



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 246 OF 2005

ELIJAH NJOROGE KAMAU.....1ST PLAINTIFF
PETER KIMANI WAWERU.....2ND PLAINTIFF
SIMON MUNGAI MBURU.....3RDPLAINTIFF
MBURU WAINAINA NGUGI.....4TH PLAINTIFF
SAMSON GACHENIA KIARIE.....5THPLAINTIFF
PETER KAMAU KOMU.....6THPLAINTIFF
JEREMIAH KARIUKI GITAU.....7THPLAINTIFF
ABRAHAM THIGE GICHINGO.....8THPLAINTIFF
CHARLES KARUA NJOROGE.....9TH PLAINTIFF
ROBBINSON NGIGE GITHUKA.....10THPLAINTIFF
MICHAEL NGUGI KARIUKI11TH PLAINTIFF
SAMWEL KAMORE THIGA.....12TH PLAINTIFF
LUCY NDUTA KARIUKI.....13TH PLAINTIFF

VERSUS

THE. HON. ATTORNEY GENERAL.....1STDEFENDANT
P.C. DICKSON MUTEMI.....2ND DEFENDANT
JOHN KIMUHU.....3RD.DEFENDANT

JUDGMENT

1. The plaintiffs are former directors of South Kinangop Farmers Co-operative Society Limited. By their plaint dated the 27th June 2005 and filed on the 5th October 2005, they sued the defendants for damages arising from a purported false arrest, false imprisonment and malicious prosecution in **Nakuru Principle Magistrates Criminal Case No. 1291 of 2004** that culminated in an acquittal under the provisions of

Section 210 of the Criminal Procedure Code, for lack of evidence.

The first to the 9th and 11th plaintiffs were charged with the offence of stealing by **Directors Contrary to Section 282 of the Penal Code** while the 10th plaintiff was charged with the offence of stealing by servant contrary to **Section 281 of the Penal Code**.

2. The plaintiffs case is that upon a complaint made by the third defendant of the nature stated above the first Defendant the Hon. The Attorney General being the Governments Chief legal advisor and being the employer of the second Defendant P.C. Dickson Mutemi maliciously arrested and detained the plaintiffs and eventually preferred charges against them. Particulars of malice on the part of the third defendant are tabulated in the plaint, that the third Defendant manipulated the criminal justice, made false reports to the police when he knew or ought to have known that the plaintiffs had not committed any offence nor was there any basis for the complaints. The plaintiffs state that they were arrested and detained in October 2001 and charged but the charges were withdrawn under **Section 87(a) of the Criminal Procedure Code**, and rearrested and charged with similar offences in **Criminal Case No. 1964 of 2002** which was also withdrawn in 2004 and thereafter another charge that culminated to the acquittal stated above.

Together with general damages, the plaintiffs seek special damages in the sum of Kshs.378,500/= particulars pleaded in the plaint.

3. In their separate defences, the defendants denied the claims. The third defendant denies that the reports and request for investigation by the police into malpractices in the cooperative society were malicious or false.

The first and second defendants in their joint defence too deny the allegations of malice and falsehoods and without prejudice state that if the plaintiffs were charged then it was upon investigations that revealed existence of reasonable and probable cause. It is further denied that the plaintiffs suffered any special or general damages.

4. The parties evidence was taken before the Honourable Justice H. Omondi and submissions filed. All the plaintiffs had recorded their respective statements. Four of the plaintiffs testified, and for the rest of the plaintiffs it was agreed that their statements would form part of the evidence. Having not heard or seen the parties testify, my duty is therefore to analyse the evidence as recorded and make findings based on the said evidence.

5. Plaintiff's Case

PW1 testified that all the plaintiffs were at the material time officials of South Kinangop Farmers Co-operative Society and he was the Secretary/Manager while the rest were members of the Management Committee, and the third Defendant became a member of the Committee when the plaintiffs left office.

It was his testimony that the third Defendant made a complaint to the police that the plaintiffs had stolen from the Society following which they were charged. That it was the 3rd Defendant who testified against them alone and that he had no authority to make the complaint upon which they were arrested and charged in the three criminal cases that were all discontinued and eventually dismissed for lack of sufficient evidence.

He produced receipts to support their joint claim of special damages at Kshs.378,500/=. He stated that when arrested, they were locked up in police cells for a weekend and therefore seek general damages for the false arrest, imprisonment and the malicious prosecution.

Upon cross examination, PW1 stated that the Minister of Cooperatives had sent an inspector to investigate the affairs of the Society but they did not see the report.

6. PW2 Simon Mungai Mburu was the Secretary of the Management Committee of the Cooperative Society in the period 1994/96. He testified that there were no complaints regarding accounts of the society

and that there was no resolution by members for the investigations, and so no basis for the same and nor the charges against them. He exonerated the plaintiffs from any criminal activities.

PW3 to PW9 all testified and reiterated the evidence adduced by PW1 and 2. Their evidence is that the third Defendant had no basis upon which he reported the complaint to the police leading to their arrest and subsequent charges. They placed blame upon the third defendant.

The 1st, 2nd and 3rd Defendants did not testify. Submissions were however filed on their behalf by their Advocates.

7. There is no dispute that the complaint is were lodged by the 3rd Defendant and that he alone was the only one who testified against the the plaintiffs. In a claim for malicious arrest and prosecution upon the plaintiffs to prove on a balance of probability that the prosecution by the defendant was actuated by malice. It is enough for the plaintiff to show that the defendant was actively and instrumental in putting the law in force. The plaintiffs must prove that the prosecution ended in their favour, either by way of an acquittal or discharge. A plaintiff too must prove that the prosecution was without reasonable and probable cause, and was actuated by malice.

See **Zablon Mwaluma Kadori vs National Cereals & Produce Board HCCC No. 152 of 1997 (Mombasa)**, and **Kagane & Others vs – Ag and Another HCCC No. 1332 of 1966**. The Judges held that:

- i. *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 justify a prudent and cautious man that the accused was probably guilty.*
- ii. *The fact that the prosecution was instituted on the advice of state counsel did not if itself constitute reasonable and probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case.*
- iii. *Once the objective test is satisfied, it may be necessary to consider whether the prosecutor did not honestly believe in the guilt of the accused but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case.*
- iv. *On the facts, no reasonable person could honestly have believed that the prosecution was at all likely to succeed, and the defendant was actuated by malice.*

8. I have considered the evidence and submissions tendered vizaviz the evidence adduced.

The plaintiffs submit that there was no competent complaint to warrant the arrest and prosecution of the plaintiffs. The plaintiffs and the third Defendant who was the complainant were all members of the Co operative Society, and as such, any dispute between them ought to have been referred to the Cooperative Tribunal in line with **Section 769(1)** of the Cooperative Societies Act. It is therefore submitted the third defendant had no *locus standi* to institute the complaint against the plaintiffs and therefore the complaint was actuated by malice. It is further submitted that the complaint by the third defendant was not sanctioned by the Societies General Meeting. That there being no resolution to amount the complaints, the said complaints were baseless and incompetent.

It is further submitted that the probe instigated by the third defendant on the matter of mismanagement of the affairs of the Cooperative Society was malicious as none of the plaintiffs were called to testify and no report was filed, thus there was no basis to have the plaintiffs prosecuted.

The plaintiffs are categorical that it is the third defendant who, out of malice instigated the investigations and the eventual prosecution without any reasonable and probable cause.

9. On the part of the third defendant, submissions were tendered that as Chairman of the probe committee and an allegation of loss of the societies money was made, it was in order for him to report to the police for investigations which was both legal and his duty, and that it was upon the police through the second defendant to investigate and at that level, he had no control over the investigations. It is submitted therefore that there was no malice and none was established in the complaint.

10. The first and second defendants submit that the events leading to the arrest and prosecution of the plaintiffs was started by the third Defendant by filing his complaint with the police.

Upon investigation, the second defendant submits that there was reasonable and probable cause to charge the plaintiffs. Citing the case **Kiiru vs Mwamburi & 2 Other s Civil Appeal No. 171 of 2000** it was stated that to prosecute a person is not *prima facie* tortious, but to do so dishonestly is, and that the onus of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.

11. There is no dispute that the third Defendant was instrumental to the events that lead to the arrest and prosecution of the plaintiffs, not once, but in three occasions whereof in the first two cases preferred against the plaintiffs they were withdrawn by the prosecution. The third prosecution as stated above ended in an acquittal for lack of evidence. A probe committee set up to investigate the affairs of the company did not prepare a report. It was chaired by the third defendant. It is not clear then on what reasonable and probable basis the third defendant instigated the prosecution. A reasonable and probable cause is an honest belief in the guilty of an accused person based upon full conviction founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would lead on ordinary prudent and cautious man placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed See **Zablon Mwaluma Kadori (Supra)**. The two withdrawals of the cases against the plaintiffs in my view presents a matter where from the beginning, no reasonable and probable grounds were available to sustain the criminal charges. No satisfied with the prosecutors action, the 3rd defendant proceeded to have them charged a third time, leading to the acquittal.

No evidence was adduced by the defendants to point out to that any money or property was stolen by the plaintiffs.

It can therefore not be said that the third defendant had no malicious intentions when he instituted the prosecution He was instrumental in all the actions taken by the police.

12. It is true that once a complaint is filed with the police, it is its duty to investigate and where it is convinced that there are reasonable or probable reasons proceed to arrest and charge the suspects.

In this present case nothing has been demonstrated to by the first and second defendants upon which the charges were preferred. It is not enough to arrest and charge persons without any reasonable cause and concrete evidence upon which a charge could be supported.

13. It is not in dispute that the first two charges were withdrawn under **Section 87 A of the Criminal Procedure Code**. Upon such, there was no reason for the plaintiffs to be charged on similar offences. That is not what I could interpret as being:

“facts discovered by the prosecutor of information capable of satisfying an ordinary, reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

14. The defendants called no evidence. The defence counsel however cross examined the plaintiffs. At large, the plaintiffs evidence is uncontroverted. The evidence adduced in my view is enough to prove on a balance of probabilities that the prosecution was instituted by the third defendant out of malice as there was no reasonable and probable cause to institute the same.

The second defendant as agent of the first Defendant too had no reasonable cause to institute the three criminal charges against the plaintiffs when, for instance, the first two were withdrawn. There was no

basis to institute the third criminal trial. I find that there must have been some malice or a push by the 3rd defendant to push the 2nd Defendant to institute the 3rd prosecution. There is no evidence that any prudent person would have been guilty taking all the circumstances into account. The police officer (second Defendant) had no reason to keep on preferring charges against the plaintiffs without any probable cause to charge them evidenced by withdrawals of the two prosecutions.

To do so three times and withdrawing the charges must have been malicious on his part. I disagree with his submissions that he was acting on a complaint by the third defendant. Together they must bear the blame.

15. The duty of a police officer is to first investigate the truth of a complaint. If no evidence is found the police ought to refuse to prefer charges against the suspect. It is not enough to state that the third defendant had no control over what the investigation revealed and the decision to charge by the prosecutor and what the court do. The police is under a duty to independently and impartially investigate a complaint. It is not a mere conduit for complaints and prosecution. It must first satisfy itself that there are probable reasons and cause for a prosecution before dragging a party to court.

It was not explained why the plaintiffs were charged three times for the same offence.

16. Ojwang JC (as he then was) in Thomas Mboya Oluoch (Supra) held:

“Unless and until the common law tort of malicious prosecution is abolished by parliament, policemen and prosecutors who fail to act in good faith or are led by pettiness, chicanery of malice in initiating prosecution and in seeking conviction against individuals cannot be allowed to recompense themselves in Judicial immunities when third victims rightfully seek recompense”

17. I have stated that the defendants did not tender any evidence. The second defendant did not adduce evidence on how the decision to charge the plaintiffs was reached their having been no report of the probe committee on the mismanagement of the society's funds. For those reasons, it is evident that the criminal charges were not supported by any reasonable or probable cause. The first and second defendants must share the blame with the third defendant.

18. The first defendant being the employer of the second defendant is vicariously liable for the acts of its employee, performed in the cause of his duties. It has not been alleged that the second defendant acted outside his authorised duties. In its totality, it is my finding that the plaintiffs have proved on a balance of probability all the ingredients that constitute the torts of wrongful arrest, false imprisonment and malicious prosecution against the defendants jointly and severally at different percentages.

I find that the first and second defendants shall bear 30% of blame while the third defendant bears the greatest blame at 70%. They are liable in damages to the plaintiffs.

19. Quantum of damages

The plaintiffs sought compensation in terms of general damages and special damages.

None of the defendants submitted on the probable and reasonable damages awardable to the plaintiffs should their claim succeed.

The plaintiffs were arrested and locked up in police cells for a weekend as they were denied bail. The criminal charges were preferred in March 1999 and carried them on their necks upto 4th February 2005 when they were acquitted, a period of five years. They no doubt spent money in defence of the claims.

The plaintiffs submit that each of them ought to be compensated by a sum of Kshs.3,000,000/=. Two cases were cited but authorities not provided. The case provided of **Zablon Mwaluma Kadori** (Supra) the court (Hon. Maraga J (as he then was) awarded the plaintiff a sum of Kshs.500,000/= being general damages for malicious prosecution. That was in July 2005.

20. I have considered the circumstances of the plaintiffs who were former directors of the Kinangop Farmers Co. Ltd. There is no doubt that arrests, imprisonment and malicious prosecution prejudiced them and dented their characters and reputation by being branded thieves.

In **HCCC No. 160 of 1993 Dr. Willy Kaberuka vs A.G. Kampala**, it as held that :

“the plaintiff suffered injury to his reputation and indignity and humiliation, and for that he is entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence the plaintiffs status society is a relevant consideration”

The court upheld an award of Kshs.300,000/= in general damages to the plaintiff who was a teacher.

In **Njuguna vs A.G. & Others HCCC No. 2007 of 2001 (2001) LLR 4948, J Ransley** (as he then was) granted a sum of Kshs.300,000/= for malicious prosecution and Kshs.500,000/= for punitive damages. In **Thomas Mboya Oluoch & Another Lucy Muthoni Stephen**, the plaintiff was awarded Kshs.500,000/= in 2008.

In **Crispine Otieno Caleb vs The A.G. 2014 e KLR** the plaintiff was awarded a sum of Kshs.800,000/= by J. O. Odunga on November 2014.

I have considered the above authorities They are persuasive. An award of damages is at the discretion of the court.

I am persuaded that a sum of Kshs.300,000/= in general damages for each of the nine plaintiffs is reasonable. I award the same.

21. Special Damages

The plaintiffs pleaded general damages of Kshs.378,500/= jointly. Out of the said sum Kshs.120,000/= is pleaded as Advocates fees in defence of the criminal cases. Kshs.220,000/= is pleaded as traveling and boarding expenses while Kshs.38,500/= is stated as spent on meals.

Though the plaintiffs produced receipts to support the above expenses, I am not persuaded that some of the expenses ought to be reimbursed.

These are expenses for meals, boarding and traveling.

The criminal cases were filed at the Magistrates court at Nyahururu. The plaintiffs are residents of South Kinangop in Nyandarua, not very far from Nyahururu. I agree they must have spent money towards transport and meals. I will use my discretion in assessing the *quantum*.

22. None of the parties submitted on the issue of special damages. In exercise of my discretion, I shall allow Kshs.120,000/= being legal fees. Receipts were produced in support. I have looked at receipts produced for meals and boarding. I do not see why the plaintiffs were residing at the Checkpoint Hotel Bar and lodging and being served with breakfast, lunch and supper as indicated. I have stated the plaintiffs could travel to court from South Kinangop, and be back to their homes for dinner. I shall exercise my discretion and allow a sum of Kshs.150,000/=to include transport and lunch. That is a total of Kshs.270,000/= I consider the said sum to be a reasonable expense, for reasonable expenses.

23. Accordingly there shall be judgment entered for the plaintiffs against the defendants jointly and severally as hereunder:

- a. *Liability is apportioned at 70% against the third defendant while the first and second defendants shall shoulder 30% liability jointly and severally.*
- b. *General damages for each of the plaintiffs at Kshs.300,000/= .*

- c. *Special damages for all the plaintiffs jointly Kshs.270,000/=.*
- d. *Damages awarded above shall be subject to apportionment of liability as stated in (a) above.*
- e. *The plaintiffs shall have costs of the suit to be borne by both the 1st, 2nd and 3rd Defendants as per clause (a) above.*

Dated, signed and delivered in court this 17 Day of November 2016.

JANET MULWA

JUDGE