



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 837 OF 2007

HESBON OJANGO NGANYI.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT

ERASTUS AMONDI OOKUL.....2ND DEFENDANT

TITUS KASUVE.....3RD DEFENDANT

JUDGEMENT

1. Hesbon Ojango Nganyi, the Plaintiff herein sued the A.G, Erastus Amondi Ookul and Titus Kasuve, the 1st, 2nd and 3rd Defendants claiming general damages for malicious complaint, wrongful detention, malicious prosecution and torture vide the plaint dated 20th December 2007. The Defendants filed a defence to deny the Plaintiff's claim.
2. When the case came up for hearing, the Plaintiff testified without summoning any independent witnesses in support of his case. The Defendants closed their case without summoning any witnesses. It is the evidence of Hesbon Ojango Nganyi (PW 1) that on 17.11.2005, officers from Langata Police Station stormed in and arrested him while he was briefing members of the Liberal Democratic Party on the up-coming national referendum at the Kenya Science Teachers College. PW 1 claimed that he was frogmarched and bundled into a waiting police vehicle despite his protest. It is his view that there was no justification at all for his arrest. The Plaintiff averred that he was later charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. While undergoing trial he was remanded at Kamiti G.K. Maximum Prison since the offence at the time was non-bailable. The Plaintiff stated that he was in remand for a year and 46 days. He claimed that while in prison he contracted TB and had to receive treatment at Kenyatta National Hospital where his family spend kshs.33,000 on his medical bills. It is the evidence of the Plaintiff that while in custody he also lost his cows and his children left school for lack of school fees. He also alleged that his business of selling second hand clothes and farming activities collapsed. At the time of his arrest PW1 stated that he was the organizing secretary of Dagoretti Constituency of the Liberal Democratic party and that due to his incarceration he was unable to defend his seat in the subsequent general elections. He claimed he suffered embarrassment and financial strain. The Plaintiff further averred that the 2nd and 3rd Defendants instigated his arrest and prosecution for their own selfish ends.
3. At the close of the Plaintiff's case, learned counsels appearing in the matter were invited to file submissions which I have taken into account.

4. The Plaintiff produced proceedings of the criminal trial that he underwent at the Chief Magistrate's court, Nairobi. It is apparent from those proceedings that the Plaintiff together with six others underwent a trial. At the close of the prosecution's case the Plaintiff was acquitted since he had no case to answer under Section 210 of the Criminal Procedure Code. During the Plaintiff's trial, it came out clearly that the complainants namely Erastus Ookul and Titus Kasuve, the 2nd and 3rd Defendants had actually been badly assaulted by a large group of people. Two witnesses managed to identify and placed the Plaintiff as one of the people who participated in attacking the 2nd and 3rd Defendants. The trial magistrate did not believe the evidence of identification of those witnesses since they were based on the identification of an informer who was not summoned to testify. The question which the evidence tendered must answer is whether the Plaintiff was unlawfully arrested, detained, tortured and maliciously prosecuted.
5. The principles to be considered in determining cases of malicious prosecutions are well settled. First, the Plaintiff must show that the Defendants instituted the prosecution. Secondly, that the case was terminated in his favour. Thirdly, that the prosecution was instituted without reasonable and probable cause and fourthly, that the Defendants were actuated by malice.
6. There is no denial that the 2nd and 3rd Defendants were the complainants in the case against the Plaintiff. It is also not in dispute that the robbery with violence case was terminated in favour of the Plaintiff under Section 210 of the Criminal Procedure Code. It is the Plaintiff's assertion that he and his co-accused were hurriedly charged even before proper investigations were conducted by the police. It is his view that there was no reasonable cause to charge them. I have already outlined the facts that gave rise to the Plaintiff's arrest and subsequent trial. It is not in dispute that the 2nd and 3rd Defendants were attacked and seriously injured. There were reports from a police informer who did not testify that placed the Plaintiff at the scene of crime. The 2nd and 3rd Defendants were candid in their testimonies tendered before the court trying the criminal case.
7. They were basically informed by witnesses who were never summoned to testify that the appellant was the culprit who was the mastermind of their attack. It was therefore upon the police to carry out thorough investigation to establish the link. In my view the police undertook the investigations which may not have been good enough. In the circumstances of this case, it cannot be said that there was no reasonable cause. I am convinced that the Plaintiff and his co-accuseds were properly arraigned before a court of law.
8. The remaining question is whether or not the Plaintiff's prosecution was malicious. The evidence tendered shows that the prosecution presented the evidence of eight witnesses in support of the prosecution's case. The Plaintiff is of the view that since the evidence disclosed no iota of suspicion of commission of the offence against him, means his arrest and subsequent prosecution was malicious. After a careful analysis of the evidence tendered before the court trying the criminal case and that presented before his court, I do not find any evidence of malice on the part of the Defendants. The complaint lodged by the 2nd and 3rd Defendants was genuine and based on the information which formed the basis of the Plaintiff's arrest and subsequent trial.
9. In the end, I find that the Plaintiff has failed to prove his case on a balance of probabilities. The suit is hereby dismissed with costs.

Dated and delivered in open court this 25th day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant