



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 46 OF 2014

CATHERINE WANJIRU KINYUA.....PLAINTIFF

V E R S U S –

JULIE MWANGI.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

1) Catherine Wanjiru Kinyua, the plaintiff herein, filed an action claiming damages for malicious prosecution and defamation against Julie Mwangi and the Hon. Attorney General, the 1st and 2nd defendants respectively vide the plaint dated 26th February 2014. In the aforesaid plaint, the plaintiff sought for the following orders:

a. General damages for malicious prosecution.

b. General damages for defamation.

c. Exemplary/punitive/and or aggravated damages.

d. Special damages for legal expenses incurred in instructing counsel in criminal case no. 35 of 2012.

e. Damages for loss of business.

f. Interest thereon.

g. Costs of this suit.

h. Any other relief the court deems fit to grant.

2) The defendants each filed a defence to deny the plaintiff's claim.

3) When the suit came up for hearing, the plaintiff (PW1) heavily relied on the witness statement she executed. She also appeared and orally testified. PW1 told this court that as a result of the trumped up charges preferred against her by the 1st and 2nd defendants, she suffered emotional pain and anguish and that she was defamed since some clients got to know of the criminal case and as a result, they avoided her business. PW1 also stated that her business which is a tours and travel company suffered because a lot of clients were unable to reach her when she was busy attending Kibera Criminal Case no. 35 of 2012 and thus diverted their business elsewhere. Julie Mwangi (DW1) told this court that she received a text message from the plaintiff which read **“You tried to have me killed”**. She said that the message really disturbed her prompting her to report to the C.I.D headquarters in Kiambu. DW1 said that the police investigated her complaint before commencing criminal proceedings against the plaintiff (PW1). The 2nd defendant averred in his defence that the 1st defendant's complaint was investigated and thereafter the plaintiff was summoned, charged and prosecuted based on a report made to the police. At the close of evidence parties were invited to file and exchange written submissions.

4) The following issues were identified for determination.

1. Whether the criminal proceedings were instituted by the 1st defendant.

2. Whether the said prosecution was actuated by malice.

3. Whether there was reasonable cause and/or justification to make the complaint to the police.

4. Whether the criminal proceedings were terminated in the plaintiff's favour.

5. Whether the 1st defendant is liable to compensate the plaintiff and if so what would be the award of damages.

6. Who should bear the costs of this suit.

5) On the first issue, it is not in dispute that the 1st defendant lodged a complaint with the police when she received a text message from the plaintiff titled **"You tried to have me killed"**. The 1st defendant stated that she made a report to the police because she felt disturbed by the text message. The 2nd defendant stated that the plaintiff was charged after a complaint had been lodged and a probable criminal offence punishable in law established.

6) The next issue to be determined is whether the plaintiff's prosecution was actuated by malice and whether there was a probable cause. The plaintiff is of the submission that she was never the 1st defendant's friend and that they have never engaged in small talk since their relationship was strictly business. The plaintiff is of the firm view that the 1st defendant was malicious and she intended to cause the plaintiff emotional pain and anguish. The plaintiff stated that attempts had been made on her life prompting her to send a text message alluding the same. The plaintiff stated that the 1st defendant only made a report to the police since she had hinted to her that she was going to book a report over the issue with the police. It was pointed out that the 1st defendant's purported report to the police was meant to pre-empt the plaintiff's intended report to the police. The plaintiff further submitted that the 1st defendant's complaint was made maliciously and in bad faith with the sole aim of frustrating the plaintiff's genuine efforts to address attempts on her life and the alleged infidelity in her marriage.

7) The 2nd defendant was accused of not carrying out any investigations before apprehending the plaintiff, therefore the 2nd defendant had no probable cause. The plaintiff further pointed out that the criminal case preferred against her was dismissed due to non-attendance by the complainant. According to the plaintiff, the failure by the 1st defendant is a manifest of malice on her part. The principles to be applied in establishing the tort of malicious prosecutions were restated in the case of **Kagarne and others =vs= Attorney General (1969) E.A 643 inter alia** as follows:

a. That the prosecution was instituted by a police officer;

b. That the prosecution terminated in the plaintiff's favour;

c. That the prosecution was instituted without reasonable and probable cause; the test for this condition is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

d. That the prosecution was actuated by malice; malice means that the prosecution was motivated by something more than a desire to vindicate justice.

8) There is no dispute that the prosecution of the plaintiff was instituted a police officer. It is also not in dispute that the case was terminated in favour of the plaintiff. The issue which is hotly contested is whether the prosecution was actuated by malice and without a reasonable and a probable cause. I have considered the evidence tendered by the 1st defendant and the plaintiff. What provoked the 1st defendant to lodge a complaint with the police against the plaintiff is a text message the plaintiff sent to the 1st defendant insinuating that there is a plot to kill the plaintiff. Both the plaintiff and the 1st defendant admit the contents of the text. The police acted on the report and had the plaintiff apprehended and charged. In my humble view, there was no malice in the whole process of instituting criminal proceedings against the plaintiff. The plaintiff failed to prove that the 1st defendant was actuated by malice. The plaintiff also failed to adduce evidence to show that the 2nd defendant in discharging his duties was actuated by either spite or ill-will or by indirect or improper motives.

9) The other issue which was given prominence is whether the plaintiff's reputation was injured and whether she is entitled to damages as a result of the same. It is the submission of the plaintiff that her reputation was injured as a result. The plaintiff claimed that when her clients heard that she was facing criminal charges in court they stopped doing business with her. The plaintiff also complained that she suffered emotional pain and mental anguish as a result of the malicious prosecution. One of the ingredients necessary to establish the tort of defamation is that the statement complained of was false. In the matter before this court, it is clear that the charge preferred against the plaintiff was based on a text message the plaintiff sent to the 1st defendant. There is therefore nothing false about the complaint. It cannot therefore be said that the plaintiff's reputation was injured.

10) The plaintiff merely stated that her businesses were avoided by her customers when they learnt she was facing a criminal charge. Unfortunately, the plaintiff did not summon any of those customers to testify. The assertion therefore remains as an allegation but without proof.

11) In the end, I find that the plaintiff failed to prove her case to the required standards of proof in civil cases. The law enjoins the court to consider the award on damages even where the action is being dismissed. On damages, the plaintiff asked this court to award her a global sum of kshs.1,200,000/= plus ksh.88,000/= special damages. The 2nd defendant did not propose any figures but merely stated that the plaintiff was not entitled to any save for ksh.88,000/= being special damage. The 1st defendant urged this court not to make any award on damages.

12) On my part, it is trite law that the kind of damages the plaintiffs are asking for are purely granted at the discretion of the court. In the circumstances of this case, I think I could have awarded a global sum of ksh.1,000,000/= had the plaintiff established her claim.

13) In the end this suit is dismissed. A fair order on costs is to order which I hereby do, that each party bears its own costs.

Dated, Signed and Delivered in open court this 31st day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant