



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 20 OF 2016

BETWEEN

ELIJAH ADUL.....PLAINTIFF

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST DEFENDANT

DIRECTOR OF PROSECUTION.....2ND DEFENDANT

JUDGMENT

Background

1. ELIJAH ADUL (*hereinafter referred to as Plaintiff*) was charged with others with offences under the Anti-Corruption and Economic Crimes Act (“ACECA”) in **KISUMU ANTI-CORRUPTION CASE NO. 02 OF 2015** and was acquitted under section 210 of the criminal procedure code in a ruling dated 21st February, 2016.

2. The State appealed the acquittal in **REPUBLIC V ANNE ATIENO ADUL & 8 OTHERS [2017] eKLR** and in a judgement dated and delivered on 6th March 2017, the court dismissed the appeal on the grounds that the case against the respondents was threadbare.

Plaintiff's case

3. Consequently, Plaintiff has sued **THE ETHICS AND ANTI-CORRUPTION COMMISSION** and **DIRECTOR OF PROSECUTION** (*hereinafter referred to as the 1st and 2nd Defendants respectively*) claiming:

- a) **General damages for malicious arrest and prosecution as well as the consequential public humiliation and adverse publicity**
- b) **Exemplary damages for malicious abuse of public power in the arrest and prosecution of the Plaintiff**

c) Costs of and incidental to the suit

4. The defendants filed respective statements of Defence and denied the Plaintiff's claim and urged the court to dismiss it with costs.
5. The Plaintiff testified that the evidence presented in **KISUMU ANTI-CORRUPTION CASE NO. 02 OF 2015**, the subsequent acquittal and dismissal of **REPUBLIC V ANNE ATIENO ADUL & 8 OTHERS (supra)** demonstrated that the charges against him were actuated by malice, spite and ill-will.
6. In cross-examination by Mr. Bii and Miss. Langat for the 1st and 2nd Defendants respectively, the Plaintiff stated that the only amount that he knew of was Kshs. 750,000/- in respect of a tenancy agreement between him and Factor Connect's director Sam Odera and that her spouse ANN ATIENO ADUL who was one of her co-accused persons is the one that could explain what the payments for Kshs. 2,335,000/-; Kshs. 1,400,000/- and Kshs. 1,150,000/- made into their joint account was paid for.
7. ANN ATIENO ADUL, the plaintiff's spouse and the plaintiff in **CIVIL CASE NO. 21 OF 2016** similarly conceded that Factor Connect paid Kshs. 2,335,000/-; Kshs. 1,400,000/- and Kshs. 1,150,000/- into a joint account of herself and the Plaintiff on 06.06.14; 27.06.14 and 09.07.14 respectively which she stated was proceeds of sale of some machinery by her spouse to Sam Odera a director Factor Connect.

Defendants' case

8. ABRAHAM KIPRONO KUTO a Forensic Investigator with the 1st Defendant testified that the Plaintiff and others were charged for the reason that the procurement of services by the County Assembly of Kisumu and the subsequent award thereto to Factor Connect did not comply with the provisions of **section 45(2)(b)** as read with **section 48** of **ACECA**". He further told court that the Plaintiff and his spouse did not offer a reasonable explanation for the deposit by Factor Connect of Kshs. 2,335,000/-; Kshs. 1,400,000/- and Kshs. 1,150,000/- into their joint account. The 2nd Defendant did not tender any evidence.

SUBMISSIONS BY THE PARTIES

9. At the close of both the Plaintiff and Defendants case, the court directed the parties to file written submissions which they dutifully filed.

Plaintiff's submissions

10. The plaintiff holds the view that the acquittal and dismissal of the appeal by the state entitles him to the finding that prosecution was actuated by malice, spite and ill-will. Reliance was placed on **Gitau vs East African Power & Lighting Limited (1996) KLR 365** and **Kasana Produce Store vs Kato (1973) EA 190**.

1st Defendant's submissions

11. The 1st defendant contends that in charging the Plaintiff and others, it acted within its mandate under the provisions of Article 252(1) (a) and (d) of the Constitution and Sections 11 (1)(d), (g) and (j) of **ACECA**. It submitted that it established that **section 45(2)(b)** as read with **section 48** of the **Anti-Corruption and Economics Crimes Act ("ACECA")** had not been complied with in the procurement by the County Assembly of Kisumu and subsequent award of tender to Factor Connect and that coupled with the fact that the Plaintiff could not explain the reason for which Factor Connect paid money to him and his spouse charged the plaintiff and others under the **ACECA** on the basis that there was a reasonable suspicion that an offence had been committed.

12. The 1st defendant contended that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious

prosecution and in support thereof relied on NZOIA SUGAR COMPANY LTD V FUNGUTUTI [1988] eKLR where the Court of Appeal held that “**spite or ill-will must be proved against the prosecutor.**”

13. The 1st Defendant also placed reliance on CIVIL CASE NO 171 OF 2000 JAMES KARUGA KIIRU V JOSEPH MWAMBURI & 2 OTHERS where the court held that:

“the plaintiff is not entitled to the claim because this is merely one of the criminal cases where the accused is discharged or acquitted but cannot succeed in a suit against the Government for damages resulting from the arrest and prosecution because the arrest and prosecution complained of were based on a reasonable suspicion that a criminal offence had been committed and were lawfully carried out by officers entrusted with maintenance of law and order.....”.

14. The 1st Defendant holds the view that for the Plaintiff’s claim to succeed, he must prove that the prosecution was actuated by malice, was dishonest and unreasonable and in support thereof relied on JAMES KARUGA KIIRU V JOSEPH MWAMBURI & 2 OTHERS (supra) and JOHN NDETO KYALO -VS- KENYA TEA DEVELOPMENT AUTHORITY AND THE HON. ATTORNEY GENERAL, HIGH COURT (MOMBASA) CIVIL CASE NO. 502 OF 1999 [2005] eKLR.

2nd Defendant’s submissions

15. The 2nd Defendant equally submitted that prosecution was justified for the reason that Plaintiff stated that the only amount that he knew of was Kshs. 750,000/- in respect of a tenancy agreement between him and Factor Connect’s director Sam Odera thereby denying and contradicting his spouse’s evidence that the Kshs. 4,885,000/- paid into his joint account with his spouse was proceeds from his sale of some machinery to Sam Odera a director of Factor Connect.

16. The 2nd Defendant contended that the Plaintiff did not prove that the prosecution was instituted without reasonable and probable cause and was actuated by malice and in support thereof relied on the case of MURUNGA -VS- ATTORNEY GENERAL (1979) KLR, 138. From the foregoing, the 2nd Defendant contended that there was an honest belief in the guilt of the Plaintiff and in support thereof relied on Robert Okeri Ombeka V Central Bank of Kenya [2015] eKLR, Socfinaf Kenya Ltd V Peter Guchu Kuria & Another [2002] eKLR, James Karuga Kiiru V Joseph Mwamburi & 2 Others (supra), Music Copyright Society of Kenya V Tom Odhiambo Ogowl [2014] eKLR, Mbowa v East Meno District Administration [1972] EA 352 and Nzoia Sugar Company Ltd V Fungututi.(supra).

ANALYSIS AND DETERMINATION

17. I have carefully considered the evidence on record, the written submissions made on behalf of the Plaintiff and Defendants and the cited authorities. The issue before the court is limited to a determination of whether the Plaintiff’s case has met the threshold of principles that govern a claim founded on malicious prosecution that were laid down in the case of Murunga V Attorney General, (supra) and Kasana Produce Store Versus Kato (supra) that: -

1. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge.

2. That the prosecution was determined in the plaintiffs favour.

3. That it was without reasonable or probable cause

18. In dealing with this case, I will endeavour to address each of the principles as set out hereunder.

a. Whether the prosecution instituted by the Defendant, or by someone for whose acts he is responsible

19. It was the 1st Defendant's case that it received an anonymous complaint of impropriety relating to the procurement of services by the County Assembly of Kisumu and a subsequent award in respect thereof to Factor Connect. There was no dispute that in the course of investigations, the 1st respondent discovered that the Plaintiff and his spouse had received Kshs. 4,885,000/- from Factor Connect the purpose for which was not explained to their satisfaction. In their wisdom, and following the investigation, the 1st Defendant with the authority of the 2nd Defendant preferred charges against the Plaintiff and others. It is therefore not disputed that the prosecution was set in motion against the Plaintiff and others by the Defendants.

b) Whether the prosecution terminated in favor of the Plaintiff.

20. It is not in dispute that the trial court in **KISUMU ANTI-CORRUPTION CASE NO. 02 OF 2015** found that there was no *prima facie* case against the Plaintiff and others and consequently acquitted them under **Section 210 of the Criminal Procedure Code**. The appeal in respect thereof in **Republic V Anne Atieno Adul & 8 Others [2017] eKLR** was similarly determined in favour of the Plaintiff.

c) Whether the Plaintiff has demonstrated that the prosecution was instituted without reasonable and probable cause.

21. In the case of **Hicks V Fawkers, (1878), 8 Q.B.D. 167** at pg 171 Hawkins J. defined probable and reasonable cause 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.”

22. The foregoing definition was adopted by Rudd, J. in **Kagane V Attorney General & Another, (1969) EA 643** in which the learned Judge reiterated that:

“... to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

23. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in **James Karuga Kiiru –Vs- Joseph Mwamburi and 3 Others** (Supra) the court held: -

“To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”

24. Aganyanya, J (*as he then was*) in the case of *Socfinaf Kenya Ltd V Peter Guchu Kuria*, (*supra*), observed as follows:

“..... And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution..... That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established.”

25. Public policy favors the exposure and investigation of crime. Law enforcement agencies are required to investigate complaints before preferring a charge against a person suspected of having committed an offence. There is no doubt that Kshs. 4,885,000/- was paid to the Plaintiff and his spouse by Factor Connect which was suspected to have been irregularly awarded a tender for supply of services to the County Assembly of Kisumu where the Plaintiff was acting Clerk around the material time. There is no doubt that the Plaintiff and his spouse did not make a satisfactory explanation as regards what the payments were made for.

26. Reasonable and probable cause has also been defined to mean the existence of facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified. As was said in **Kagane’s Case** (*supra*), 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 which the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test (See **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR**).

27. The 1st defendant tendered evidence explaining how the decision to arrest and charge the Plaintiff was arrived at. After carefully considering the explanation offered by the Plaintiff and his spouse concerning the Kshs. 4,885,000/- paid to them by Factor Connect, in the circumstances of this case, I have no difficulty whatsoever in holding that the proceedings set in motion by the Defendants against them were not actuated by malice but by an honest aspiration to do justice. The alleged particulars of malice, spite and ill-will were not proved and I find it strangely curious that the Plaintiff pressed on with the plea that he was maliciously prosecuted even after having failed to explain for what purpose him and his spouse were paid Kshs. 4,885,000/-by Factor Connect,

28. In conclusion, and from the foregoing analysis, I have come to the conclusion that the Plaintiff was not maliciously prosecuted, the prosecution was from the foregoing analysis justified and the Plaintiff is therefore not entitled to an award of damages.

29. For the reasons above stated, this case fails. It is accordingly dismissed with costs to the Defendants.

DATED, DELIVERED AND SIGNED THIS 25th DAY OF July, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Plaintiff - Ms Ongoya

For the 1st Defendant - Ms Omieri

For the 2nd Defendant - N/A