



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 163 OF 2006

NAHASHON MWANGI MWAURAPLAINTIFF

VERSUS

1. THE COMMISSIONER OF POLICE

2. THE HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

1. By a Plaint dated 12th February, 2006, the Plaintiff sued the Defendant claiming special damages of KShs. 5,600/=, and general damages for unlawful arrest, confinement and malicious prosecution. He also prayed for costs and interest of the suit.
2. It was the Plaintiff's claim that he was on 11th August, 2003 arrested without any justification and subsequently confined for seven (7) days at Shauri Moyo Police Station and thereafter charged with the offence of creating disturbance in a manner likely to cause a breach of peace in Makadara Criminal Case No. 19662 of 2003 for which he was acquitted under Section 210 of the Criminal Procedure Code.
3. At the trial of this suit, the Defendant did not appear The Plaintiff's case, therefore, proceeded ex parte. The Plaintiff recounted that on 11th August, 2003, at around 6 p.m. while he was at his business premises at Eastleigh, a police officer known as Mr. Mutiso in company of Mary Gathoni, Grace Waithera and Charles Ndirangu Muchiri arrested him. He was put in the boot of a Peugeot saloon car and taken to Shauri Moyo Police Station. He stated that the reason of his arrest was not explained to him. He was booked in the occurrence book for creating disturbance and put in the cells about 9 p.m., he was taken to the Officer Commanding Station and was told that he had insulted Charles Ndirangu Muchiri. He remained in the cells for seven (7) days. He told the court that at the trial of the Criminal Case to court on 17th September, 2003 where he faced the offence of creating disturbance. He stated that he called for the occurrence book to enable him cross-examine the first prosecution witness but the occurrence book went missing. That he kept attending mentions until the year 2005 when the investigating officer failed to attend court to testify and he was subsequently acquitted. He claimed that no investigations were undertaken and that he was charged with an intention to have him migrate from his neighbourhood. It was his testimony that since his acquittal, he has never been re-arrested and there was no appeal preferred against the decision to acquit him. The criminal trial lasted for about three (3) years. He claimed that his children who had sat for their class eight at the time of his arrest examination suffered; his business was affected and his neighbours thought he had been arrested for theft. He stated that had the police conducted investigations he could not have been arrested and prosecuted. To him, the arrest, confinement and prosecution was malicious.
4. It was the Plaintiff's submissions that he was unlawfully arrested and confined since he was arrested without any justification and confined for seven (7) days. That he had proved that he was prosecuted in Makadara Criminal Case No. 19662 of 2003 for the offence of creating disturbance

in a manner likely to breach peace but was acquitted of the same. It was submitted that the prosecution was actuated by malice for the reasons that the complainant who had been stood down for the occurrence book to be availed to court was not re-called and the occurrence book was not availed as intimated. It was submitted that from the foregoing, no offence was disclosed against the Plaintiff. In support of this contention the Plaintiff relied on **Samson John Nderitu v. The Attorney General (2010) eKLR** where it was held as follows:-

" It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police of whatever unit, whose functions fall under the office of the defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law. "

5. It was the Plaintiff's submissions that as a result of the detention and prosecution his reputation and business were adversely affected as he was called a thief and had to close his business for the period he was in detention and the times he attended court and that he is therefore entitled to damages. Relying on **Samson John Nderitu** (supra) the Plaintiff submitted for general damages of KShs. 3,000,000/=.
6. I have considered the depositions and the submissions of the Plaintiff vis a vis the law on malicious prosecution. In order for the claim of malicious prosecution to succeed, the Plaintiff is required to establish; that the prosecution was instituted by the Defendants' agents for whose actions the Defendants are responsible; that the prosecution was terminated in his favour; that the prosecution was instituted without reasonable or probable cause and that the prosecution was actuated by malice. From the evidence tendered by the Plaintiff, which was uncontroverted, particularly the charge sheet and the proceedings in Makadara Criminal Case No. 19962 of 2003 it is clear that the first and second requirements have been satisfied i.e. that the criminal case was instituted by the Kenya Police for whose actions the Defendants are responsible and that the Plaintiff was acquitted of the offence for which he was charged. The issues left for this court's determination are:-
 - i. *Whether or not the prosecution was without reasonable or probable cause and*
 - ii. *Whether or not the prosecution was actuated by malice.*
7. The test to determine whether or not there was reasonable and probable cause for the Plaintiff's prosecution and whether it was actuated by malice was laid down in **Kagane & Others Vs. A G & Another [1969] EA 643**. In that case, it was held that:-

"Whether or not there was reasonable and probable cause for the prosecution is primarily lodged 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. Once the objective test is satisfied, it may be necessary to consider whether the prosecutor did 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...The facts show that no reasonable person could honestly have believed that the prosecution was at all likely to succeed then malice would have been established and malice in that case meant that the prosecution was motivated by something more than a desire to vindicate justice."

8. I have carefully considered the criminal case proceedings. PW2 and PW3's evidence was that they were at the scene at the time the alleged incident occurred. However, it is my view that the police failed to establish or rather investigate the truth of their statements. I say so because of the manner in which their evidence was contradictory. While the complainant failed to mention the presence of the Plaintiff's family members, PW2 talked of his wife's presence and PW3 only talked of his children's presence. Secondly, the investigating officer who was a material witness to the case failed to attend court to justify the arrest and outline the investigations conducted if any. Even the arresting officer was never availed. Finally, the complainant who was stood down for the occurrence book to be availed for him to be cross-examined was not re-called and his evidence

was not tested. Taking the objective test outlined in the **Kagane** case (supra), from the clumsy way in which the prosecution conducted its case, I draw an inference that there was no basis for charging and prosecuting the Plaintiff and further that the prosecution was actuated by malice. I accordingly find the Defendants liable.

9. On quantum, the Plaintiff suggested an award of KShs. 3,000,000/=. I have considered the circumstances under which the Plaintiff was arrested, the incarceration for seven (7) days before being charged; the prosecution for about five (5) years. In **Njuguna Vs The AG & Others (2001) LLR 4948 (HCK)**, an award of Kshs.500,000/- was given. In **Samuel Muchiri W Njuguna Vs the AG and 8 Others NBI HCCC No. 838 of 2003 (UR)** an award of Kshs.2,000,000/- was made. And in **Samson John Nderitu Vs the AG (2010) eKLR**, the court awarded Kshs.1,500,000/-. Since the Plaintiff did not join the principal culprit who led to his arrest and incarceration I will award a conservatory figure of Kshs.800,000/-. I also award interest and costs on the said amount.

Dated, Signed and Delivered at Nairobi this 26th day of March, 2015

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A. MABEYA

JUDGE