



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 235 OF 2008

SAMMY KIPROTICH TANGUS.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. This is a claim for malicious prosecution and false imprisonment. The Plaintiff's claim is as follows. That on 3rd February, 2003 he was arrested by the police attached to Kenya Anti-Corruption Commission and was arraigned in court on 4th February, 2003 where he was charged with five (5) counts of abuse of office, one charge of false claim and one count of uttering false documents in Nairobi Anti-Corruption Case No. 8 of 2003. He alleged that on 21st June, 2007, he was acquitted of all the charges under Section 215 of the Criminal Procedure Code. He averred that his arrest, detention and charge was baseless, malicious, irregular and an abuse of the office by the police officers for which the Defendant is liable. He averred that his arrest has caused him pain, mental anguish, degradation, loss of employment and loss of business. The Plaintiff prayed for general damages for malicious prosecution and false imprisonment, exemplary or punitive damages and special damages of KShs. 3,500,000/-.
2. In response to the Plaintiff's claim, the Defendant filed a statement of defence in which it denied the Plaintiff's claim.
3. The Defendant was served with a hearing notice for this matter but never appeared in court. This Plaintiff's case was then heard ex parte. The Plaintiff testified that he was he was arrested and held in custody for three (3) days. By that time he was a the road engineer working with the Ministry of Roads. He stated that he was devastated by the case and resigned. He stated that the case was widely published that he lost his image and as a result lost an elective post in Marakwet East when he was contesting. He added due the case, he missed on three promotions.
4. The Plaintiff filed written submissions to this suit. It was submitted that the Plaintiff satisfied the four essentials for malicious prosecution and unlawful arrest i.e.; that he was arrested and charged by police attached to Anti-corruption Commission through a charge sheet dated 4th February, 2003; that prosecution was undertaken by the Attorney-General as public prosecutor at the time; it was stated that the decision to charge and prosecute him was taken by the police and the Attorney-General and that the prosecution was instituted without reasonable and probable cause. It was submitted that the trial court ruled that the issue was whether the Plaintiff abused his authority arbitrarily without regard to tendering procedures by inviting bids through selective tender. That evidence pointed out clearly at the hearing that the Plaintiff got his instructions from his superiors who were not called as witnesses. He stated that the trial magistrate found that the police rushed to charge the Plaintiff because they had not taken the statements of the Plaintiff's superiors and that the investigations were shoddy and was actuated by malice. It was submitted that without any evidence from the Defendant on how the decision to arrest and charge him was arrived at, this

court should find that there was no probable and reasonable cause for the prosecution. The Plaintiff in support of his submissions, relied on an excerpt from **Thomas Mutsotso Bisembe v. Commissioner of Police & Another (2013) eKLR** where Justice Odunga stated as follows:-

"The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. ...Where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. ...But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice."

5. On the issue of quantum, the Plaintiff submitted that as a result of the charge and prosecution which lasted five (5) years, he suffered great loss. He stated that his reputation was tarnished and he spent a considerable amount of money as legal fees. It was submitted that the Plaintiff was subjected to stay in custody for three days under degrading conditions before he was released on bond. That he underwent embarrassment and stress, attending court for mentions and hearings with anxiety that if he failed to attend court a warrant of arrest would be issued against him. He stated that the prosecution also affected his political career. Citing **HCCC No. 336 of 2008., Justus Mike Kitivo v. The Hon. Attorney General** and **Patrick Muriithi Mukuha v. Edwin Warui Munene & Others (2005) eKLR** the Plaintiff proposed an amount of KShs. 8 Million as damages. On special damages, it was submitted that receipts for legal fees were produced by the Plaintiff in proof of his claim as to special damages and a sum of KShs. 3.5 Million was proposed as special damages.
6. I have considered the depositions herein above. In claims for malicious prosecution and false imprisonment, once there is a finding of malicious prosecution, then claims for imprisonment or arrest in pursuance of such prosecution become unlawful. It is for this court therefore to determine whether or not the Plaintiff's prosecution was malicious. The essentials of malicious prosecution were set out in the leading cases of **Murunga v. The Attorney General [1979] KLR 138** and **Kagane and Others v. Attorney General and Another [1969] EALR 643** are as follows:-
 - i. **The Plaintiff must show that prosecution was instituted by the Defendant or by someone for whose acts he is responsible;**
 - ii. **That the prosecution terminated in the Plaintiff's favour;**
 - iii. **That the prosecution was instituted without reasonable and reasonable cause; and**
 - iv. **That the prosecution was actuated by malice.**
7. **I shall determine the issues herein seriatim. It is clear from the evidence on record that the Plaintiff's arrest and detention was made by the police whose actions the Attorney General is responsible for in accordance with Section 12 of the Government Proceedings Act, Cap 40 Laws of Kenya and further that the prosecution was undertaken by the Attorney-General as the public prosecutor. Secondly, it is not in doubt that the case was terminated in the Plaintiff's favour. This is clear from the proceedings produced in evidence that the Plaintiff was acquitted under Section 215 of the Civil Procedure Code. In view thereof, I find and hold that the Plaintiff has on a balance of probability proved the first and second the elements for malicious prosecution.**
8. The test in determining 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** (supra) where it was held:-

"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."

9. Also in Samson John Nderitu v. The Attorney General (2010) eKLR 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."

10. It is an un rebutted evidence that the police did not gather sufficient evidence before charging the Plaintiff. This is indicated by their failure to interrogate and take statements of witnesses who would have been very vital to the case such as the Permanent Secretary for Treasury. Taking the objective test outlined in the **Kagane** and **Samson John Nderitu** cases (supra), I draw an inference that there was no basis for charging and prosecuting the Plaintiff and further that the prosecution was actuated by malice considering the lousy way in which the prosecution conducted its investigation and case.

11. On quantum, the Plaintiff suggested an award of KShs. 8,000,000/- as general damages and exemplary damages. On exemplary damages I am fortified by the holding of the Court of Appeal in Obongo & Another v. Municipal Council of Kisumu [1971] EA 91 where it was held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. None of these allegations were made against the defendants. The prayer for exemplary damages therefore fails.

12. With regard to aggravated damages, I am fortified by Francis Xavier Ole Kaparo v. The Standard & 3 Others, HCCC No.1230 of 2004 (UR) where it was stated:-

"Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors...Damages will be aggravated by the defendant's improper motive."

13. The Plaintiff stated that he underwent embarrassment and stress, attending court for mentions and hearings with anxiety that if he failed to attend court a warrant of arrest would be issued against him and that the prosecution also affected his political career. Bearing in mind the finding in Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993 that:-

" He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence... There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's

status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”.

14. At the time of his arrest, the Plaintiff was a roads engineer with the Ministry of Roads and Public works. After his arrest, he was interdicted and even lost a job opportunity as a superintendent engineer which he had applied for. The allegation as to his political career was not proved. The plaintiff is therefore not entitled to damages on this. I have given due consideration to the aforesaid facts and the cases cited by the Plaintiff and the holding in **Crispus Karanja Njogu vs. The Attorney General [2008] KLR** where Waweru, J awarded the plaintiff, who was an Acting Senior Assistant Registrar in the Examinations Section of Kenyatta University, Kshs 800,000.00 as general damages for malicious prosecution. Taking into account the circumstances of this case I award the Plaintiff a global sum of Kshs 3,000,000.00 general and aggravated damages. With regard to the claim of special damages, the Plaintiff claimed for KShs. 3.5 Million. The receipts produced in evidence are for KShs. 3 Million further they do not meet the requirement of section 5 of the Stamp Duty Act, Cap 480 Laws of Kenya since they bear no revenue stamps and the Plaintiff has not sought for the remedies prescribed under Section 19 of the Stamp Duty Act hence the reliefs are inadmissible. The claim for special damages is refused.

15. In the result I enter judgement for the Plaintiff in the following terms:-

- a. *Kshs 3,000,000.00 general and aggravated damages for malicious prosecution.*
- b. *Costs of the suit.*

Dated, Signed and Delivered in open court this 29th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Amayo h/b for the Plaintiff.

N/A for the A.G.