



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL CASE NO. 40 "A" OF 2013

FREDRICK NJUGUNA WAMUGUNDA.....PLAINTIFF

VERSUS

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

PETER MWANGI MAINA.....2ND DEFENDANT

JUDGMENT

The plaintiff was charged and tried of the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**, in **Kangema Senior Resident Magistrates' Court Criminal Case No. 48 of 2012**; he was alleged to have unlawfully assaulted the 2nd defendant to the extent that he caused him actual bodily harm on the 16th day of January, 2012. At the conclusion of the trial he was acquitted. This suit therefore, is founded on what the plaintiff thinks was his malicious prosecution and in it he asks for both general and special damages.

The plaintiff averred in his plaint that on or about the 19th January, 2012, the 2nd defendant maliciously and without any reasonable or probable cause lodged a complaint with the police at Kangema police station of having been assaulted by the plaintiff. Acting on the instructions of the Inspector General of police and the Director of Public Prosecutions, the police officers at Kangema police station arrested the plaintiff and preferred criminal charges against him. It is the plaintiff's case that the criminal case was actuated by malice and without any reasonable or probable cause.

In his defence the 1st defendant denied that the plaintiff was unlawfully arrested or detained at the police station or prosecuted as alleged by the plaintiff. In the alternative, the defendant averred that if the plaintiff was arrested and charged then it was only because a cognizable offence had been committed. The defendant also contended that the arrest and prosecution of the plaintiff were in execution of the police's statutory duties and the plaintiff's subsequent acquittal did not give rise to a cause of action in malicious prosecution.

The 2nd defendant also disputed the plaintiff's claim and in his defence, he maintained that the plaintiff assaulted him on 16th January, 2012; he reported the assault to the police who arrested the plaintiff and charged him accordingly. He denied that the plaintiff's arrest and prosecution was motivated by malice or was because of a land dispute that was before a civil court. It was the 2nd defendant's claim that having

reported the case to the police, he had no control over their investigations and their decision to prosecute the plaintiff.

Except for the 1st defendant who did not call any witness, the rest of the parties reiterated the averments in their pleadings and largely dwelt on the evidence they had given at the criminal trial when this case up for hearing. The plaintiff added that the 2nd defendant was instrumental in his (the plaintiff's) prosecution because even after the District Commissioner called a meeting to resolve the underlying land dispute between the plaintiff's and the 2nd defendant's clans, the 2nd defendant insisted on the prosecution of the plaintiff. The 2nd defendant also testified against him.

The plaintiff's quarrel with the 1st defendant was that the police did not carry out any investigations and had they done so diligently, they would have established who it was that assaulted the 2nd defendant.

On his part, the 2nd defendant testified that he knew the plaintiff very well and that the two had schooled together in the 1960's. He said that he saw the plaintiff clearly when he attacked him and that when he reported the assault to the police, he even told them his attackers' names. When he was referred to his testimony in the criminal case where he said that he did not know the attackers' names, he changed his testimony to say that he did not give the names to the police but that he only knew them physically.

As noted the cause of action against the defendants is founded on malicious prosecution and therefore the primary questions that would naturally follow are; what constitutes malicious prosecution? Is there evidence to sustain a cause based on malicious prosecution? If there is such evidence, what is the extent of damages payable?

A malicious prosecution has been defined as an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge; see *Mohamed Amin v Jogendra Kumar Bannerjee* [1947] AC 322 at 330, PC, per Sir John Beaumont and *Martin v Watson* [1996] AC 74 at 80, [1995] 3 All ER 559 at 562, HL, per Lord Keith of Kinkel.

To succeed in a claim founded on malicious prosecution, the claimant must prove that indeed there was a prosecution by the defendant of a criminal charge against the claimant and that the proceedings complained of were terminated in the claimant's favour; see *Redway v McAndrew* (1873) LR 9 QB 74. In addition the claimant must also demonstrate that the prosecution was initiated without reasonable and probable cause; see *Glinski v McIver* [1962] AC 726, [1962] 1 All ER 696, HL.

It must also be proved that the prosecution was instituted or carried on maliciously; see *Stevens v Midland Counties Rly Co* (1854) 10 Exch 352 (where the defendant's object was to punish someone in order to deter others); and, the claimant must also prove damage; see *Berry v British Transport Commission* [1961] 1 QB 149, [1960] 3 All ER 322.

Coming back to the case before court, the record from the magistrates' court which was admitted in evidence shows that the plaintiff was arrested, charged and prosecuted by the police in a case in which the 2nd defendant was the complainant. That record also shows that by a ruling delivered in court on 14th May, 2012 the plaintiff was ultimately acquitted under **section 210** of the **Criminal Procedure Code**; the trial court held that the prosecution did not even establish a prima facie case as to require the plaintiff to be put on his defence.

It follows that much as the defendants disputed the plaintiff's prosecution and acquittal, there is ample uncontroverted evidence on record that clearly shows that the plaintiff was infact arrested, charged, tried and acquitted. The prosecution and the termination of that prosecution in favour of the plaintiff, therefore, are questions whose answers are beyond doubt and which do not warrant any further discussion in this judgment. To that extent the applicant has satisfied two of the ingredients necessary in an action based on malicious prosecution as a tort- the prosecution and its termination in his favour.

The major question that, in my humble view, deserves serious scrutiny and analysis of the evidence is

whether there was *a reasonable and probable* cause for the plaintiff's prosecution but before coming to that, it is necessary to consider what it is that constitutes *a reasonable and probable cause*.

The concept of reasonable and probable cause was discussed, relatively extensively, in **Kagane & Others versus Attorney General & Another (1969) E.A 643**. In that case Rudd, J. cited with approval the English decision of **Hicks versus Faulkner (1878), 8QBD 167** at page 171 where 'reasonable and probable cause' was defined.

Reasonable and probable cause is an honest belief in the guilt of the accused upon a full conviction founded upon reasonable grounds of the 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. (Per Hawkins, J.)

The court explained that unless the basis of the prosecution case is clearly or wholly fabricated, the question of whether there was a reasonable or probable cause for the prosecution is an objective question. To constitute a reasonable and probable cause, so the court explained, the totality of the material comprising the facts within the grasp of the prosecutor or the information which has been brought to his knowledge or both the facts and the information, must be such that it can satisfy *an ordinary, reasonable, prudent and cautious man* to believe that the accused person is probably guilty. Where the material is based upon information, the information must be reasonably credible such that the ordinary, reasonable, prudent and cautious man would believe it to be true and that it can form a strong basis for prosecution.

Turning back to the evidence at the plaintiff's trial in the criminal court, six witnesses testified on behalf of the state and in his evidence, the 2nd defendant who was the complainant and the first prosecution witness testified that on 16th January, 2012, he was asked by his father to go to Marimera and point out some trees to one Kanyi who had purchased them. The said Kanyi was to cut the trees on the land parcel identified as **Loc. 12/sub-loc1/1250** which, though was registered in his father's name, was a subject of ownership dispute between two clans. On his way back he was accosted by a group of about 30 men who were armed with pangas. Some of them held the motor-cycle on which he was riding pillion from the back and while two others hit him with the flat side of a panga on his forehead and on his right elbow. He identified one of his attackers as the plaintiff while the other one was called Willy.

The 2nd defendant testified that his attackers waylaid and attacked him because of the longstanding dispute over the land in Marimera.

After this incident, the 2nd defendant went to the police where he made a report and proceeded to Kangema Sub-district hospital for treatment. In his report to the police he said that he had been assaulted by two persons known to him but that he could not identify them by their names.

In answer to questions during cross-examination, the 2nd defendant testified that he knew the plaintiff but somehow he did not give his name to the police at the time he made the report. He also testified that he did not accompany the police when they arrested the plaintiff because it was his father who knew the plaintiff well and was therefore in a better position to point him out to the police.

The 2nd defendant also testified that he knew two persons who were known by the name Kanyi; there was John Maina Kanyi who accompanied him to the police station to make the report of assault and Francis Kanyi who was to buy the trees on the disputed farm.

Isaac Maina Mwangi testified that he was at the scene where the 2nd defendant was allegedly assaulted; he testified that he had been tasked by the 2nd defendant's father to cut some trees at the Marimera; however, he could not cut the trees as there was a group of people who warned him that he risked death if he dared cut down the trees on that farm.

According to this witness, when the 2nd defendant arrived, he saw one Njuguna Wamugunda hit him on

the upper part of the left eye with a panga. Another person whom he identified as Willy hit him with a stick on the right hand. The witness testified that the person who assaulted the 2nd defendant was not in the dock, thereby implying that he was not the plaintiff. He also said that he knew Njuguna Wamugunda who assaulted the 2nd defendant and described him as a man who sells potatoes; according to him, he was short-statured, big-head and bald headed as well.

On his part, **John Maina Kanyi**, the motorcyclist who was carrying the 2nd defendant when they were attacked, testified that indeed they were attacked but that he could not tell the person who hit the 2nd defendant.

The investigations officer, one **Job Onyango**, testified that he established, in the course of his investigations, that the plaintiff assaulted the 2nd defendant. He told the court that indeed the 2nd defendant assisted the police in tracing and arresting the plaintiff. He also testified that upon the release of the plaintiff on cash bail, the police advised him to settle the dispute between him and the 2nd defendant out of court. The officer also testified that he established that there was a dispute between the plaintiff and the 2nd defendant over the Marimera land and therefore it was his opinion that the plaintiff must have planned the incident in which the 2nd defendant was assaulted. He was aware that the District Commissioner had wanted the two parties to settle the dispute.

During cross-examination, the investigations officer changed the version of his testimony to say that it was an informer and not the 2nd defendant who pointed out the plaintiff to the police. According to this officer, the 2nd defendant did not give any names when he reported his attack to the police though he is alleged to have known his attackers.

The officer testified that he did not investigate the aspect of the dispute over the ownership of the land at Marimera and whether it had anything to do with the 2nd defendant's complaint against the plaintiff. He also said that he was clear in his mind as to the identity of the plaintiff and therefore there was no need for an identification parade.

Clement Kimemia Ndirangu, the assistant chief of Marimera sublocation testified that he went to the scene of the attack after he was instructed to do so by the Chief of Muguru location who in turn had been instructed by the area District Commissioner. He said that he was aware of a dispute between one Jason Mwangi Maina and the Kahugu clan over the Marimera land.

The witness testified that when he arrived at the scene, the 2nd Defendant was being surrounded by group of people who he asked to leave; he later talked with the 2nd Defendant who told him that he could not tell who had attacked him. The witness also testified that he did not know the plaintiff and that he never saw him at the scene; he only learnt that the plaintiff was the accused in the trial when he was summoned to testify. He said that the plaintiff was from the Kalugi clan which was also involved in the dispute over the ownership of the Marimera land and which dispute had been simmering since the 1980's.

This was the evidence against the plaintiff. As noted the learned magistrate in the lower court was not satisfied that it is the kind of evidence that had met the threshold of a prima facie case and therefore she acquitted the plaintiff because, in her respectful view, he had no case to answer. For our purposes, the only question is whether, assuming that this evidence represents the material presented to the police or, as far the investigations officer's testimony is concerned, is the information which the police gathered by themselves, was it sufficient to constitute what one would regard as a reasonable and probable cause to prosecute the plaintiff? Would that material and the information which the police obtained themselves have satisfied *an ordinary, reasonable, prudent and cautious man* to believe that the accused person was probably guilty?

There are some inconsistencies in the prosecution evidence that would certainly not sustain the prosecution of the plaintiff; it is not necessary to go through all of them but I can only narrow down to those parts of evidence which could possibly lead an ordinary reasonable, prudent and cautious man to

believe that the plaintiff was probably not guilty and therefore he should not have been charged or prosecuted in the first place.

From the evidence, it is probable that an offence could possibly have been committed; what was also clear, however, was that the person who was charged with the offence was not its perpetrator. Whether this was a case of mistaken identity or sheer recklessness on the part of the police is an issue that I will revert to in due course but it is necessary to consider the evidence that clearly exculpated the plaintiff.

At one point in his evidence, the 2nd defendant said he knew his assailants and indeed he had schooled with one of them; he later changed his testimony to say that he only knew their physical appearance. As if he was not done with his contradictions he named one of them as Willy. When he reported the incident to the police, however, he never gave them any names including that of Willy. This was confirmed by the investigations officer who testified that the 2nd defendant never named any particular person as having attacked him.

The second prosecution witness, was an eyewitness; he gave a vivid description of the person who attacked the plaintiff. He said he was short, bald headed and also big-headed. He was candid that he was not the plaintiff who was in the dock.

The assistant chief of Marimera sub-location, who was also at the scene of the attack, said that the plaintiff was not at the scene and that he only came to know that the plaintiff had been charged with the offence of assaulting the 2nd defendant when he was summoned to testify in court.

The investigations officer himself was not consistent in his evidence as how he came to the conclusion that it was the plaintiff who had attacked the 2nd defendant; he initially testified that the complainant, the 2nd defendant herein had assisted him locate the plaintiff but later in his evidence, he changed his testimony to say that an informer pointed the plaintiff out. The investigations testimony was not only self-contradictory but it was also inconsistent with the evidence of the 2nd defendant who testified that the plaintiff was pointed out to the police by his father who knew him better than he did. But even so one wonders why the 2nd defendant himself could not identify his assailant or assailants to the police instead of his father who neither testified in the trial against the plaintiff nor in this suit.

Had the investigations officer been diligent enough in analysing the information which he was supplied with and which he himself may have gathered, he would probably have come to the conclusion that there was no evidence to hold the plaintiff culpable and therefore he ought not to have been prosecuted. An ordinary, reasonable, prudent and cautious man would not have believed that in the face of the apparent contradictions, there was any reasonable and probable cause to arrest, charge and prosecute the plaintiff. I am satisfied that the plaintiff has established on a balance of probability that his prosecution was mounted without any reasonable or probable cause.

The next question is whether the prosecution was malicious. The question of when to infer malice was again discussed in **Kagane & Others versus Attorney General & Another case (supra)** in which **Rudd, J.** said that in the nature of things, a person who is actuated by malice may for that reason be likely to institute a prosecution without reasonable and probable cause; in other words malice can be inferred from want of reasonable and probable cause. This is a logical conclusion because unless a contrary intention is shown, there should be no reason why one should institute a criminal prosecution against another without a reasonable and probable cause unless such prosecution is actuated by malice.

Apart from want of reasonable and probable cause for the prosecution of the plaintiff one can also read malice from the fact that there was no evidence linking the plaintiff with the 2nd defendant's assault. Infact, looking at the evidence of the assistant chief, the investigations officer and even the 2nd defendant himself, the plaintiff was dragged into the criminal case because of the longstanding dispute over ownership of the land in Marimera. The investigations officer decided not to investigate this aspect of the case and establish whether the complaint against the plaintiff was in some way linked to this dispute although he was aware of its existence and had even prevailed upon the parties to resolve the dispute out

of court.

The investigations officer decided to proceed with the case despite the fact that it was not certain that it was the plaintiff who had assaulted the 2nd defendant. His own evidence as to the identification of the plaintiff was contradictory and inconsistent with that of the 2nd defendant. He said he saw no need of the identification parade yet it was the only means, in the circumstances, where the 2nd defendant could have picked his attackers if he did not know their names. The refusal to conduct an identification parade when there was no evidence linking the plaintiff with the 2nd defendant's assault was not only reckless but it also goes to show, the malice with which the plaintiff was prosecuted.

The last question for consideration is whether the plaintiff suffered any damage. In a claim for damages for malicious prosecution, the claimant must prove damages under any of the following heads: (1) damage to one's fame, as where the matter of which he is accused is scandalous; or (2) damage done to the person, as where his life, limb or liberty is endangered; or (3) damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged; see *Savile v Roberts (1698) 1 Ld Raym 374 at 378* per Holt CJ and *Berry v British Transport Commission [1962] 1 QB 306, [1961] 3 All ER 65, CA*. If any of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings; see *Wershof v Metropolitan Police Comr [1978] 3 All ER 540*.

The plaintiff pleaded and proved special damages of the sum **Kshs 75,000.00** which comprised the fee he paid for legal representation in the trial against him. Although he asked for **Kshs 80,000/=** it is the sum of **Kshs 75,000/=** that was pleaded as special damages and that is what this court will award him under this head.

The plaintiff testified that he was arrested in public at Gakira market and the police even attempted to handcuff him but he told them that he will not resist arrest. He was, however, confined in the police cells before he was released on bond. He said that his reputation was injured and he sought for general damages for the pain that he went through.

The plaintiff asked that general damages be assessed at Kshs 500,000/= and in this regard he relied on the High Court decision in **Civil Case No. 250 of 2004, Joseph C. Mumo versus Attorney General & Another** where the claimant was awarded Kshs 300,000/= as general damages for malicious prosecution. I have read that decision and established that the sum awarded was the cumulative award for unlawful arrest, false imprisonment and malicious prosecution. In the instant case all that the plaintiff asked for was general damages for malicious prosecution and that is all that is entitled to besides of course, the special damages. Only the 2nd defendant filed his submissions but even then, he never submitted on the quantum of damages payable to the plaintiff I did not therefore have the benefit of the defendants' views on the extent of damages payable to the plaintiff.

Apart from the decisions cited by the plaintiff's counsel, I also came across the High Court decision in **Nairobi High Court Civil Case No. 23 of 2008, Samson John Nderitu versus Attorney General** where the Court (Nambuye, J. as she then was) cited with approval the decisions in **Nairobi High Court Civil case No. 195 of 1997, Odongo versus Attorney General** where the sum of Kshs 150,000/= was awarded in damages for malicious prosecution and **High Court Civil Case No. 2007 of 2001, Njuguna Versus Attorney General** where an award of Kshs 300,000/= was awarded as damages under the same head. Considering these decisions and doing the best I can I will award the plaintiff the sum of Kshs 300,000/= in general damages. The final award to the plaintiff is therefore as follows:

a. General damages	Kshs 300,000.00
b. Special damages	<u>Kshs 75,000.00</u>
Total	<u>Kshs 375,000.00</u>

Accordingly, judgement is entered for the plaintiff against the defendants, jointly and severally, in the

sum of **Kshs 375,000/=** plus costs and interest at court rates. The interest will accrue from the date of delivery of this judgment.

Dated and signed this 19th January, 2015

Ngaah Jairus

JUDGE

Delivered and read in open court at Murang'a this 26th day of February 2016.