



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 453 OF 2011**

**JOHN NGUGI ICHUNG'WA..... PLAINTIFF**

**V E R S U S –**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**MONICA NYAMBURA KINGORI ..... 2<sup>ND</sup> DEFENDANT**

**ROSE NYAMBURA KIRUMBA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**1. John Ngugi Ichungwa and Gideon Mungai Ichungwa** the plaintiffs herein, sued the **Hon. Attorney General, Monica Nyambura Kingori and Rose Nyambura Kirumba**, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively vide the plaint dated 14<sup>th</sup> October 2011 and 5<sup>th</sup> may 2011 whereof they sought for judgement in the following terms:

***a) General damages***

***b) Costs of this suit***

***c) Interest on (a) and (b) above from the date of filing suit until payment in full***

***d) Such further or other relief as this honourable court may deem fit and just to grant.***

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their defences denying the plaintiff's claim. When the matter came up for hearing on 24<sup>th</sup> June 2013, the parties through their counsels consented to have HCCC No. 166 of 2011 and the current suit consolidated.

3. At the close of the plaintiff's case, the defendants summoned the 3<sup>rd</sup> defendant as a witness to testify in support of their case.

4. At the close of evidence, learned counsels appearing in the matter were invited to file written submissions, which they did.

**5. John Ngugi Ichungwa** testified as PW1. He stated that he was unlawfully arrested on the allegation of operating a butchery in unhygienic conditions and later charged with the offence and was acquitted for lack of credible evidence. He produced certified copies of the charge sheet, proceedings and ruling. PW1 further stated that the butchery in question was owned by his father, **Isaac Ichungwa Ngugi** and as such,

he was not operating it. He averred that the 14 days notice was issued to Isaac Ichungwa and that despite that, he was arrested on the 5<sup>th</sup> day before the lapse of the 14 days and also denied bond. In cross-examination PW1 said that he was arrested when he went to check on the workers at the butchery. He claimed that he was defamed when he was referred to as a criminal in the charge sheet.

6. PW2, Gideon Mungai Ichungwa, testified that PW1 is his elder brother. He claimed that PW1 called him upon his arrest and upon reaching the police station, he was also arrested. He produced the proceedings and the charge sheet. He tendered in evidence as an exhibit the proceedings of the criminal case. PW2 stated that he was released on bond after 8 days and that later, the case against him was withdrawn. On cross-examination, he asserted that the people who worked in his father's butchery were also arrested.

7. On their part, the 3<sup>rd</sup> defendant, **Rose Nyambura Kirumba** adduced evidence on behalf of the defendants where she testified that she is a public health officer. She adopted her witness statement as her evidence. It was her evidence that she and the 2<sup>nd</sup> defendant were in the course of their duties on 21<sup>st</sup> July 2010, when upon arriving at plot 182, a snack shop, they found the conditions to be of public health concern. She claimed that according to the local council licence, the owner was Isaac Ichungwa but the same was being operated by Gideon Ichungwa. DW1 further stated that the poor conditions included: the assertion that tea was being sold in a container, the premises lacked a suitable standard kitchen, it lacked a waste water disposal facility and lacked a sanitary facility. She further stated that she issued a statutory notice for closure of the premises but thereafter on 26<sup>th</sup> July 2010, she found that the plaintiff has been operating his business and proceeded to have him arrested. She averred that the plaintiff was the one operating the business and that he was the one securing the licences issued by the county government hence the reason why he was the one arrested.

8. At the close of evidence, learned counsels were invited to make final submissions. I have considered the evidence plus the rival submissions. The case before this court is that of malicious prosecution. Two main issues have arisen for the determination of this court namely:

**i. Whether or not the plaintiffs' prosecution was malicious**

**ii. If the answer to (a) above is yes, then what is the quantum of damages.**

9. On the question of whether the plaintiff's prosecution was malicious, it is important to apply the principles that are applicable in establishing whether a prosecution can be deemed to be malicious. This principles were restated in the case of **Kagane & Others vs The Attorney General (1967) E. A 643** as follows inter alia:

**“ ..... to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consisted of the facts discovered by the prosecutor 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.”**

I am also guided by the case of **Murunga vs the Attorney General where Cotram J.** laid down the principles that govern malicious prosecution. They include

“The plaintiff must show that:-

**1. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.**

**2. That the prosecution terminated in the plaintiff's favour,**

**3. That the prosecution was instituted without reasonable and probable cause and**

#### **4. That it was actuated by malice”**

10. Looking at the case before me and the above principles it is not in dispute that the plaintiffs were arrested and prosecuted in **Criminal Cases numbers 697 of 2010 and 696 of 2010**. It is also not in dispute that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, are the ones who caused the arrest of the plaintiffs herein for allegedly operating a butchery on plot no. 182, Kikuyu under unhygienic condition. It is also not in dispute that the prosecution of the plaintiffs was terminated in the plaintiffs favour. What this court will need to establish is whether the prosecution was instituted without reasonable and probable cause and also whether it was actuated by malice.

11. It is apparent that the plaintiffs were arrested by the defendants herein who are health officers. The defendants claimed that they inspected the business premises and found them unfit and of health concern. They proceeded to issue a statutory notice to the plaintiffs where they required him to completely endorse the meat safe, repair entire premises, provide soap and hot water system, provide a facility for waste liquid disposal, replace roofing materials for sanitary facility, replace timber slab with concrete slab in PH latrine and to clear over grown vegetation at the back of the premises. Those conditions according to the defendants warranted immediate closure of the premises. It was the defendant's evidence, that despite the issuance of the statutory notice, the plaintiffs continued to carry on their business, a fact that the plaintiffs do not dispute. In fact the plaintiffs contention is the fact that the arrest and prosecution was malicious seeing that the licence by the county government was in their name but in that of their father **Isaac Ichungwa Ngugi**. As such, they argued that they should not have been the ones to be arrested and prosecuted. The defendants on the other hand, argue that they had a reason to arrest the plaintiffs since the 1<sup>st</sup> plaintiff **John Ichungwa** came to the police station to have the workers released and further that he was issued with a notice in his name as well as another notice with his father's name as they both operated in the same premises. Furthermore, they aver that the Plaintiff is known to operate his business in the premises in question.

The defendants further submitted that they were exercising their duties and obligation since the plaintiffs were in breach of Section 7 and 36 of the Food, Drugs and Chemical Substances Act, which offence contained a penalty of fine not exceeding kshs.500,000 or imprisonment for a term not exceeding two years.

12. I have on my part evaluated the evidence tendered by both sides.

The reasons the plaintiffs feel that there was malicious prosecution was because they were charged and prosecuted with operating a snack shop in dirty conditions, yet the business premises belonged to their father Isaac Ichungwa and not them. The defendants on their part acknowledge that the county government licence to operate the business premises belonged to the plaintiff's paternal father but claim that the plaintiffs operate their business at the same premises, hence the reason why they were charged and prosecuted.

I have also examined the decision of the trial magistrate. In the 1<sup>st</sup> plaintiff's case in the trial court, the 1<sup>st</sup> plaintiff was acquitted since the learned resident magistrate was of the view that no notice had been issued on the plaintiff herein since the same was issued on his father, one Isaac Ichungwa. The prosecution further withdrew the case against the 2<sup>nd</sup> plaintiff since the notice issued did not involve the 2<sup>nd</sup> plaintiff. In my view, the fact that the court found that no notice was issued against the plaintiffs does not mean that the complainants were malicious or that the prosecuting agency was malicious. Moreover, going by the charges brought against the plaintiffs under statute, I am convinced that the prosecuting agency had reasonable and probable cause to institute a suit against the plaintiffs herein. The mere fact that the notice was issued against the father Isaac Ichungwa does not in any way constitute malice on the part of the defendants, who also operate on the premises in question. Furthermore the defendants in their evidence alluded to the fact that the 1<sup>st</sup> plaintiff also carried his business in the premises in question together with his father, hence his detention and prosecution. In the end therefore, I find that the plaintiffs have failed on a balance of probability to establish their case, upon relying on the case of **Michael Ochieng Oderea v Attorney General (2012) eKLR** where the plaintiff who had sued for malicious

prosecution was awarded general damages of ksh.500,000/=

13. On damages, I am of the view that had they been successful in this case, I would have actually awarded them the sum of kshs.500,000/= each in general damages.

14. The suit is hereby dismissed with costs to the defendants.

Dated, Signed and Delivered in open court this 25<sup>th</sup> day of November, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendant