



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 188 OF 2011

MICHAEL JUMA OTIENO PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

The Plaintiff's claim is as stated in the plaint for General Damages, for defamation, wrongful and malicious arrest and unlawful detention; special damages in the sum of **Ksh. 60,000/-** interest and costs of the suit.

Briefly, the facts of this case are that on **31st March, 2011** the plaintiff came to Kisumu Law Courts for a case in which his organization the Centre For Peace and Democracy had sued the Non-Governmental Organizations Co-ordination Board. There were several other people from his organization present. Whilst there, police officers purportedly acting on a warrant of arrest issued by the Officer Commanding Police Division(OCPD) Buru Buru arrested him and took him to the Kisumu Central Police Station. He was detained there until the following day when two police officers handcuffed him and traveled with him to Kakamega Law Courts in a matatu. At Kakamega he was arraigned for a traffic offence which he had allegedly committed in **2007**. It was alleged that he had even been charged with that offence but had jumped bail. When he appeared before the Kakamega Court he pleaded not guilty to the charge of Causing Death by Dangerous Driving and was released on a cash bail of **Ksh. 20,000/-** The case was fixed for hearing but on two occasions the witnesses did not attend and the magistrate acquitted him.

His witness Superintendent of Police **Morris Gudah(PW2)** testified that while he was the OCPD Buru Buru he received information from Kakamega Traffic Base that the Plaintiff had caused a fatal accident in 2007 and that he had absconded upon being released on a police cash bail. Since the plaintiff was living in Nairobi he (PW2) was detailed to look for him. When he could not do so he sought the help of the Executive Director at the Non-Governmental Organizations Co-Ordination Board by writing a letter dated **22nd November, 2010** to which he attached the plaintiff's photograph. He later learnt that the plaintiff had been arrested and escorted to Kakamega. He further testified that he never saw the warrant of arrest but explained that police effect arrests even in the absence of warrants. He contended that his writing to the Executive Director was not actuated by malice but rather by the fact that a young child had lost her life in the accident. He stated that being a wanted person was tantamount to a warrant of arrest. Referring to a cash bail receipt in the plaintiff's list of documents he noted that the plaintiff was required to attend court to answer to the charges on **31st December, 2007 at 8 a.m** but never did. He contended that the plaintiff was acquitted because there were no witnesses in court and stated that he saw nothing wrong with his being arrested.

In the Written Statement of Defence the Defendant admits that the plaintiff was arrested and charged but avers that this was after a genuine report was made to the police, investigations conducted and a

reasonable and probable cause was established that the plaintiff had committed the offence. It avers that the police acted in good faith and in due course of their lawful duty of maintenance of law and order. The plaintiff is put to strict proof of all the averments in the plaint. The Defendant also avers that the plaintiff's alleged acquittal is not proof of his innocence neither is it proof of malice on the part of the police. The jurisdiction of this court is also denied.

The Defendant did not adduce any evidence but written Submissions were received from both sides. In summary Learned Counsel for the plaintiff submitted that by writing the letter, Maurice Guddah peddled malicious and unfounded claims against the plaintiff without bothering to establish the facts and this amounted to abuse of office and a violation of the plaintiff's rights under Article 73(2)(b) and (c) (1) of the Constitution and the Public Officers Ethics Act. He also submitted that arresting and detaining the plaintiff without a warrant of arrest and keeping him in custody for **21 hours** in unhealthy and unhygienic conditions constitutes illegal arrest and detention Contrary to Article 49(1)(9) and (f) (1) of the Constitution. Further that as a popular public figure the plaintiff suffered serious credibility and indignity and that the charge preferred was completely different from the one that was explained to him at the time of his arrest which contravenes **Article 49(1)(9) and (f)(1)** of the constitution. He stated that the plaintiff incurred a lot of expenses in litigation as he was based in Nairobi and had to travel all the way to Kakamega to attend court. He assessed those costs as **Ksh. 159,000/-** for travel and **ksh. 160,000/-** for legal fees. He urged the court to consider the reputation of the plaintiff as an official and employee of a Non Governmental Organization and the effects of the malicious letter and the ensuing actions of the police officers in Kisumu, Kakamega and therefore award him reasonable compensation. On general damages he proposed an award of Ksh. 1,500,000/-. He urged this court to be guided by two authorities- **Otieno Mark Onyango V. AG & ano [2012] eKLR and Wachira Weheire V AG & Ano [2010] eKLR.**

On his part Learned Counsel for the state submitted that the claims for damages cannot stand. That the evidence shows that the traffic case was dismissed for lack of prosecution witnesses and that the plaintiff did not prove that the prosecution was without probable cause and the mere fact that he was acquitted does not constitute such proof. Further that he did not prove that the prosecution was actuated by malice; that he did not demonstrate that there was bad blood between him and the police or that they have always wanted to have him prosecuted without any ground. He further submitted that the claims for damages cannot stand as the plaintiff was arrested and arraigned in court within the period allowed by the constitution; That there was no evidence to show that he was defamed as nobody came to testify that their respect for the plaintiff had been lowered and they saw him as a criminal and dishonest person. He also submitted that particulars of defamation were not pleaded as required under **Order 2 Rule 7** of the **Civil Procedure Rules**. On the special damages he submitted that as no receipts were produced the same cannot be awarded. He urged the court to dismiss the case with costs. He relied on **John Ndeto Kyalo V. Kenya Tea Development Authority & Another HCCC (Mombasa) No. 502 of 1999** and **Cynthia Kuroch & 6 Others V. Tourism Promotion Services & Another Hccc**

(Nairobi)No. 1505 of 2001 none of which he availed.

In **Kudwoli V. Eureka Educational and Training Consultants & 2 others[1993]eKLR Kuloba J**, now retired, after considering many other definitions of defamation concluded thus:-

“ For myself, I understand these many and other dictions and turns of expression to mean that “ defamation” is the culpable publication to a third party, without justification, on an unprivileged occasion, of matter concerning another person, which, in all the circumstances of the publication, contains an untrue

imputation likely to appreciably diminish good affections held for him by reasonable people in a respectable and considered segment of the community”

In **Phinehas Nyagah v. Gitobu Imanyara [2013] eKLR Odunga J** states:-

“16 Defamation is a tort and is defined as the publication

of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or

avoided. The defamatory statement is one which has tendency to injure the reputation of the person to

whom it refers by lowering him in the estimation

of the right thinking members of society

generally and in particular to cause him to be

regarded with feelings of hatred, contempt,

ridicule, fear, dislike and disesteem and typical

examples are an attack upon the moral character

of the plaintiff - attributing to him any form of

disgraceful conduct such as crime, dishonesty,

cruelty and so on...Defamation is not about

publication of falsehoods against a person; it

is necessary to show that the published falsehoods disparaged the reputation of the plaintiff or

tended to lower him in the estimation of right

thinking members of society generally. An

injurious falsehood may not necessarily be an

attack on the plaintiff's reputation. The words

must be maliciously published and malice can be

inferred from a deliberate or reckless or even

negligently ignoring of facts. See **J.P Muchira V.**

Wangethi Mwangi & Nation Newspapers Civil Appeal

No. 179 of 1997

The bone of contention in this case is the letter written to the Executive Director of the Non Governmental Organizations Cordinations Board by SP Maurice Guddah(PW2) then the officer commanding Buru Buru Police Division and the subsequent arrest of the plaintiff at Kisumu law Courts, his detention at Kisumu Central Police station and arraignment in Kakamega Chief Magistrate`s Court. The impugued letter to the Executive Non Governmental Organization-Co-Ordinator (sic) Board reads as follows:-

“RE: Accident Register (Fatal) 192/07

TCR 1841/08

Accused: Michael Juma Otieno

Deceased: Maximilla Agnetta Apondi

Please, be informed that the above named accused Michael Juma Otieno who works with one of the Non Governmental Organizations under you caused an accident on the **17th of December, 2007** within Mukumu - Kakamega road fatally injuring one **Maxmilla Agnetta Apondi**.

He was arraigned in court on the 18th April, 2008. On being released on court bond, he absconded.

He is required by Kakamega Police and a Warrant of Arrest is in force.

Your assistance will be highly appreciated.

(signed)

Maurcie Guddah

For: OCPD- Buru Buru”

It is the Plaintiff`s contention that this letter was actuated by malice. On his part Maurice Guddah who the plaintiff called as PW2 testified that the letter was written in good faith as they could not trace the plaintiff who was wanted by the police in Kakamega. A perusal of the letter shows that it is not factual in two aspects:- First, the plaintiff had not been arraigned in court on those charges and had not therefore been granted bail by the court and secondly there was no warrant of arrest against the plaintiff. However among the plaintiff`s documents is a police cash bail receipt **No. A 858381** which clearly indicates that he was required to attend the Kakamega Court on 31st December, 2007 to answer to a charge of Causing Death by Careless Driving. The receipt was for **Ksh. 5,000/-**. So was the case fictitious? The answer is no. It is note worthy that this is not one of the documents that he requested the Traffic Base Commandant-Kakamega Police Station to issue him in his letter dated **28th July, 2011**. The cash bail receipt must therefore have been in his possession at all material times and he must have been aware of the accident. Indeed a closer reading of his letter to the Traffic Base Commandant seems to suggest that he settled the matter much as he denied it in his testimony. In the last sentence of that letter he states:-

**“Please, find enclosed agreement for payment
of the deceased`s family and copies of cheque
payments you asked for on the 27th July, 2011
before releasing the documents”**

The said documents are a copy of the letter written to the Executive Director and copies of the statements

of the arresting police officers all of which he was supplied. Clearly therefore by writing the letter and subsequently arresting him the police were merely doing their job. A life had been lost and they were obligated to track down and bring the plaintiff to book. The letter was not defamatory and nobody has given evidence that their estimation of the plaintiff was affected by the contents of this letter. There is proof that upon his arrest he was charged with the very offence it is alleged he had committed in 2007. That happened on the day following the arrest meaning that he was not kept in the cells for a period longer than that permitted by the law. His case is in no way comparable to that of the plaintiffs in the two authorities cited by his advocate. In the **Otieno Mark` Onyango** case the court found that the detention without charge of the plaintiff having come after he was discharged on the charge of treason by the High Court was unlawful. The Court found that there was no justification for this (**see paragraphs 165 and 166 of the judgment**). In the **Wachira Weheire** case the plaintiff was held at the Nyayo house Basement for a period of 16 days and was subjected to physical, mental and psychological torture during his confinement. The plaintiff here does not claim to have been tortured. He was by his own words held for 21 hours after which he was taken before a magistrate and once a plea was taken he was released on bond. The mere fact that he was subsequently acquitted for non attendance of the witnesses does not make the charge fictitious. He who alleges must prove and as I have stated his own letter to the Kakamega Traffic Commandant suggests that there was truth in the allegation made against him. Who was the deceased with whose family he entered into an agreement with and what were the cheques for? In whose favour were they drawn? Why was he paying them off and what connection did the agreement and the cheques have to this information/ documents he wanted the officer to furnish him? All this information should have been placed before the court by none other than the plaintiff being the party with special knowledge of the same. Even for his claim for malicious prosecution, though it is not clear that he pleaded this, to succeed he was required to prove that not only did the prosecution terminate in his favour but that it was instituted without reasonable cause and that it was actuated by malice. He has not proved any of these. All that he has managed to prove is that the impugned letter was written of and concerning him and that he was subsequently arrested and arraigned in court and that the prosecution terminated in his favour. He clearly has not proved that the letter was defamatory, that he was afterwards falsely imprisoned or that his prosecution was without reasonable and probable cause and that it was actuated by malice. The upshot is that his case found to have no merit and is dismissed with costs to the Defendant.

Had I found in his favour, I would have taking everything into consideration awarded him a sum of **ksh. 800,000/-** I would not have awarded special damages as the same were neither specifically pleaded nor strictly proved.

It is so ordered.

E.N. MAINA

JUDGE

Dated, Signed and Delivered in Kisumu this 23rd day of April, 2015.

In the presence of:

Miss Kyamazima for Amondi for the plaintiff

No appearance for the Defendant

Moses Okumu – Court clerk