general damages and **Kshs.200,000/=** as exemplary/punitive damages against the said Defendants, plus costs and interest thereon set to accrue from the date of this judgment. However, the case against the 3<sup>rd</sup> defendant is hereby dismissed with costs.

**Dated, signed and delivered at NAIROBI this 27<sup>th</sup> day of June, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

..... for the 3<sup>rd</sup> Defendant