



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 205 OF 2013

GEORGE NGIGE NJOROGE.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

This is a claim for malicious prosecution, false imprisonment, general and aggravated damages.

By way of an amended Plaintiff filed in court on the **27th January, 2013**, the Plaintiff has pleaded that on the **8th day of July 2008**, administration police officers from Kikuyu District offices in Kiambu, wrongfully, unlawfully and without any justifiable cause arrested him and placed him in custody thus depriving him his liberty and freedom. That while in custody, the police officers subjected him to torture, inhuman and degrading treatment which included physical assault as a result of which he sustained grave personal injuries.

The Plaintiff further pleaded that on the **9th day of July 2008**, he was arraigned in court and charged with the offence of assault in resisting arrest, being in possession of cannabis and selling beer after hours. This was in **Criminal Case Number 536 of 2008**. He avers that the said charges were malicious and unjustified. That on the **22nd August, 2008** via a letter of even date, he complained to both the Director of Criminal Investigations Department and the Kenya National Commission of Human Rights that the police had intended to add more fictitious charges on him, which complaint was not considered and on **15/10/2015**, the charge sheet was amended to include the count of assault in resisting arrest contrary to **Section 253 (a)** of the **Penal Code**.

The Plaintiff avers that on the **1/10/2009**, he was acquitted of the charge of selling beer after hours and on the **25/3/2010**, he was acquitted of the other charges of assault, resisting arrest and being in possession of bhang. He contends that the charges were baseless and malicious and without any reasonable cause. He has set out the particulars of malice/absence of reasonable and probable cause. He has also set out the particulars of injuries and special damages.

The Defendant filed an amended statement of defence on the **29/2/2016** in which he has denied the Plaintiff's claim. In particular, he has denied the particulars of malice and absence of reasonable and probable cause as outlined in paragraphs 7 (a) – (f) of the amended Plaintiff. In the alternative and without prejudice, the Defendant avers that if the Plaintiff was arrested, charged and prosecuted as alleged, but which is denied, the same was done pursuant to a reasonable and probable cause in executing a statutory duty, after a complaint was lodged, investigations conducted and a probable and reasonable cause to prefer criminal charges punishable in law was established. He has set out the particulars of the Defendant's duty in paragraphs 5 of the amended defence.

It is further averred that the prosecution conducted was regular, procedural, reasonable and in compliance with the Defendant's mandate. The particulars of injuries and special damages set out in the Plaintiff are denied. The Defendant has prayed for the dismissal of the suit.

When the matter came up for hearing, only the Plaintiff and her witnesses testified. The Defendant did not call any witnesses. The Plaintiff who testified as PW1 told the court that on the **8th day of July 2008** at about 10.45 p.m. he was woken up by his wife who told him that some police officers were knocking on the door to the bar that they were running. The bar was next to where they were staying. On opening the door, an officer by the name Mr. Kiragu entered inside the bar and removed the pump for the Keg beer and carried it with him.

It was his evidence that he had closed the bar that day and he had he had a Liquor Selling Licence which he produced as an exhibit. The police officers were three in number and as they were leaving the premises they beat him up and even when he screamed for help they continued undeterred. They charged him with the offence of being in possession of cannabis in **Criminal Case Number 536 of 2008**. (**Republic vs George Ngige Njoroje**) but was released on bond after which he was taken to the hospital by his wife and was given a P3 form.

Following his arraignment in court, he complained to the District Officer on **11th July 2008** who requested to be given time to investigate the complaint but he did not help him much. He also complained to the Kenya National Human Rights Commission vide a letter dated **22nd August, 2008**. In addition he complained to the CID about the harassment not only to himself but also to the members of his family and in particular his son and his daughter.

That on the **15/10/2008** the police added another charge of assault in resisting arrest. After the hearing, he was acquitted in all the charges. Following the assault he was treated in several hospitals which included Kenyatta National Hospital, Kinoo and Kijabe. He produced the treatment records from the said hospitals. It was his evidence that he has not recovered from those injuries and still seeks treatment to date.

In cross-examination, he stated that he was operating a bar and was not selling bhang in that bar. He denied having assaulted the police officers as alleged. He denied that he was in possession of the bhang that was produced in court as an exhibit.

The Plaintiff's wife, **Jacinta Njoki Ngige** testified as PW2. She adopted her witness statement as her evidence in chief. She stated that on 8/7/2008 at 10.45 p.m, she heard a knock on the door and on opening, it was police officers from the District Officer's office at Kikuyu. She recognized one of them as a Sergeant Kiragu. They asked where her husband was and she told them he was asleep. They requested her to call him and on waking up, he opened the door for the officers who walked directly to the counter and removed the Keg pump. They walked out with it and the Plaintiff followed them. She heard the Plaintiff screaming as she got out to see what was happening and at that point she saw Sergeant Kiragu and two other officers beating the Plaintiff and pulling his private parts. One of the police officers fired two shots in the air then bundled the Plaintiff into a Landrover while still raining blows and kicks on him while others were beating him using the gun butt.

The following morning she was surprised to learn that he had been charged with being in possession of bhang which, according to her, was a lie as there was no bhang as alleged by the police offices. She took him to hospital and later reported the matter to the police station which was booked as OB/30/09/2008.

In cross-examination she stated that the police went to the bar before 11.00 p.m. In the bar, she was with her two daughters and two customers who were waiting for her to close but they were not taking alcohol.

Leonard Karenga testified as PW3. He adopted his statement as his evidence in chief. He stated that on 8/7/2008 at 10.11 p.m, he was at G. Jersey Pub with his colleague and some other (5) people when they heard a knock on the door to the bar. The Plaintiff's wife went to call him and when he opened the door, PW3 saw a man walking to the counter and bolted the keg pump and carried it away. The Plaintiff followed him and after sometime they heard him shouting and crying and they rushed to see what was happening. They saw three men beating him and one was wearing an AP Uniform and on seeing that, the Plaintiff's wife screamt and one of the police officers shot in the air twice. He ran for his life but from a distance, he could see them beating the Plaintiff. He stated that he did not see anyone with bhang.

In cross-examination it was his evidence that the police went to the bar before 11.00 pm and the door to the bar was locked.

As I had noted earlier, the defence did not call any witnesses. Both parties filed their submissions which I have duly considered alongside the evidence on record.

The main cause of action herein is that of malicious prosecution. The law on this tort is well settled in the case of **Sammy Kiprotich Tangus vs Attorney General [2015] eKLR** where the judge referred to the case of **Muringa vs the Attorney General [1979] KLR 138**. The essential elements of malicious prosecution are 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) The prosecution was instituted without reasonable and probable cause.*
- (c) The prosecution was actuated by malice.*
- (d) The prosecution ended in favour of the Plaintiff.*

On the first ingredient, it is clear that the prosecution was instituted by the state and thus the defendant being the chief government advisor on legal matters is sued as the defendant.

On the second ingredient, what constitutes a reasonable and probable cause was defined in the case of **Simba Vs Wambati (1987) – KLR 601** as;

“The plaintiff must proof that the setting of the law in motion by the Inspector was without reasonable and probable cause ... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.”

The case of **Samson John Nderitu Vs the Attorney General 2010 eKLR** is also relevant on the issue at hand thus;

“It is trite and this court has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose function fall under the office the defendant, usually carry out investigations, record statements from potential witnesses and analyzed the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

In the case at hand, the police arrested and arraigned the plaintiff in court. He was acquitted of all the charges that were preferred against him. As noted by the trial magistrate, the evidence by the prosecution witnesses was contradictory and it did not meet the threshold required in a criminal case and its no wonder the plaintiff, was acquitted. From the evidence of the plaintiff, it appears that there were some other underlying factors that could have led to his prosecution. He had on several occasions complained about police harassment to himself and his family members. It is also on record that the police had threatened to add more charges if the plaintiff pursued the complaint that he had made and true to it, they did exactly that.

On the charge of assault, the evidence on record is that the plaintiff was arrested by three police officers who were armed. There is no evidence adduced by the prosecution to show that he was armed. The P3 form that he produced shows that he sustained more serious injuries compared to those sustained by Andrew Kiragu one of the officers who arrested the plaintiff. It could not have been possible for the plaintiff to assault a police officer who was in the company of two others and who were all armed. Its no wonder, the learned magistrate did not convict him for the offence of assault. With regard to the other two counts, that of being in possession of bhang and selling beer after hours, the evidence that was adduced was very weak to sustain a conviction and this left a lot of doubts as to whether indeed, the plaintiff committed those offences. It is also worth noting that all the prosecution witnesses were police officers mainly from the District officer's office, Kikuyu and these are the same officers that the plaintiff had all long complained about. In those circumstances, it is highly probable that they could have been biased in their investigations and that they could have preferred charges against the plaintiff to punish him. I would not hesitate to find that the prosecution was motivated by malice and that there was no reasonable and probable cause to mount the prosecution. I so find.

The last ingredient is that the prosecution must have ended in plaintiff's favour. This is a straight forward issue and the court need not belabor on this as the criminal proceedings are self explanatory. The plaintiff was acquitted of all the charges.

On false imprisonment, it was the plaintiff's testimony that after he was arrested on the 8th July 2008 he was arraigned in court the following day and was released on a bond of Ksh.20,000/= with a surety of a similar amount. The criminal proceedings marked as exhibit 5 clearly shows that he was charged the following day. This therefore means that he spent one night at Kikuyu Police Station which is clear evidence of false imprisonment.

The plaintiff has also sought general damages for pain, suffering and loss of amenities, torture, inhuman and degrading treatment. In his evidence he testified that he was assaulted by the police officers at the time of arrest. His evidence was corroborated by that of PW2 and PW3. He produced a P3 form dated 9th day of July 2008, treatment records and a medical report dated 3rd June 2015 prepared by Dr. D. K. Mwaura of Kinoo Medical Clinic.

According to the said medical report the plaintiff sustained the following injuries;

- 1) Swollen, tender – nasal bridge and occipital region and neck.
- 2) Swollen tender – right shoulder back chest – right side.
- 3) Swollen tender – scrotum and testes
- 4) Bruises – right hand
- 5) Swollen, bruised – both knees and left leg.

The doctor has noted that the plaintiff received multiple injuries and was treated at Kinoo Medical Clinic, Tigoni District Hospital, Aga Khan Hospital, Kijabe hospital, St. Mary's Mission Hospital and Kenyatta National Hospital. Though the healing is fair the doctor noted the following complications;

- i) Osteo – arthritis (spondlosis) cervical (neck) thoracic and lumbar spine.
- ii) There is also narrowing of the disc spaces and nerve roots compression of the spine.
- iii) Consequently, he has developed severe back pains, weakness of upper limbs and numbness.
- iv) He is unable to walk long distance, cannot stand for a long time and unable to bend freely. He can only lift light objects.
- v) Permanent degree of incapacity was assessed at 40%.
- vi) He has developed severe loss of libido and impotence.
- vii) Future costs; monthly medications Sh.200/= that is Sh.360,000 in 15 years.
- viii) He can only perform very light duties and in most cases a dependant.

Though the defendants denied that his officers subjected the plaintiff to torture, inhuman and degrading treatment and that they did physically assault him, no evidence was tendered to support that denial. The plaintiff has succeeded in proving that he was assaulted by police officers. The defendant did not call any witnesses to support their case and therefore, the evidence of the plaintiff remains uncontroverted.

In view of the foregoing, I find that the defendant is liable to the plaintiff for malicious prosecution, false imprisonment, pain and suffering and for torture, inhuman and degrading treatment.

a) On quantum of damages for malicious prosecution, the plaintiff has suggested a figure of Ksh.8 million and has relied on the case of Teresia Wanjiku Njoroge Vs the Standard Chartered Bank and Another (2015) eKLR where a sum of Ksh.5 million was awarded. He has also relied on the case of Sammy Kiprotich Tanguo Vs The Attorney General (2015) eKLR where a sum of Ksh.4 million was awarded as general damages for malicious prosecution. The defendant did not make submission under this head. In my view the sum suggested by the plaintiff is too much on the higher side. A sum of Ksh.1 million is reasonable and I hereby award the same.

b) False imprisonment

The plaintiff has relied on the case of **Harriet Karimi Vs The Attorney General (2005) eKLR** in which the plaintiff was awarded Ksh.1,000,000 as damages for unlawful arrest and confinement. In the case referred to herein above, the plaintiff was in custody for 26 days while in the instant case, the plaintiff was in custody for only 24 hours. Taking that into account, an award of Ksh.300,000 is reasonable under this head.

c) General damages for pain, suffering and loss of amenities torture and inhuman treatment

Under this head, it is noted that the injuries sustained by the plaintiff were multiple and serious. The degree of incapacity is given as 40%. The plaintiff has suggested a figure of 1million under this head and has relied on the case of **Elias Njeru & Another Vs Medrinigo Kimirwa (2010) eKLR** where a sum of Ksh.230,000 was awarded as general damages. He has also relied on the case of **Nicholas Njue Njuki Vs Eliud Mbugu Kahuro (2014 eKLR)** where a sum of Ksh.400,000 was awarded. On his part the Defendant has suggested a figure of Kshs.300,000/=. I have taken into account the degree of injuries sustained by the Plaintiff and the doctor's opinion and diagnosis and in particular that he can only perform very light duties and in most cases a dependant. He has developed severe loss of libido and impotence and that he is unable to walk long distances and cannot stand for long. The Plaintiff has been left with the permanent disability which the doctor assessed at 40%. In my view, a sum of **Kshs.3 million** will be reasonable to compensate the Plaintiff for the injuries sustained.

d) Aggravated damages

Aggravated damages are awarded in actions where damages are at large. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods. The matters that the court should take into account in awarding such damages include the Defendant's motive, conduct and manner of committing the tort. The court has to consider whether the Defendant acted with malevolence or spite or behaved in a high handed manner. The court has also to take into account the conduct of the Defendant upto the conclusion of the trial. In other words, aggravated damages are compensatory in nature. See the case of **Abdulhamad Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR**

The Plaintiff testified that he was beaten and humiliated before the members of his family. The injuries that he sustained were multiple and serious. Though the Defendant submitted that the police had good intentions and that they were not motivated by something more than the desire to do justice, this court is not persuaded by that submission at all. It is very unfortunate that the Plaintiff had to suffer such serious injures in the hands of the law enforcers who are the same people who should protect him. He has to live with a permanent disability for the rest of his life. In my view, this is a good case where the court should award aggravated damages. The Plaintiff has suggested Kshs.2 million while the Defendant suggested Kshs.300,000/=. I find a sum of **Kshs.500,000/=** reasonable under this head. Having awarded damages under this head it would amount to double compensation if I were to make an award for torture, inhuman and degrading treatment. I therefore make no award under that head.

On special damages a receipt dated 3rd June 2015 for Ksh.3000/= by Kinoo Medical Clinic was produced in evidence as **exhibit 21 "B"**. I make an award of the same amount as it was also pleaded in the amended Plaintiff.

Before I conclude, the issue of limitation was raised in the defence and during the hearing. The Plaintiff produced a Ruling dated 10th May 2013 in Misc. 354/2011 in which he was granted leave to file suit out of time by Hon. Justice Ogo. Though the Defendant challenged the leave I find that the Hon. Judge was right in granting the same as the reasons given for the delay are justified.

In the end, I enter judgment for the Plaintiff against the Defendant as follows:-

- a) Malicious prosecution** - **Kshs.1,000,000/=**
- b) False imprisonment** - **Kshs.300,000/=**
- c) General damages for pain and suffering** - **Kshs.3,000,000/=**
- d) Aggravated damages** - **Kshs.500,000/=**
- e) Special damages** - **Kshs.3,000/=**
- TOTAL Kshs.** - **Kshs.4,803,000/=**

The Plaintiff is also awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 19th Day of April, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Appellant/Applicant*

..... *For the Respondent*