



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 199 OF 2014

DR. HOSEA WAWERU..... PLAINTIFF

-VERSUS-

KENYATTA NATIONAL HOSPITAL.....1ST DEFENDANT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD DEFENDANT

ATTORNEY GENERAL..... 4TH DEFENDANT

JUDGEMENT

1. The plaintiff filed an action for damages against the defendant vide the plaint dated 4th July 2014. The defendants each filed a defence to deny the plaintiff's claim. The plaintiff's cause of action arose from an acquittal of the charges preferred against him in Nairobi C.M.C.CR.C No. 2399 of 2005 vide the ruling delivered on 5th July 2013. On 27th October 2005, the plaintiff was charged with two counts of abuse of office while serving as the Director of Kenyatta National Hospital.

2. When this suit came up for hearing, the plaintiff and the 1st and 2nd defendants each summoned witnesses in support of their case.

3. It is the evidence of Dr. Hosea Waweru (PW1) that his prosecution was founded on malice on the part of the defendants and as a result, the plaintiff suffered damages in various forms. PW1 produced as an exhibit in evidence the proceedings in the criminal case file.

4. In those proceedings Hon. Ndwigwa learned Senior Resident Magistrate delivered a ruling in which he expressly stated that the prosecution had miserably failed to make out a prima facie case for the plaintiff to answer.

5. In count 1, the plaintiff was accused of arbitrarily and in abuse of authority and without regard of Government Financial Regulations and Procedures by approving payment of ksh.57,075,200/= in favour of **M/s Countryside Suppliers Ltd** being 80% advance payment for the supply of bedside lockers, an act that is prejudicial to Kenyatta National Hospital.

6. In the second count the plaintiff faced a charge whose particulars are that he arbitrarily and in abuse of public office approved import duty and value added tax reimbursement of kshs.41,371,515/15 in favour of **Countryside Suppliers Ltd** an act prejudicial to Kenyatta National Hospital.

7. The plaintiff stated that the alleged irregular payments are that the tendering process and performance of the resulting contract were above board, but payment of the contract was from KNH's development account yet the tender was to be aid from the USAID fund account which by then had no sufficient funds.

8. PW1 stated that EACC, the 2nd defendant, painted him as a criminal and exposed him to public ridicule. The plaintiff pointed out that EACC issued a press release on 26.10.2005 in which it was indicated that the plaintiff was one of the persons it was preferring criminal proceedings against.

9. PW1 also said that the press release imputed that EACC had sufficient evidence against him in relation to the charges against him.

10. PW1 further stated that as a result of the criminal proceedings that lasted for 8 years, he incurred financial costs in form of legal fees to the tune of KSh.500,000/=.

11. The plaintiff stated that he wasted a lot of time attending court sessions instead of being in gainful medical practice in his private clinic.

12. PW1 also claimed that his medical practice suffered due to the public poor perception of his moral standing as a doctor.

13. Professor Mungai (PW2) testified in support of the plaintiff's case. He told this court that the plaintiff was socially and professionally ostracized due to the criminal case he faced.

14. PW2 further stated that the process of investigation, arrest and subsequent prosecution cost the plaintiff a lot of embarrassment and ridicule.

15. Two witnesses testified in support of the defence case.

Kenyatta National Hospital, the 1st defendant summoned Walter Owino (DW1), its Human Resource Officer to testify in support of its defence. DW1 told this court that KNH was not a complainant in the criminal proceedings but E.A.C.C was the complainant. DW1 stated that he was not aware of the facts that transpired that resulted in the arrest and charging of the plaintiff.

16. Dunstan Aura Chibole (DW2), a senior forensic officer with E.A.C.C testified on behalf of E.A.C.C, the 2nd defendant. It is the evidence of DW2 that EACC received a file from the Banking Fraud Unit which it evaluated and sent to the office of the Attorney General's office which office sent it back to E.A.C.C with recommendations.

17. DW2 further stated that E.A.C.C used the Attorney General's recommendation to charge the plaintiff with two counts of abuse of office. The office of the D.P.P and A.G, the 3rd and 4th defendants respectively did not summon any witness.

18. At the close of evidence, learned counsels appearing in this matter were invited to file written submissions. Having considered the evidence and the rival submissions, the following issues arose for the determination of this court: **First**, whether the plaintiff proved his case to the required standards in civil cases.

Secondly, whether the plaintiff is entitled to damages and if yes how much.

19. On the first issue, it is not in dispute that the plaintiff's case is a claim of damages for malicious prosecution. In the case of **Kagane and others vs= the Attorney General (1969) E.A 643** the court restated the principles which must be established in order to prove a case of malicious prosecution inter alia as follows:

- i. That the prosecution was instituted by a police officer.
- ii. That the prosecution terminated in favour of the plaintiff
- iii. That the prosecution was instituted without a probable cause
- iv. That the prosecution was actuated by malice.

20. There is no dispute that the plaintiff was prosecuted by a police officer and that the criminal case was terminated in favour of the plaintiff.

21. The twin principles which need to be examined are first whether the plaintiff was prosecuted without a probable cause and secondly whether his prosecution was actuated by malice.

22. The two principles are interrelated and therefore the same can be considered together. According to the plaintiff, his acquittal under Section 210 of the Criminal Procedure Code meant that he had no case to answer and therefore the defendants had no basis in the first place to charge him. It was argued that the prosecution's evidence did not incriminate him at all.

23. The plaintiff further submitted that the decisions to recommend Prosecution of the plaintiff and the legal appropriateness of the criminal proceedings were actuated by malice.

16) The plaintiff further argued that the decisions were premised on insufficient evidence to mount a successful prosecution and that the same was highlighted by the inculpatory evidence presented in the criminal case.

24. This court was invited to impute malice on the part of the 2nd, 3rd and 4th defendants. It is the submission of the 1st defendant that it is an institution that operates through a board of directors and since the plaintiff was the CEO of the hospital and was therefore part of the board, he was therefore privy to each and every decision made. It was further pointed out that if the hospital would have made the decision to make

a complaint then the plaintiff would have been fully aware of the same.

25. The 1st defendant's witness argued that he was performing its duty as a citizen by being a witness in the matter and did not in any manner cause the prosecution of the plaintiff.

26. The 2nd defendant was of the submission that the plaintiff's prosecution was justified by the investigation carried out which indicated that there were irregularities in the tender process. The 2nd defendant further argued that EACC had reasonable and probable cause. It is also argued that E.A.C.C exercised its power and discretion independently and without bias. The 2nd defendant stated that the plaintiff failed to establish the particulars of malice on its part.

27. The 3rd and 4th defendants too argued that the plaintiff had failed to prove malice on the part of the 3rd and 4th defendants. It is also argued that there was no sufficient material to enable the prosecution believe that there was a strong case against the plaintiff.

28. Having considered the rival submissions I have come to the following conclusion in this matter. **First**, is that the plaintiff failed to tender credible evidence to prove that the 1st defendant made a formal complaint to the police. It is apparent from the charge sheet used to prosecute the plaintiff, that EACC, the 2nd defendant was listed as the complainant. Even if there was evidence that the 1st defendant was the complainant, there was no evidence to show that the 1st defendant had malice in filing the complaint against the plaintiff.

29. **Secondly**, that the acquittal of the plaintiff in itself did not connote that the prosecution were malicious. It is clear from the evidence presented before this court and before the court which tried the criminal case that investigations had been carried out before a charge was preferred against the plaintiff.

30. The investigations revealed that there were irregularities in the tendering process and that there was evidence that payments were authorized out of the 1st defendant's hospital development account yet the tender had been advertised as USAID funded which meant that payments would not attract duty and other taxes. In the circumstances I am therefore convinced that there was reasonable and probable cause to prosecute the plaintiff.

31. **Thirdly**, that there is evidence that the 2nd defendant acted independently and without bias. It is apparent that E.A.C.C received a file over the complaint which prompted it to carry out investigations after which it sought for the advise of the Attorney General, the 4th defendant herein, and thereafter proceeded to prosecute the plaintiff after receiving recommendations from the 4th defendant. The plaintiff therefore failed to present credible evidence to attribute any malice on the part of the 3rd and 4th defendants.

32. The second and final issue is whether the plaintiff is entitled to damages. The plaintiff submitted that he is entitled to damages since his reputation was destroyed. He also stated that he suffered mental anguish and inconvenience. He urged this court to award him kshs.500,000/= as special damages and ksh.6,000,000/= as general damages plus costs of this suit and interest.

33. The 1st defendant is of the submission that the plaintiff is not entitled to any award in damages and did not therefore propose any figure.

34. The 2nd defendant too stated that since no liability attaches, no claim for general damages lies as well. The 3rd and 4th defendants are of the submission that if the plaintiff had proved his claim he is entitled to an award of special damages which is specifically pleaded and proved.

35. Having considered the rival submissions plus the authorities cited, I am convinced that had the plaintiff established his claim, this court would have awarded him damages. It is apparent from the plaint that the plaintiff pleaded to be paid a sum of kshs.500,000/= as special damages. He produced receipts issued by his advocates showing that he spent the aforesaid sum as legal fees to defend himself before the court which tried him on the criminal charge vide Nairobi C.M.C.CR.C no. 2399 of 2005. This court would have awarded him the same had he established his claim.

36. On general damages, the plaintiff beseeched this court to award him ksh.6,000,000/=. He cited the case of **Samuel Chepkong'a vs= Kenya Anti-corruption Commission & Another (2014) eKLR** where this court awarded the plaintiff ksh.5,000,000/= for malicious prosecution. The aforesaid decision was delivered in the year 2014. I find the same to be relevant and comparable to this case. I would have awarded the plaintiff in the circumstances a sum of ksh.5,000,000/= had he proved his case.

37. In the end, this suit is ordered dismissed with costs being awarded to the defendants.

Dated, Signed and Delivered at Nairobi this 25th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendants