



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1455 OF 1999

BENSON MACHARIA MUGO.....PLAINIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

The plaintiff herein was employed by the 2nd defendant as a banking clerk in the course of his employment he was suspected to have been involved in a criminal transaction which led to his arrest and prosecution. Following his acquittal he filed this case against the 1st and 2nd defendants claiming general damages for false imprisonment and malicious prosecution. He also claimed special damages of Ksh. 40,000/=.

His claim was denied by both defendants. In this very old case he took quite some time before the plaintiff took the stand to testify in October, 2003. The matter has since been handled by several judges and at some stage the hearing had to start de novo. I took over the matter in June, 2017 when the defence case was pending herein. The 1st defendant did not call any witness but the 2nd defendant called one witness. I observe from the outset that there are some issues raised both in the pleadings and during the hearing relating to the employment of the plaintiff and the 2nd defendant and termination thereof but which no sufficient evidence was led to determine. In addition those are matters which now belong to the jurisdiction of Employment and Labour Relations court.

The facts that can be discerned from the pleadings are that the 2nd defendant reported to Kilimani Police Station that the plaintiff had opened an account through which the customs and exercise department lost a sum of Kshs. 7,140,678/=. Following that report the plaintiff together with others were arrested, charged and prosecuted in a criminal trial. The first charge was that of making a false statement which was subsequently substituted with two counts of stealing a Barclays bank cheque in favour of Customs and Excise Department and stealing Kshs. 10,060/=. The trial ended with the acquittal of the plaintiff on 15th October, 1998 under Section 215 of the Criminal Procedure Code.

During the trial the plaintiff produced 6 exhibits related to his pleadings. Most importantly a copy of the charge sheet and judgment of the court. The receipt issued by his advocates (for legal fees) was one of those exhibits. For reasons that are not clear, on 19th May, 2009 one Dickens M. Ouma Advocate employed by the firm of advocate for the plaintiff collected these documents from the court.

As at the time of writing this judgment those exhibit was not part of the court record. That however is not impairment to addressing the salient issues that have been identified by the parties. From the evidence and

the submissions filed by all parties herein, there is no dispute that a cheque meant for the Customs and Excise Department was presented to the 2nd defendant and one of the staff members involved in the processing of that cheque was the plaintiff herein.

There is also no dispute that when this was not credited to the recipient of the sum contained in the said cheque a complaint was made at the instance of the 2nd defendant. Following that complaint at Kilimani Police Station what followed was the arrest and prosecution of the plaintiff among others.

There is also no dispute that witnesses drawn from the two defendants and in particular the 2nd defendant gave evidence against the plaintiff. The plaintiff was found to have a case to answer and put to his defence. Thereafter he was acquitted under Section 215 Criminal Procedure Code.

I have already observed that termination of the plaintiff's services with the 2nd defendant is not within my determination in these proceedings. The plaintiff had the duty to establish on a balance of probability that his arrest and prosecution was malicious in the circumstances of this case.

In the case of Katerregga vs. Attorney General (1973) EA 289 the court stated as follows,

“It is well established that in a claim for damages for malicious prosecution malice in fact must be proved showing that the person instituting the proceedings,..... was actuated either by spite or ill will or by indirect or improper motives.”

In the case of Kagane vs Attorney General (1969) EA 643 the court defined what reasonable and probable cause means and stated,

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of 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.”

In addition to the foregoing the plaintiff has the duty to prove that the prosecution was terminated in his favour. Further that the said prosecution was instituted without reasonable and probable cause following the observation in the Kagane case above. To establish malice the plaintiff has the duty to prove **“that the prosecution was motivated by something more than a sincere desire to vindicate justice.”** (Kagane case).

It is not enough to rely on an acquittal as a basis upon which to found a ground for malicious prosecution. See *Nzoia sugar Company Limited vs. Fungututi (1988) KLR 399*.

Going back to the facts of the case, there is no doubt that the 2nd defendant's agents and or employees set into motion the events that led to the arrest and subsequent prosecution of the plaintiff. The police officers who took up the matter were persuaded that the plaintiff had an explanation to offer in the circumstances presented and therefore instituted or caused the plaintiff to be charged with the criminal offences that he faced. In fact after the prosecution evidence the court found that he had a case to answer.

The investigations leading to his charging cannot be faulted in the circumstances of the case. The plaintiff has not dislodged the 2nd defendant's evidence that he was one of the employees who handled and or processed the cheque in question. That the handling of the said cheque led to the theft of funds meant for a client of the 2nd defendant in effect placed the plaintiff in a position of suspicion.

The complaint therefore against him cannot be said to be misplaced. There was a reasonable and probable cause to make that complaint. Malice therefore has not been proved because both the 1st and 2nd defendants were out to vindicate justice and nothing more.

Upon analysis of the entire evidence adduced by the plaintiff and the defendants I have come to the conclusion that the plaintiff has failed to establish his claim against the two defendants and therefore his suit must be dismissed.

I have debated whether or not to award costs to the two defendants against the plaintiff. This case was filed in 1999. The wheels of justice have turned so slowly that I believe to award costs to the defendants after the loss of the plaintiffs claim would be against the interest of justice in the circumstances of this case. The order that commends itself is that each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 24th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE