



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.196 OF 2011

DR. MANASE ODENY ONYIMBIPLAINTIFF

VERSUS

R A1ST DEFENDANT

JOHN OBURA ADEL.....2ND DEFENDANT

CHARLES ODIDA AWUOR.....3RD DEFENDANT

THE ATTORNEY-GENERAL.....4TH DEFENDANT

J U D G M E N T

1. The plaintiff herein was charged in the criminal case No.324 of 2009 at Kisumu with the Offence of Defilement and committing Indecent Act with a child contrary to Section 8(1)(3) and 11(1) of the Sexual Offences Act. He was however acquitted under the provisions of Section 215 of the Criminal Procedure Code.
2. Pursuant to the above acquittal the plaintiff has filed this claim against the defendants jointly and severally for general damages for
 - a. **Defamation**
 - b. **Malicious prosecution**
 - c. **False imprisonment**
 - d. **Assault and battery**
 - e. **as well as costs and interest.**

THE PLAINTIFF'S CASE

3. The Plaintiff told the court in his evidence in chief that he was a Medical doctor and a Researcher by profession of over 20 years experience. He said that on 15.7.2009 he was at his residence at Rabuor within Kisumu District when police officers came and arrested him on allegation that he had confined the 1st defendant in her house. Further that in the cause of the said confinement he also defiled her. He was then arrested and incarcerated for 3 days. Eventually he was charged but acquitted on 24.3.2011.
4. According to him the architect of his arrest were the defendants. He produced the lower court file which contained all the evidence and proceedings leading to his acquittal. He further testified that he was assaulted by the said police officers while under their custody. The plaintiff said also that he was handcuffed and paraded in town and driven on a public vehicle which caused great embarrassment and humiliation.

5. He was also taken to hospital for medical test where he endured great shame from the medical personnel who apparently included his past students. In short he said that the arrest and prosecution was actuated by malice and ill will that is why the court set him free.
6. He denied that 1st defendant was in his house on that material day. He said that on that day he had travelled to Bondo to testify in a Road traffic case where he was required to produce a medical report for one John Ocharo.
7. **PW2 GEORGE OSUNGA** the Executive Officer of the court produced the Criminal Case file on behalf of the plaintiff. He confirmed that the plaintiff was put on his defence but was acquitted as earlier stated.
8. **DW1 R A** told the court that she knew the plaintiff who was her neighbour. She was by then staying with her sister one M A. She was a standard 6 pupil at [particulars withheld] Primary school.
9. She testified that on the material day the plaintiff met her on the way to school and requested her to go to his house so that he could give her money to take to his son R who was a pupil also at [particulars withheld] Primary school. In the plaintiff's house the plaintiff prepared tea and gave to the 1st defendant before forcefully defiling her on his bed. He then left for town and locked her in the house,.
10. In the cause of time the 1st defendant went to the toilet and she was spotted by somebody. People who included her headmaster, deputy headmaster, assistant chief and AP officers came and rescued her. She was taken to police station then later to the hospital. She further said that she was praying to be paid damages since according to her counterclaim she has not known peace after the incident though she was married by now.
11. On cross-examination by the plaintiff the 1st defendant denied that she had been bribed to testify against him.
12. **DW2 RASHID OCHIENG** was in 2009 working for one Nelson Owinyo and a neighbour to the plaintiff. He was working as a farm hand. He testified that he knew both the plaintiff and the 1st defendant. He said that the plaintiff infact had put some of his items at his employer's house while he was building. He said that on several occasions he would see the 1st defendant going to the plaintiff's house sometimes alone or accompanied by her sister whom she was staying with. He was however not present on 15.7.2009 when the incident occurred since he had gone to Migori.
13. **DW3 JOHN OBURA ADENY** is the chief Kochieng East Location. He testified that he was the area sub-chief and on that day he received a call from the head teacher [particulars withheld] Primary School concerning a student who had been seen at a nearby house yet she was meant to be at school. He went to school and together with the head teacher and others went to the plaintiff's house. They knocked the gate but nobody opened. He called his chief who sent him two police officers who came and forcefully entered the house and rescued the child who was still in school uniform.
14. The plaintiff was not in the house by then. Later in the evening at around 2.30 p.m. They came back and arrested the plaintiff and escorted him to Rabuor Administration Police Camp and the following day on 16.7.2009 escorted to Kisumu Central Police Station.
15. On cross-examination he said that he knew the plaintiff as he was his subject. He further stated that his business was to maintain law and order.
16. **DW4 CHARLES ODIDE** the 4th defendant is the head teacher at [particulars withheld] Primary school. He testified that he has been a teacher for the last 36 years and part of his duties is to ensure the safety of his pupils. He confirmed that the 1st defendant by then was a standard 6 pupil at his school.
17. On the material day he got information that one of his pupil, the 1st defendant was confined in a house near the school. He called his deputy head-teacher as well as the assistant chief and went to

the scene. They found the gate closed and they sort assistance from the area chief who sent some police officers. The said police officers managed to enter the house and rescued the child who was in school uniform. The child was taken to Kisumu Central Police station. He said that he knew the plaintiff for at least 1 ½ years and they were good friends. He had nothing adverse against him and that all that he was doing was within his mandate.

ANALYSIS AND DETERMINATION

18. Having summarised the evidence as presented by the rival parties herein the issues to determine are whether or not there was a malicious prosecution against the plaintiff and whether as a result of that he suffered humiliation and defamation and therefore entitled to damages.

19 There is no doubt that the plaintiff was arrested, charged and prosecuted and subsequently acquitted. That evidence is clearly contained in the criminal proceedings produced herein.

20. All the parties herein filed written submissions in support and opposition of their position which I have perused then carefully together with the attached authorities.

21. As clearly submitted by the 4th defendant, the duty of the police is to act on any complaint by the citizenry. They ought to investigate and carry out any prosecution should they deem that there is a probable case.

22, For one to succeed in a case such as this the following test ought to be satisfied:

1. **that the prosecution was instituted by the defendant or by someone to whose acts he is responsible;**
2. **that the persecution terminated in the plaintiff's favour;**
3. **that the prosecution was instituted without reasonable and probable cause;**
4. **that the prosecution was actuated by malice. (see *Murunga vrs The Attorney- General (1976-80) KLR 1251***

One therefore ought to clearly show that there was no probable cause for making the report at the police station and that there was malice, spite or ill will.

23. In **KAGANE VRS ATTORNEY GENERAL & ANOTHER (1969) E.A. 643** the court held as follows:

“Excluding cases where the basis for the prosecution was alleged to be wholly fabricated by the prosecution, in which the sole issue is whether the case for the prosecution was so fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecution at the time he instituted the prosecution where that material consisted of facts discovered, by the prosecution or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material 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 base for the prosecution,”

24. In this case, can it be said that what the 2nd, 3rd and 4th defendants did was actuated by malice? I don't think so. The head teacher having heard that his pupil who was meant to be in school that morning was confined in a house was reasonably expected to act and ensure that she was rescued. It appears from the parties evidence that the plaintiff was not present at the material time. The only available evidence of how and why she was in that house at that time was that of the 1st defendant.

25 Further the action of involving the provincial administration including the administration police

officers to access the compound was not repudiated by the plaintiff. The business of the head teacher and the chief clearly ended when they handed over the child to the police. Respectfully and contrary to what the plaintiff asserted they were not supposed to investigate. They however offered statements on the circumstance leading to the rescue.

26 The police on the other hand did carry out their investigation. They established from the child that she had been forcefully confined in that house and further had been defiled. As expected any prudent investigation would subject the complainant to medical test which they clearly did. They then proceeded to arrest the plaintiff (the suspect) for investigation which they did and found a prima facie case against him. He was then charged in a court of law and subsequently acquitted,

27. Can the above action be deemed to be malicious? I don't think so. There was no evidence of bribery as alleged by the plaintiff. There was no evidence that the 1st defendant was induced to testify against the plaintiff or at all.

28. Consequently I find that the plaintiff's prosecution was not actuated with any malice, ill will or spite. The thread running through the trial was clearly a case of reasonable suspicion. It was not and has never been the business of police or the complainant to convict, but its the duty of the trial court. For the reasons given in the court's judgment the plaintiff was duly acquitted. The prosecution choose not to appeal.

29. It is however not true that an acquittal perse is a sufficient ground for a suit such as this. One ought as stated earlier, to prove malice and ill wil too. I find that the prosecution had all the probable cause to charge the plaintiff.

30. The other issue raised by the plaintiff is the fact that his character was defamed. I do not find any basis or ground to agree with the plaintiff. The action of arresting and charging him in a court of law had no malice at all. In any event he has not demonstrated how he had been defamed. No witness was called to buttress this assertion.

31. Neither do I find any reasons to agree with him that he was falsely imprisoned. Its clear that he was arrested on 15/7/2009 and taken to the Chief's Administration Police Camp at Rabuor. On 16/7/2009 he was taken to Central Police Station and on 17/7/2009 he was released on bond having been charged in court. The whole process in my view was seamless and it cannot be equated to false confinement or imprisonment.

32. On the heading of assault and battery, again, unfortunately I do not find any basis for this. The mere presentation of a P3 form does not constitute evidence of assault. The plaintiff did not state where and when and who assaulted him. He produced torn clothes but he did not lead evidence to that effect The prayer must also fail.

33. Consequently for the reasons stated above I do not find that the plaintiff proved his case on a balance of probability against the defendants. Apparently from the body language of the plaintiff and his sentiment as contained in the voluminous submissions its clear that there was bad blood between him and the 4th defendant in particular. The issue of corruption and fraud against the 4th defendant in respect to the running of [particulars withheld] Primary School ought to be raised in another forum.

34. Turning now to the 1st defendant's counter-claim I am not inclined to grant the same as the facts raised there including the evidence itself as presented was not found sufficient during the criminal trial. In any case, the said 1st defendant did not place sufficient material before the court including medical evidence to suggest that she was sexually assaulted by the plaintiff. By allowing her counter-claim, this court would be dealing with the concluded Criminal Case through the back door so to speak.

35. For the foregoing reasons I do dismiss both the plaintiff's case as well as the counterclaim. Owing to the efforts by the parties herein in particular the plaintiff who acted in person as well as the nature of the research and the submissions made I exercise my discretion not to award costs to any party herein.

Each party shall bear their respective costs.

Dated, signed and delivered this 14th day of March 2016

H. K. CHEMITEI

J U D G E

In the presence of:

.....**plaintiff**

.....**1st defendant**

.....**2nd defendant**

.....**3rd defendant**

.....**4th defendant**