



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 340 OF 2006

JOHN KUNG'U KIARIE.....PLAINTIFF

-VERSUS-

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. The plaintiff filed the plaint dated 4th April, 2006 seeking for judgment against the defendant herein in the following manner:

- a) *Special damages, the particulars of which would be supplied at the hearing of the suit.*
- b) *General damages for malicious prosecution.*
- c) *Costs of the suit together with interest thereon at court rates.*
- d) *Any other and further reliefs that the court may deem fit and just to grant.*

2. The plaintiff pleaded in his plaint that on or about the 16th May, 2003 while attending a seminar in Karen area with his then employer, Kenya Commercial Bank, he was arrested by the Banking Fraud Investigation Unit Police and subsequently charged with three (3) counts of theft by agent which charge was later substituted with 10 counts of obtaining by false pretences in Nairobi Chief Magistrate Court, Criminal Case No. 1218 of 2003. The plaintiff stated that he was eventually acquitted of all the charges.

3. It was also pleaded that the plaintiff was arrested, detained and charged even before a complaint was made, thereby making the arrest and prosecution malicious, irregular and an act of abuse of office by the arresting officers.

4. It was further pleaded by the plaintiff that in the course of the trial, the police did not at any point avail the complainant in counts 1-11 set out in the charge sheet, neither did they advance any evidence linking him to the charges preferred against him.

5. The plaintiff is seeking via this suit damages for pain, mental anguish, degradation, loss of employment and loss of business.

6. The defendant entered appearance and filed its statement of defence stating *inter alia*, that the relevant police officers acted on information given to them by the complainant and had reasonable cause to believe that the plaintiff had committed the offences of which he was charged with.

7. The defendant went further to plead that the police officers acted reasonably in arresting and charging the plaintiff, adding that there was no evidence of malice on their part. It was also the defendant's statement that the plaintiff had not laid out the particulars of malice and special damages pleaded in his plaint, thus this court was urged to dismiss the plaintiff's suit with costs.

8. At the hearing, the plaintiff testified as the sole witness for his case while the defendant called one (1) witness to support its case. The plaintiff adopted the contents his witness statement as his evidence in chief. The plaintiff further produced his list and bundle of documents as exhibits in evidence.

9. In his evidence, the plaintiff restated that he was arrested and arraigned in court before the complaint was officially recorded with the police and only after he had made a habeas corpus application. The plaintiff testified that following his arrest, he was detained at Industrial Area Police Station for two (2) nights.

10. It was also the plaintiff's testimony that following his arrest and prosecution, his employment with Kenya Commercial Bank (KCB) was terminated and he has not been able to obtain gainful employment since then.

11. During cross examination, the plaintiff stated that he was unable to trace the habeas corpus order and that prior to his arrest and prosecution, he had no dealings with the police. Further to this, the plaintiff indicated that he had no evidence to show that he was detained at Industrial Area Police Station.

12. The plaintiff also clarified that the relevant account bearing the sums of money associated with the proceedings belonged to him at all material times and that the relevant bonds worth KShs.100 million equally belonged to him. He went ahead to explain that he was found to have a case to answer during the criminal proceedings against him and that he did not call any witnesses at that time.

13. On being re-examined, the plaintiff reiterated that he was acquitted of all the criminal charges preferred against him.

14. C.I. Joseph Koech Kendi (*DW 1*) gave evidence to the effect that he was at all material times attached to the Banking Fraud Investigation Unit as a fraud investigator, clarifying that the investigating officer in the matter has since passed on. The witness stated that the investigations in the criminal case began sometime around 16th May, 2003 and that such investigations revolved around suspicious activity in the treasury bonds registered in the name of the plaintiff, adding that the firm of Mungai & Gakuru Advocates was involved in the transactions.

15. It was DW1's evidence that the Banking Fraud Unit began investigations into the matter following a complaint and that a person named Shaileshi Rajani made a statement linking the plaintiff with the fraudulent activities.

16. On cross examination, the witness admitted that he did not investigate the case and only got hold of the documents about a month prior to the date of his testimony. The witness further admitted that the plaintiff was only charged in the criminal court after an order of habeas corpus was issued. The witness produced as evidence documents obtained from the Investigating Officer to show that investigations were fully carried out prior to the arrest of the plaintiff.

17. Thereafter, the parties exchanged written submissions which I have considered alongside the authorities relied upon by the parties. I have likewise considered the evidence on record. The following are issues for determination:

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.

18. To begin with, malicious prosecution was defined by the court in *Stephen Gachau Githaiga & another v Attorney General [2015] eKLR* thus:

“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.”

19. The guiding principles to be considered in an action for malicious prosecution were restated in *Kagane v Attorney General (1969) EA 643* inter alia as follows:

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.

20. On the *first* principle, the plaintiff submits that going by the evidence, it is clear that his arrest and prosecution were instigated by the police whose actions the defendant is entirely responsible for. This was not disputed by the defendant. Furthermore, the law sets out that the Attorney General, who is the defendant in this instance, shall represent the State in civil proceedings. There is no doubt that the criminal proceedings were instituted by the police officers following investigations.

21. As concerns the *second* principle, going by the judgment delivered in the criminal proceedings lodged against the plaintiff, there is no doubt that the same terminated in his favour since he was eventually acquitted of the criminal charges.

22. The *third* principle concerns the issue of probable/reasonable cause. The plaintiff contends that the casual nature of the investigations and prosecution coupled with the absence of the testimony of one of the complainants depicts the possibility that the police could not have been convinced of his guilt. The plaintiff goes further to contend that the defendant through the investigating police did not gather sufficient evidence prior to arresting and prosecuting him.

23. On its part, the defendant argues that going by the evidence presented, there was probable cause for the police to investigate him, particularly the various transactions involving the plaintiff's bank accounts, adding that the plaintiff has not demonstrated that there was an

absence of reasonable cause.

24. In the case of *Kagane v Attorney General* (*supra*) where the court sought to define what amounts to reasonable or probable 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...”

25. The evidence placed before this court discloses that the plaintiff's bank account was the subject of various financial transactions involving colossal sums of money. This prompted the police to carry out investigations into transactions and there are statements to support this.

26. This court has noted from the statements adduced before it that the relevant persons explained the history of the transactions and it would appear, confirmed that payments had been made to the plaintiff. This was further supported by the various correspondences between the plaintiff's employer (KCB) and the relevant persons, including Dhanjal Investments Limited who was said to be one of the complainants.

27. It is apparent that while there could have arisen reasons to investigate the matter further, it is clear from the circumstances that the transactions were explained and the involved parties did not raise any suspicion that the plaintiff was duping them. The mere presence of a complaint and the subsequent investigations does not automatically lead to prosecution unless probable cause has clearly been shown.

28. In this case, I am not satisfied that probable cause was established especially going by the evidence by way of the witness statements on record.

29. In relation to the *fourth* principle on malice, it is the plaintiff's submission that his arrest and prosecution were actuated by malice, going further to submit that the complainant in the first two (2) counts did not even turn up in court to testify during the criminal proceedings.

30. The plaintiff also argues that he was not notified of the reason for his arrest, neither was he arraigned in court within the legal timelines thus forcing him to apply for orders of habeas corpus. Various authorities that have discussed the principle were cited in support thereof.

31. The defendant vehemently denied the presence of malice in the prosecution of the plaintiff and submitted that no evidence has been brought forth to indicate spite or ill will.

32. Turning to the evidence tendered before this court, it is clear that the plaintiff was the only person charged in the criminal proceedings; this is notwithstanding the fact that other parties were involved in the transactions, including his supposed advocate, Mungai from the firm of Mungai & Gakuru Advocates.

33. The evidence on record shows that a number of cheques were issued in the name of the said firm by Kenya United Steels Co. Limited (KUSCO) who was supposedly the other complainant in the criminal proceedings. On a similar note, there are correspondences to show that the plaintiff's then employer, KCB, was privy to the business arrangements and transactions being undertaken between the plaintiff and the involved parties.

34. The statements of Shaileshi Rajani and Nirmal Singh Dhanjal were adduced as evidence. The duo aver that they came to learn of the plaintiff's arrest via the media and were later contacted by the police to avail themselves for purposes of recording their statements. This supports the plaintiff's averment that he was arrested before the relevant statements were taken, which to my mind connotes malice on the part of the police.

35. It was not controverted that the plaintiff was not informed of the reason for his arrest. It was further admitted by DW1 that the plaintiff was arraigned in court after he was granted the order for habeas corpus and no explanation was offered for the delay in prosecuting him despite the constitutional provision that a party ought to be arraigned within 24 hours of his or her arrest. In view of the foregoing, I am satisfied that inference can be safely be made that there was malice in the prosecution of the plaintiff.

36. Being satisfied that a case for malicious prosecution has been made by the plaintiff as against the defendant, the other issue to be determined is whether the plaintiff is entitled to the reliefs sought.

37. I have taken into account the submissions made by the plaintiff. He is seeking for aggravated damages on the premise that his prosecution was the subject of a wide media coverage and his reputation was tarnished. However, the plaintiff did not make any proposals or offer any guiding authorities in support of the claim on this head.

38. On its part, the defendant maintains that the plaintiff is not entitled to any form of damages but submits that in the event that this court finds otherwise, then an award of Kshs.300,000/= would be sufficient. The defendant cited the case of *Kenneth Onyango Odhiambo v The Attorney General & 2 others [2006] eKLR* where an award of Kshs.500,000/= was upheld.

39. In the plaint the plaintiff is seeking for both general and special damages for malicious prosecution. However, the amount of special damages were neither specifically pleaded nor strictly proved hence I have no basis to grant the same.

40. The plaintiff through his submissions, is seeking for aggravated damages; however, the same was not pleaded in the plaint as one of the

reliefs being sought. In the circumstances, I am equally unable to consider or grant such damages.

41. In determining what would amount to a reasonable award for general damages, this court should take into account the plaintiff's standing in society and the experiences he underwent from the time of his arrest, trial and eventually acquittal.

42. The plaintiff gave evidence to the effect that he was at all material times a Director of Risk Management at KCB. He further stated in evidence that his employment was terminated following the conclusion of the criminal case though no evidence was adduced to support this assertion.

43. The plaintiff also stated that he was detained at Industrial Area Police Station though it is not clear for what duration of time. However, the evidence on record indicates that he was only arraigned in court following the order of habeas corpus. This evidence was detained for longer than allowed by the constitution.

44. I have taken into account comparable awards made in cases involving claimants in a near similar standing in society as the plaintiff. In the case of *Daniel Njuguna Muchiri v Barclays Bank Of Kenya Ltd & another [2016] eKLR* the court awarded the sum of Kshs.2,000,000/= as general damages to a plaintiff who worked as a General Accounting Manager at a bank. Similarly, in *Kasio Matuku & Kenya Post Office Savings Bank v James Kipkemboi Cheruiyot; Inspector General of Police & Attorney General (Interested Parties) [2019] eKLR* the High Court sitting on appeal upheld an award of Kshs.1,500,000/= as general damages for a plaintiff who was employed at a banking institution.

45. In the end and guided by the above authorities, I award a sum of Kshs.2,000,000/= as a reasonable figure for general damages for malicious prosecution.

The plaintiff shall also have costs of the suit and interest at court rates from the date of judgment until payment in full.

Dated, Signed and Delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....**for the Plaintiff**

.....**for the Defendant**