



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 167 of 2006

DAVID WAHOME GICHERU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

By an Amended Complaint dated 8th March 2009 and filed on 9th March 2009, the Plaintiff claimed that on or about 26th day of October 2005, the 1st Defendant's agents, servants and/or employees at its Molo Branch, while in the course of their employment maliciously and without a reasonable or probable cause laid information before one Elijah Kiprop, Inspector of Police attached to Molo Police Station at the time against the Plaintiff to the effect that the Plaintiff had conspired with unknown persons to commit a felony, namely to rob the 1st Defendant of its monies.

The Plaintiff also averred that that acts of the 1st Defendant's agents were actuated malice, as they knew their allegations were out of spite when they reported the matter to the Police.

The Plaintiff further averred that he was charged with the offence to commit a felony contrary to Section 393 of the Penal Code in Molo S.R.M.C. Criminal Case No. 2340 of 2005, and that he was subsequently found not guilty and was acquitted under Section 210 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*).

The Plaintiff claimed that by virtue of his arrest and prosecution he suffered loss and damage, and claims -

- (a) Special damages of Shs 50,000/=,
- (b) General damages for malicious prosecution,
- (c) Costs of the suit.

In its Amended Defence dated 19th March 2009, and filed on 23rd March 2009, the 1st Defendant denied the Plaintiff's claims, and stated that no injury was caused to the plaintiff's reputation, and also denied particulars of special damages, and asked the court to dismiss the plaintiff's suit.

Evidence was led by both the plaintiff and the 1st Defendant. I have considered the respective evidence. The issue is basically one, whether the plaintiff's prosecution was malicious. What is malicious

prosecution? It is a tort in which the plaintiff proves -

- ***that he has sustained damage,***
- ***that the Defendant prosecuted him,***
- ***that the prosecution ended in the plaintiff's favour,***
- ***that the prosecution lacked any reasonable and probable cause,***
- ***that the Defendant acted maliciously (i.e. with some other motive than desire to bring to justice a person whom the accuser believes to be guilty.***

(See the case of BROWN VS. HANKES [1891] 2 QB 718.

A prosecution is said to be malicious in the absence of reasonable and probable cause in relation to the prosecution. “Reasonable and probable cause” means -

“an honest belief in the guilt of the accused based upon full conviction founded upon reasonable grounds, of the existence of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

(HERNIMAN VS. SMITH [1938] A.C. 305)

The question is whether there were in this case circumstances which would lead a prudent person to the honest belief that the Plaintiff was probably guilty of the crime imputed. To answer this question, we need to look at the totality of the evidence in this case.

It is not in dispute that in the night of 25th – 26th October 2005, unknown robbers raided the 1st Defendant's National Bank Branch in Molo Town and made away with a sum of money amounting to Ksh 770,000/= . The 1st Defendant's personnel called in the Police to investigate. The Bank's premises were secured by a series of security alarms internally and a security guard patrolled the premises outside. The Plaintiff who was the 1st Defendant's Branch Accountant was in charge of the keys to the security alarm.

In circumstances of a suspected crime, the Police or Investigating Officers usually secure the scene. In this case the Police directed Branch staff not to interfere with the security or alarm system until alarm technicians came to establish why the alarm system did not sound off at either the premises or the Police Station to which the system was connected.

It was the evidence of DW1 that contrary to those instructions the Plaintiff made entry into the ATM Area, which had been broken into and switched off the alarm purportedly to assist a customer. No employee was expected to enter that scene of crime until officers from Scenes of Crime Unit of the Police and the alarm technician had examined the area.

According to the Report prepared by the late Mr. Ogana (*described as an upright and honest man – who had worked in investigations for the 1st Defendant for 15 years*), and produced by DW1 and Dexh. I

(I) the Plaintiff was asked to call Secular Alarms Ltd (who were the suppliers and installers of the alarms to the Branch),

(II) the Plaintiff however switched off the alarm in the ATM area before the Technician arrived,

(III) the control panel which had been switched off during the robbery had now been switched on by the plaintiff,

(IV) as soon as the alarm at the ATM was switched on the control panel the alarm bell was triggered and rung,

(V) it was found later that the aerial which was supposed to send a signal to the Police had been damaged.

It is clear therefore that apart from the damaged aerial, the other findings show that the ATM alarm was switched on but the alarm to the control panel was off, and the alarm could not therefore be triggered to ring. Being the sole custodian of the alarm keys to the area, the Police were within their mandate to lay the greatest suspicion on the plaintiff, and decided to charge him with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code. The trial court found that there was no evidence to commit the plaintiff to his defence, and therefore acquitted him under Section 210 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*).

The Plaintiff and his counsel laid great emphasis upon the fact that the trial court found no sufficient evidence to put the plaintiff to his defence. This being a civil case, and not an appeal, it is not open for this court to re-examine and re-evaluate the evidence before the trial court and therefore come to its own findings and conclusions.

It is however important to say that an acquittal under Section 210 of the Criminal Procedure Code does not mean the absence of reasonable and probable cause for the plaintiff's prosecution. All it means is that there is no evidence to prove the plaintiff's guilt beyond reasonable doubt as the standard of evidence in criminal trials. The question therefore whether there was reasonable and probable cause has already been answered. The plaintiff may not have appreciated the significance of it, but a scene of crime is one area, where if advised not enter or tamper with, while a crime is being investigated, may when orders are disobeyed, may lead to serious suspicion that one is either trying to interfere with the investigations, or destroy the evidence. There was no destruction of evidence in this case, but since the working of the alarm system was central to the investigations, at that stage, before the Alarm Technician, and Scenes of Crime personnel checked the area and equipment, it was very unjudicious and ill-advised for the plaintiff to trigger the alarm system. Suspicion was consequently focused upon him. He cannot argue that there was no reasonable or probable cause. He cannot argue that his prosecution was actuated by malice.

According to John Salmond – **Jurisprudence** – cited in Blacks Law Dictionary 8th Edn. p. 976 -

“Malice means in law wrongful intention. It includes any intent which the law deems wrongful and which therefore serves as a ground for liability. Any act done with such intent is, in the gauge of the law malicious ...”.

According to Rollin M. Perkins & Ronald N. Boyce, Criminal Law 860, 3rd Edn. 1982 (*cited in the Blacks Law Dictionary op.c*) -

“Malice in the legal sense imports -

(1) the absence of all elements of justification, excuse or recognized mitigation and

(2) the presence of either (a) the actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result ...”.

The Plaintiff led no evidence of any wrongful deliberate intention without any element of justification, excuse or recognized mitigation on the part of the Defendants.

The 1st Defendant's Branch of which the plaintiff was both Assistant Manager and Branch

Accountant had been robbed and had lost over 733,000/= in the process. A security guard had led the robbery, the alarm system the keys to which the Plaintiff was sole custodian had failed to sound off upon intrusion by the robbers. The plaintiff enters the areas under investigations and knowingly touches off the alarm. The Police Officers represented by the Attorney-General as detectives and law enforcers had the justification, the excuse, and recognized mitigation to have the plaintiff prosecuted for an offence disclosed and recognized in law. There was no malice either in the legal or social sense. There is no basis for any claim at all against either Defendants.

I therefore dismiss the plaintiff's suit with a direction that costs lie with each party.

It is so ordered.

Dated, signed and delivered at Nakuru this 12th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE