



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 172 OF 2004

HOSEA WILFRED WAWERU.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES.....DEFENDANT

J U D G E M E N T

1. The Plaintiff is a medical doctor. He is a Consultant Dermatologist and Venereologist in private practice. He has been such for over 37 years.
2. On 14th February 2000 the Plaintiff was appointed Director of *Kenyatta National Hospital* (a state corporation under the **State Corporations Act, Cap 446**) (hereinafter called the *Hospital*). His appointment lasted until 8th March 2002.
3. On 30th November 2001 the Defendant caused the Plaintiff to be charged (as 2nd accused) jointly with Kenyatta National Hospital (1st accused) with one count of **failing to pay contributions contrary to section 36(a) of the National Social Security Fund Act, Cap 258**. The particulars of the offence in respect to the Hospital were that on or about 15th August 1991 to 15th April 2001 within Nairobi area, being a registered and contributing employer No. 484067, it failed without lawful excuse to pay the National Social Security Fund contributions amounting to KShs. 79,410,280/00, being standard contributions in respect of its employees for the period July 1991 to March 2001 (all months inclusive) when required to do so by an inspector of National Social Security Fund as per the attached appendix 1. That appendix set out the years (1991 – 2001) and unpaid contributions for each year. In respect to the Plaintiff the particulars of the offence were stated to be that **at the material time he was the Director in charge of the day-to-day affairs of the Hospital**.
4. The Plaintiff pleaded not guilty to the charge. He and the hospital were prosecuted vide **Nairobi CM Criminal Case No. 2736 of 2001**.
5. After the Plaintiff ceased to be Director of the Hospital the charge sheet was amended to join the succeeding Director. In the course of the criminal proceedings on 2nd December 2002, the Plaintiff's learned counsel raised a preliminary objection to the charge. The same was canvassed at length. By a ruling delivered on 14th January 2003 the court agreed that the charge was defective in substance but permitted the prosecution under section 214(1) of the **Criminal Procedure Code** (the *Code*) to amend the charge in the interest of justice.

6. By 26th February 2003 the charge had not been amended. The prosecutor's application to withdraw the charge under section 87(a) of the Code was refused and the court rejected the charge under section 89(5) of the same Code. The Plaintiff and his co-accused were discharged. This was nearly a year after the Plaintiff had ceased to be Director of the Hospital.

7. The Plaintiff then filed the present suit. His case as pleaded is that his prosecution by the Defendant was malicious. He seeks appropriate general damages. He has also sought special damages of KShs. 246,540/00. His specific case is pleaded in paragraph 5 of the **plaint dated 24th February 2004** as follows –

“5. The Defendant's conduct of charging and prosecuting the Plaintiff was, in all the circumstances thereof, malicious and without reasonable or probable cause and amounted to a malicious abuse of process. Further, the Defendants failure to amend the charges to include other Directors of Kenyatta National Hospital despite being ordered by the court to do so manifested extreme bias in the charging and prosecution of the Plaintiff and amounted to abuse by the Defendant of its statutory authority. The Defendant's conduct aforesaid was further motivated by improper motive and actuated by spite and ill will. The charging and prosecution of the Plaintiff was further meant to harass and hound the Plaintiff and to cause him annoyance, expense and disgrace rather than the adjudication of fair and just claims.

PARTICULARS

- a. **The charge stated that the accused had failed to pay contributions “on or about the 15th day of August, 1991 to 15th April, 2001”. The Defendant know or ought to have known if it exercised due diligence and care that the Plaintiff became director of Kenyatta National Hospital on 17.2.2000 and could not have failed to remit the contributions between 15th August, 1991 and 16th February 2000.**
- b. **The Defendant had no honest belief that the Plaintiff could have committed the offence between 15th August, 1991 and 16th February 2000 and therefore lacked any reasonable and probable cause of laying the charge that it did.**
- c. **The Defendant's refusal to charge and prosecute other Directors of Kenyatta National Hospital who could have been responsible for failure to pay the said contributions as ordered by the court manifested the Defendant's malice, spite and ill will towards the Plaintiff and outright bias against the Plaintiff.**
- d. **The Defendant's refusal to amend the charge and include the latest Director of Kenyatta National Hospital manifested that the Defendant was not exercising its statutory authority independently and/or for the intended purposes.”**

8. The Defendant filed **defence dated 29th March 2004**. It contended that while it was true that it instituted prosecution against the Plaintiff, it denied malice and put the Plaintiff to strict proof thereof. It was further argued that the prosecution did not at all cause injury to the Plaintiff's credit, character and reputation as alleged.

9. The Plaintiff testified on his own behalf; he called no other witness. The Defendant called one witness, **Charles Wandetto** (DW1). Both witnesses adopted their detailed witness statements as their testimonies-in-chief. The Plaintiff's statement is dated 19th and was filed on 20th September 2011. That of DW1 is dated 9th and filed on 14th December 2011. Nothing additional came out of cross-examination.

10. I have considered the testimonies of those two witnesses. I have also considered the written submissions filed on behalf of the parties, both filed on 21st February 2012.

11. The following essential facts are not in dispute -

- (i) The Plaintiff was director of Kenyatta National Hospital from 14th February 2000 to 8th March 2002.
- (ii) The Plaintiff was prosecuted by the Defendant vide Nairobi CM Criminal Case No.2736 of 2001.
- (iii) The prosecution determined in favour of the Plaintiff when he was discharged on 26th February 2003.

12. It is now well established that a claimant in malicious prosecution must establish the following on a balance of probabilities -

- (i) That he was prosecuted by the defendant.
- (ii) That the prosecution was determined in his favour.
- (iii) That the defendant in prosecuting him acted without reasonable and proper cause.
- (iv) That the prosecution was actuated by malice.

Those are really the issues to be determined in this case. If they are determined in favour of the Plaintiff there will be the additional issue of what damages are due to him.

13. As for the first two issues, the answer is indisputably yes as already seen from the facts not in dispute.

Did the Defendant have reasonable and probable cause in prosecuting the Plaintiff?

14. The charge against the Plaintiff covered the period between 15th August 1991 and 15th April 2001. The Plaintiff was employed as Director of the Hospital on 15th February 2000. This is a fact that the Defendant must have known or ought to have known. To state the obvious, the Plaintiff was not Director of the office between 15th August 1991 and 14th February 2000. So, why was he charged with offences committed during that period?

15. The Plaintiff was also not a ‘contributing employer’ within the meaning of section 2 of Cap 258. He was Director of the *Kenyatta National Hospital Board* (the *Board*) established under **Rule 2** of the *Kenyatta National Hospital Board Order, 1987 (Legal Notice No. 109 of 1987)* (the *Order*). The Order was made under Cap 446 aforesaid. Under **Rule 3** of the same Order, the Director is the Chief Executive and Secretary to the Board. No other role is defined for the Director.

16. But ordinarily who is a **chief executive officer** of an organization? There is no definition of that term in the *Interpretation and General Provisions Act, Cap 2*.

17. According to *Wikipedia*, the online encyclopaedia,

“a chief executive officer (CEO) is the highest-ranking corporate officer (executive) or administrator in charge of total management of an organization. An individual appointed as a CEO of a corporation, company, organization or agency typically reports to the board of directors.”

18. *Black’s Law Dictionary* (online edition) defines a chief executive officer as the

“top executive in a firm who is **responsible** for a firm’s overall well-being in terms of operations and **performance**. The hired leader of the firm, serving as the main link between the **board of directors** or board, and the firm’s other various parts or levels. The CEO typically is held solely responsible for the firm’s success or failure. One of the major duties of the CEO is the governance, maintaining and implementing corporate policy. Policy is usually established by the board.”

19. Specific powers and functions of the Board are set out in **Rule 4** of the Order. These include -

(i) Being responsible, under the control of the Minister for the time being responsible for matters relating to health, for the administration, management and development of the Hospital.

(ii) Administration of the assets and funds of the Hospital in such manner and for such purposes as will promote the best interests of the hospital in accordance with the Act.

(iii) Receive on behalf of the Hospital, gifts, donations, grants or other money and to **make legitimate disbursements therefrom**.

20. It is clear therefore that notwithstanding the ordinary functions of a chief executive officer of an organization as seen from the definitions set out above, **it is the collective responsibility of the Kenyatta National Hospital Board to administer and manage the Hospital, to administer the assets and funds of the hospital and to make legitimate disbursements therefrom**. This surely must of necessity include *collection and remittance of contributions to the Defendant*.

21. Notwithstanding that the Plaintiff as Director was a member of that Board, it was not, nevertheless, his *singular responsibility* to remit NSSF collections to the Defendant. It was the *collective responsibility of the entire Board*, and all members thereof ought to have been charged. No personal responsibility thus accrued to the Plaintiff as Director under **section 37(2)** of Cap 252 which states –

“37(2) Where an offence under this Act is proved to have been committed with the consent or connivance of, or to be attributable to any negligence on the part of, any director, manager, secretary or other officer of a body corporate, he as well as the body corporate shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

22. No consent or connivance of, or attributable to any negligence on the part of the Plaintiff in the commission of the offence charged, was particularized in the charge. None could have been so particularized for the simple reason, as seen above, that he was not in law personally and singularly responsible for remittance of the NSSF contributions.

23. It is therefore my finding that the Defendant did not have any reasonable or proper cause at all to prosecute the Plaintiff.

Was the Defendant actuated by malice in prosecuting the Plaintiff?

24. I will pause again the question I have already posed: **Why was the Plaintiff charged for offences committed in the ten years prior to him being appointed Director of the Hospital?** Even after that obvious fact was drawn to the Defendant why did it persist in prosecuting him for the period? It has not been pleaded that the Defendant did not know that the Plaintiff had been appointed Director only in February 2000. The Defendant had dealt with previous Directors of the Hospital in that ten-year period; there were correspondences produced in evidence between the Defendant and such previous Directors.

25. There is also evidence on record that the Hospital had long established a **superannuation fund** to which most of its employees were contributors. There was provision in the law for seeking exemption

from NSSF contributions on account of such superannuation fund. There were many letters written by the Plaintiff, as well as by previous Directors, seeking this exemption from the Minister of Government concerned. The Defendant knew of these applications. It also knew or ought to have known that the Minister had not finally addressed the issue and either grant or refuse the exemption sought. Why then could the Defendant not wait until this issue of exemption was solved one way or the other?

26. There is another disturbing aspect to this case. For ten years the Defendant did not deem it necessary to charge any of the previous Directors. Why did it become necessary to charge the Plaintiff and not the previous Directors?

27. It is my finding that the prosecution of the Plaintiff by the Defendant could not have been prompted by anything other than malice.

28. On the issue of liability therefore I find that the Plaintiff has proved his case on a balance of probabilities.

What damages are due to the Plaintiff?

29. I will now consider what damages are due to the Plaintiff. In doing so I have taken into account the respective submissions of the parties, including the cases and other authorities cited.

30. It is the Plaintiff's case that the malicious prosecution caused injury to his credit, character and reputation, particularly in his profession and calling, and his credentials as Director of the Hospital. He has also stated that his character and reputation were brought into ridicule and contempt; and that he suffered considerable pain and mental anguish, trouble, inconvenience, anxiety and unnecessary expense.

31. In his testimony-in-chief he stated that the prosecution had serious adverse consequences to him and he suffered severe emotional distress, sleepless nights, and that his friends and colleagues in the medical profession shunned him. He further stated that he lost patients and it became hard for him to practice his profession. He was constantly hounded by journalists because of the "high profile nature" of the case and he could not travel internationally as he used to do.

32. The Plaintiff further testified that the employees at the hospital and at his own practice treated him with suspicion "because the negative publicity in the media painted the picture that (he) had either stolen or misappropriated the huge sum in remittances that the Defendant claimed had not been remitted". It was his further case that he lost the opportunity to ascend to higher office like his predecessors who had gone on to be appointed to senior public positions like Permanent Secretary or World Health Organization officer. He said he had never been able to hold any other public office since he ceased to be Director of the Hospital. He attributed all that to the malicious prosecution. He also complained that his discharge was not publicized as the prosecution had been.

33. It must be borne in mind that this is not a case based on defamation. It is a malicious prosecution case. But the court will certainly take into account such proved damage to the Plaintiff's character, prospects or fortunes on account of the malicious prosecution. It is to be expected that any malicious prosecution will cause a certain amount of anxiety and distress to the person prosecuted. There will be attendant trouble and inconvenience. But if a plaintiff claims that the malicious prosecution has damaged his character and reputation, he must provide some evidence tending to prove such damage. The same applies to any alleged damage to his prospects and fortunes.

34. Apart from his say so, the Plaintiff did not lead or call evidence regarding damage to his character and reputation or to his prospects or fortunes. He did not call to testify any friend or professional colleague who may have shunned him, or who may have known of others shunning him, on account of the malicious prosecution. The Plaintiff did not tender any evidence of any application he may have made for high office and rejection on account of the malicious prosecution.

35. But I have borne in mind that the Plaintiff was a very senior medical practitioner no doubt of

good standing. The malicious prosecution must have caused him and his family much distress and inconvenience. There would probably be, at least initially, some uneasiness or awkwardness on his part and on the part of his friends and professional colleagues in socializing together while the prosecution was afoot. He suffered trouble and inconvenience, though this was mitigated somewhat by him being excused by the criminal court from attending mentions of his case (this is apparent from the proceedings produced). Upon being discharged, he could have publicized that fact himself and claim the attendant costs as special damages.

35. Learned counsels for the Plaintiff in their submissions suggested general damages of KShs 2 million. The Defendant's counsels did not suggest anything. Taking all these factors into account, including the fact that the malicious prosecution was terminated some ten years ago (which means that the Plaintiff must have long since moved on), and doing the best that I can, I will award the Plaintiff **general damages of KShs 1.2 million.**

36. The Plaintiff claimed **special damages** of KShs 346,540/00, the same being his legal expenses connected with his defence and court fees. KShs 299,680/00 was strictly proved by way of receipts. I will award that sum.

37. In summary I enter judgment for the Plaintiff against the Defendant for the total sum of KShs 1,499,680/00. The general damages will carry interest at court rates from the date of delivery of judgment while the special damages will carry the same interest from the date of filing suit, until payment in full. The Plaintiff shall have costs of the suit. Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS

15TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE