



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

HCCC NO. 14 OF 2002

ROBERT NJOKA MUTHARA.....PLAINTIFF

VERSUS

COMMISSIONER OF VALUE ADDED TAX.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

KENYA REVENUE AUTHORITY.....3RD DEFENDANT

J U D G M E N T

A. Introduction

1. By an amended plaint dated 26th February 2002 the plaintiff instituted suit against the defendants for compensation as follows;

- a) *Special damages of Kshs. 1,376,340/=*
- b) *General damages for unlawful arrest and malicious prosecution*
- c) *Costs and interest at court rates.*

2. The plaintiff testified that on the 1/10/1999 while in Nairobi, he received a call from his office, Njoka Tanners Ltd in Embu informing him that agents of the 1st and 3rd defendants were at the premises and they had confiscated some records.

3. The plaintiff further testified that he travelled back to Embu and found two officers from the 3rd defendant who wanted to see him as they falsely perceived him to have more books of records in his office. He further testified that the officers left but after a couple of days more officers from the 3rd defendant came and took more records from the office of Njoka Tanners but they did not take an inventory of what they had confiscated.

4. The plaintiff further testifies that he was subsequently prosecuted for obstructing officers of the KRA.

5. DW1 testified that on the 1/10/1999 under instructions from the manager KRA Embu station, he and a colleague went to the plaintiff's premises, a gated compound where he was to carry out post-audit investigations for tax refund claims. DW1 testified that they requested to see the Managing Director but they were directed to see the accountant as he was not present.

6. DW1 further testified that he and his colleague identified 14 documents which they thought were relevant to their investigations and the same were subsequently listed by the secretary and a copy of the inventory given to them. DW1 further testified that as they attempted to leave the compound, the gatekeeper refused to grant them access to leave on instructions from the plaintiff and after sometime they were informed that the plaintiff wanted to talk to them via phone. The plaintiff refused to issue instructions to allow them to leave and they stayed at the compound until around 3:15 pm when the plaintiff arrived from Nairobi.

7. DW1 further testified that the plaintiff subsequently removed the documents that they had secured from the premises and carried them back to his office after which they left but that subsequently the plaintiff and 3 others were charged and convicted in criminal case 3512 of 1999. DW1 further testified that he was aware that the plaintiff and 3 others were acquitted on appeal.

8. The parties disposed of the matter by way of submissions

B. Plaintiff's Submissions

9. It is submitted that the plaintiff has established the 3 principles as laid out in the case of **Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & Anor [2016] eKLR**. This proposition is based on the fact that it was the police officers who instituted the prosecution.
10. The plaintiff further submits that the prosecution was terminated in his favour and that the investigating officer and prosecution were not prudent and cautious in the matters and this is evidence that the prosecution was actuated by malice and was not meant to secure justice.
11. It is thus submitted that the plaintiff is entitled to general damages to the tune of Kshs. 2,000,000 for malicious prosecution as was awarded in the cases of **Daniel Njuguna Muchiri (supra)** and that of **Naqui Syed Omar v Paramount Bank Limited & Another [2015] eKLR**.

C. 1st & 3rd Defendant's Submissions

12. It was submitted that for a claim for malicious prosecution to crystallise, the four prerequisites laid out in the case of **C.A. No. 6 of 1972 Mbowa v East Menjo Administration [1973] E.A.L.R** “*must unite in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.*”
13. It is submitted that the criminal charge against the plaintiff were not instituted by the 1st and 3rd defendants but by the police and that the 1st and 3rd defendants were only involved as the offence leading up to the charge was under the VAT Act necessitating them to be called up as witnesses. This submission was prompted by the holding of the court in the case of **Gitau v Attorney General [1990] KLR 13** where it was held “*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.*”
14. It is also submitted that the plaintiff's acquittal was not an indication that the plaintiff was innocent of the charges brought against him but rather, on this case, as was held by the Hon. Judge, because of a “*misjoinder of counts and lack of evidence to show that the plaintiff was in direct or indirect contact with the gatekeeper.*”
15. It is also submitted that there was reasonable and probable cause for the arrest and prosecution of the plaintiff. This based on the fact that the investigations into the plaintiff's tax evasion were instituted after a complaint by an informer and in the course of carrying out the investigation, the plaintiff was arrested for obstruction. Reliance is placed on the case of **Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR** where it was held inter alia that “*the third element which must be proven by a plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceedings in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.*”
16. It was further submitted that the onus of proving malicious prosecution lies on the plaintiff as was held in the case of **James Karuga Kiiru v Joseph Mwamburi & 2 Others [2001] eKLR**.
17. It is submitted that the plaintiff has not proved his claims of injury to his reputation and further no documentary evidence has been adduced to support his claim for special damages and as such his whole claim against the defendants should be dismissed.

D. 2nd Defendant's Submissions

18. It is submitted that the plaintiff need to be put on strict proof as to the fact he alleges and relies upon to support his claim for special damages for legal fees, travelling and accommodation costs. Reliance is placed on the cases of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** and that of **Kirungi & Anor v Kabiya & 3 Others [1987] KLR 347**.

E. Analysis & Determination

19. From the foregoing pleadings, evidence and detailed submissions by parties which I have reproduced as presented to court, it is my considered view that the issue for determination is ***whether the plaintiff suffered an unlawful arrest and malicious prosecution.***
20. *On whether the arrest and detention of the plaintiff was wrongful*, it is important to appreciate that the terms wrongful arrest and false imprisonment are used interchangeably. A compensation claim for false imprisonment or wrongful arrest can occur if one is detained unlawfully by the police or another public authority. Wrongful arrest or false imprisonment consists of False imprisonment and is described by Halsbury's **Laws of England 4th Edition page 606** as:

“Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification.”

21. In **Daniel Waweru Njoroge & 17 Others V Attorney General [2015] e KLR** the court set out elements of false imprisonment as follows:

“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:

The unlawful restraint of another;

Against their will; and

Without justification.

Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accused party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”

22. The High Court in Civil Appeal No. 89 of 2002: Services Limited v Charles Obingo Angujo [2005] eKLR addressed the question of wrongful arrest as follows:

“It is clear from the above that for a claim of false arrest or false imprisonment to succeed there must be a report which was false and actuated by malice. The arrest should be attributed to the defendant either because he arrested on that false report or that the police arrested on the basis of his false report.”

23. The law on the tort of wrongful detention was set out by Maraga, J. (as he then was) in High Court (Mombasa) Civil Case No. 502 of 1999 [2005] eKLR: John Ndeto Kyalo -vs- Kenya Tea Development Authority and the Hon. Attorney General, at Paragraphs 4 and 5 where the learned Judge observed:

“Claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;

As regards a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment;

By dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment (wrongful detention) would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment;

Defendant would not be liable to a Plaintiff for wrongful detention, where the detention was as a result of a court order remanding the plaintiff in custody pending hearing of the suit as the defendant would have had no control over the court giving the order. For this proposition Maraga J. placed reliance on Katerregga -vs- Attorney General, High Court of Uganda (Kampala), High Court Civil Case No. 96 of 1971 (1973) EA 287 as well as Juma Khamisi Kariuki -vs- East Africa Industries Limited And George Okoko, High Court Of Kenya At Nairobi, Civil Case No 1414 of 1980 [1986] eKLR.”

24. From the facts of this case, there was evidence before the lower court as reiterated in this case that the gatekeeper at the plaintiff’s premises refused to allow the 1st and 3rd defendant’s agents to leave the premises on alleged instructions from the plaintiff in violation of the VAT Act. It is this act of obstruction that led to the arrest and subsequent prosecution of the plaintiff.

25. In my humble view, it cannot be said that the arrest was wrongful as it was based on the report made to the police by agents of the 1st and 3rd defendants. The fact that the plaintiff was acquitted of the offences charged in itself does not mean that the report that led to his arrest was false.

26. On the strength of the authorities quoted above, it is my humble view that the 1st Defendant complainant cannot be held liable under a cause of action for wrongful arrest and detention. In addition, by dint of section 3(1) of the **Public Authorities Limitation Act, Chapter 39 Laws of Kenya which stipulates that “No proceedings founded on tort shall be brought against the Government...after the end of twelve months from the date on which the cause of action accrued”**, the claim for false or wrongful imprisonment or arrest as against the Attorney General is statute barred as it was filed more than 12 months from the date when the cause of action allegedly arose and therefore not maintainable.

27. On **whether the prosecution of the plaintiff was malicious**, as correctly submitted by both parties’ advocates, the law relating to the tort of malicious prosecution is now settled as set out in various decisions including the case of Mbowa vs. East Mengo District Administration [1972] EA 352, where the East African Court of Appeal stated: -

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting

the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action."

28. In Gitau v Attorney General(supra)Trainor, J had this to say:

"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. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not..."

29. What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained in the case of Stephen Gachau Githaiga (supra) where it was held inter alia that *"the third element which must be proven by a plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceedings in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused."*

30. Therefore, on whether the arrest, arraignment in court and prosecution of the plaintiff in the said Criminal Case was wrongful and malicious, the plaintiff claims that his prosecution was actuated by malice.

31. The law as stipulated above is clear that the mere fact that a person has been arrested and charged with a criminal offence does not necessarily mean that the arrest is wrongful.. Further, that an acquittal of one of the criminal charge does not necessarily connote malice on the part of the complainant or the prosecutor.

32. As was held in James Karuga Kiiru (supra) *"to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is and the burden of proving that the prosecutor did not act honestly or reasonably is on the person prosecuted."* Malice, however, can either be express or can be inferred or gathered from the circumstances surrounding the prosecution.

33. In a case of malicious prosecution, the plaintiff must also prove that the prosecution was actuated by malice. As stated above, the prosecution was carried out by the police as agents of the Attorney General. The plaintiff should have led evidence to prove malice on the part of the police which he did not.

34. It must always be remembered that the element of malice is material on the part of the prosecutor and not the complainant unless there is collusion between the two. See Music Copyright Society of Kenya v Tom Odhiambo Ogowl [2014] eKLR. In the present case there was no malice on the part of the police/prosecutor.

35. It is my considered view that that there was no collusion between the 1st and 3rd defendants, who were the complainants in this case, and the police who were the prosecutors. In the circumstances I am unable to make a finding that the prosecution was actuated by malice.

36. Further to the above, it is evident that the plaintiff has failed to prove his claims of injury to his reputation and further no documentary evidence has been adduced to support his claim for special damages and as such his whole claim against the defendants must fail.

37. The upshot of the above is that the plaintiff's claim lacks merit and is hereby dismissed.

38. Each party to meet their own costs.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Koima for Victor Shaballa for 1st & 3rd Defendants

Ms. Muriuki for Muriithi for Plaintiffs