



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 13 OF 2008

SHADRACK MWANZIA KIVUKU.....PLAINTIFF

VERSUS

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

THE NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....2ND DEFENDANT

JUDGMENT

The Plaintiff herein has sued the defendants claiming General damages for malicious prosecution, unlawful arrest and illegal confinement, costs of the suit and interest.

He avers that on or about 21st October, 2005, he was charged with the offence of stealing by servant in criminal Case No. 6506/2005 at the Chief Magistrate's Court at Makadara and later acquitted on the 12/2/2007. He had been arrested on 13/10/2005 and was held in custody without bail/bond until 21/10/2005 when he was arraigned in court.

He contends that the arrest and the subsequent prosecution were malicious and without any legal foundation and were done at the instigation of the 2nd defendant who was the complainant. That he suffered illegal confinement and unlawful arrest. The particulars of malice by the defendants are set on in paragraph 5 of the plaint.

He avers that as a result of the action by the defendants the plaintiff has suffered loss and damage for malicious prosecution, illegal confinement and unlawful arrest for which he now claims damages.

The defendants filed separate defences in which they denied the plaintiff's claim. The 2nd defendant avers that if any prosecution/charges were ever instituted which is denied, the same was not malicious as alleged. The particulars of malice are denied. On its part, the first defendants contends that if the plaintiff was ever arrested and charged, which is denied the arrest and prosecution was lawful and in execution of statutory duty after a valid complaint was lodged with the police and after investigations were carried out which revealed reasonable and probable grounds that the plaintiff had committed the offence he was charged with.

The matter came up for hearing on 30/11/2016 when the plaintiff's evidence was taken. In his evidence he told the court that on 21/10/2005 he was arraigned in court and charged with the offence of stealing by agent contrary to Section 283 (b) of the Penal code. That he was held in custody between 12/10/2005 – 21/10/2005 at Makadara police station.

He further testified that he was acquitted on the 12/2/2007 under Section 202 of the Criminal Procedure

Code after the witnesses failed to attend court. He denied having stolen as charged. The defendants did not call any witnesses to support their case.

All the parties filed their respective submissions which I have duly considered. On the part of the plaintiff it was submitted that the evidence of malice is borne by the fact that the Plaintiff was arrested and charged when he had not committed any offence. That the police failed in their duty by failing to investigate the veracity of the complainant lodged by the Plaintiff. That there was no reasonable and probable cause for charging the plaintiff.

It was further submitted that the plaintiff's arrest was illegal and irregular since they arrested him without carrying out proper investigations. That the Plaintiff was held in custody beyond 8 days without any explanation by the first defendant. Counsel for the plaintiff relied on section 72(3) of the old Constitution now Article 49(1) of the Constitution 2010 which provides that a person should not be held in custody for more than 24 hours upon arrest and before being arraigned in court. He urged the court to find the defendants fully liable.

The 1st defendant submitted that the plaintiff's arrest and confinement was not unlawful as the police have powers under **Sections 29, 30 and 32** of the **Criminal Procedure Code** to make arrest without a warrant of arrest. That the plaintiff has not claimed that his rights were violated under **Article 49** of the Constitution.

It was further submitted that the plaintiff was arrested pursuant to a complaint lodged by the 2nd defendant for the offence of stealing by agent. That the police detained him for a lawful cause so that they could proceed with their investigations. The case of **James Karuga Kiiru Vs Joseph Mwamburi & 2 others Civil Appeal No. 171/2000** was relied on where the court held that so long as the police take reasonable measures after the arrest, they are important adjunct to the administration of justice and are not to be faulted.

On whether the prosecution of the plaintiff was actuated by malice and without a reasonable and probable cause, the defendant relied on the case of **Kagame & others vs The Attorney General (1969) E.A 643** in which the court laid down the principles that the plaintiff must prove in a case of malicious prosecution. It was argued that the prosecution did not terminate in favour of the plaintiff as no evidence was tendered from which the court could make a finding that there existed no reasonable cause of instituting the proceedings and the plaintiff as acquitted under Section 202 of the CPC after the prosecution was unable to proceed due to lack of police file. That no evidence of malice was adduced by the plaintiff. Relying on the case of **Katerrega Vs A.G. (1973) E.A 289**, the 1st defendant submitted that in a claim of damages for malicious prosecution, malice in fact must be proved showing the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives.

On whether the prosecution was instituted without a reasonable and probable cause, it was submitted that the information given to the police officers was credible hence the reasons why the police charged and prosecuted the plaintiff. That the information that was relayed to the police officers by the 2nd defendant, believing it to be credible was enough to satisfy a prudent and cautious man that the plaintiff was guilty of the offence and hence the reason he was charged.

On the part of the 2nd defendant, it was submitted that the mere fact that a person has been acquitted of the criminal charges does not necessarily constitute malice on the part of the prosecutors. It relied on the case of **Mbowe Vs East Menjo District Administration** to support that contention. That the basis of arresting and charging the plaintiff was the report that was made by the 2nd defendant and that the fact that the Plaintiff was acquitted under **Section 202 of CPC** does not mean that the prosecution had no reasonable and probable cause to arrest and prosecute the Plaintiff. Counsel for the 2nd defendant cited the case of **Nzoia Sugar Company Limited Vs Fungututi (1988) KLR 399** where the court held: _

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor”

After analyzing the evidence on record and the submissions by the parties, I now proceed to set out the issues for determination which in my view are as hereunder.

- (a) Whether the prosecution was instituted by the defendant.
- (b) Whether the prosecution was terminated in favour of the plaintiff.
- (c) Whether the prosecution was instituted without reasonable and probable cause.
- (d) Whether the prosecution was actuated by malice.

The issues hereinabove are in tandem with the essential elements or requirements of malicious prosecution. See the case of **Mbowe Vs East Menjo District Administration and that of Maurice Owino Onyengo Vs Music Copyright Society of Kenya (2015) eKLR**.

The first two essentials are not in issue. It is not in dispute that the prosecution was instituted by the first defendant following a complaint by the 2nd defendant. It is also not in dispute that the prosecution was terminated in the Plaintiff's favour. What is in dispute is whether there was reasonable and probable cause and whether there was malice on the part of the defendants.

Let me first consider if there was malice. The plaintiff has submitted that there was open bias and malice against him as the defendants charged him when he had not committed any offence. The defendants on their part averred that there was no malice on their part.

Though the first defendant has tried to argue that the prosecution was not terminated in favour of the plaintiff, I beg to differ with that submission. The plaintiff having been acquitted for the charge is sufficient prove that he did not commit the offence. I appreciate the fact that no evidence was offered by the prosecution. The prosecution did not appeal against the order of acquittal and therefore, they cannot challenge it in this case by way of submissions. The finding by the learned magistrate in the criminal trial is final on the innocence of the plaintiff who was the accused in the trial.

In my view, malice does not have to be direct but it can be inferred. The 2nd defendant chose to make a report of stealing by agent against the plaintiff but none of its officials attended court to assist the police prove the case against him. The 1st defendant did not bother to bond the witnesses as required, following which the court acquitted the plaintiff under **Section 202**. I find that there was malice on the part of the defendants.

On whether there was a reasonable and probable cause, in the case of **Kagame Vs. A.G. (1969) EA 643** reasonable and probable cause is defined as an honest belief in the guilt of the accused based upon full conviction founded upon reasonable grounds of existence of state of circumstances, which assuming them to be true, 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.

If the material known to the prosecutor is based upon information, the information must be reasonably credible such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution. If a prudent and cautious man would not have been satisfied that there was a proper case put before the court, then absence of reasonable and probable cause has been established.

In our case, the 2nd defendant made a formal complaint to the police following which the first defendant carried out investigations and formed an opinion that an offence had been committed by the plaintiff and it was on that basis that he was arraigned in court.

It is trite law that in a criminal case, the burden of prove is beyond reasonable doubt and the accused person is not under duty to prove his innocence. No evidence was offered by the prosecution in the

criminal trial. I have taken the liberty to peruse the lower court proceedings in the criminal trial and I note that the prosecution applied for several adjournments until the learned magistrate could not accommodate them anymore. Not even a single witness testified.

In the case of **Peter Nagweya Chagowe Vs A.G (2006) eKLR** in which the case of **Kagame & Others Vs. A.G** was cited, the court had this to say regarding reasonable and probable cause:-

“Whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty.”

In the criminal case, no material was placed before the court by the prosecution by way of evidence on the basis of which the learned magistrate could have made a finding as to whether the accused person (the plaintiff) was probably guilty.

I am alive to the fact that an acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution but in the circumstances of this case in the absence of any evidence by the prosecution and with the order of the acquittal of the plaintiff, I find and hold that the prosecution did not have a probable and reasonable cause to institute criminal proceedings against the plaintiff.

On quantum of damages this court has considered the submissions made by the parties in that regard. The plaintiff has suggested a sum of Kshs. 5 million based on the case of **Julius Njuguna Vs the A.G** in which a total of Kshs.300,000 was awarded and that of **Erastus Wachira Kariuki Vs A.G** where a similar amount was awarded. The defendants did not submit on damages save for special damages which they submitted have not be pleaded.

I have considered the authorities relied on by the Plaintiff and in both cases, a sum of Kshs.300,000 was awarded. This court has taken note of the same and the circumstances surrounding the criminal prosecution and the case herein. Am of the considered view that a total of Kshs.600,000 is reasonable as general damages for malicious prosecution, unlawful arrest and illegal confinement. Special damages were neither proved nor pleaded. I make no award under that head.

The plaintiff is awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 22nd Day of **September, 2017**

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L. NJUGUNA

JUDGE

In the presence of:-

.....*for the plaintiff*

.....*for the defendant*