



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 799 OF 2007

JOHN OTIENO OBUYA.APPELLANT

VERSUS

NATIONAL HOSPITAL INSURANCE FUND.....1ST RESPONDENT

ATTORNEY GENERAL. 2ND RESPONDENT

(From the judgment and decree of E C Cheronu, Senior Resident Magistrate in Milimani CMCC No. 7932 of 2003)

JUDGMENT

The Appellant herein was the Plaintiff in the lower court suit. In a plaint dated 7th August 2003 he averred that on allegations and complaints made by his employer, the National Hospital Insurance Fund on or about the 10th June 1999, he was arrested and arraigned in court on allegations of theft by servant. That after a full trial took place, he was acquitted of all charges preferred against him and released on 25th July, 2000. He also in his said plaint averred that his arrest and subsequent prosecution by the police, represented in this case by the Attorney general, was not only malicious but also defamatory on his good name and reputation.

In the particulars of the malice on the part of the Defendants the Appellant stated the following: -

- i) That the defendants jointly and severally knew or ought to have known that there was no sufficient evidence to warrant a successful prosecution of the plaintiff.***
- ii) That the defendants jointly and severally did not give the plaintiff any or any sufficient time prior to his arrest to explain the issues he was accused of.***
- iii) That the defendants jointly and severally knew that the plaintiff had no past criminal record to warrant suspicion on him of the alleged offences.***
- iv) That the 1st Defendant actively participated and with excessive zeal in the plaintiffs arrest and prosecution.***
- v) That the Plaintiff was eventually acquitted of all the charges preferred against him.***

The Appellant accordingly sought orders for general damages arising from the malicious prosecution and defamation. He also sought for special damages arising from legal fees for his representation in the Criminal trial of Ksh.50,000/-, travel costs to and from court during the trial of Ksh.150,000 and medical

expenses amounting to Ksh.30,000/-.

The Defendant had filed defences. They had denied the Plaintiff's claims of general and special damages aforementioned.

During the hearing of the claim, the Appellant/Plaintiff personally testified. He called one witness to support his case. The Defendants called one witness, the General Manager of National Hospital Insurance Fund who alone testified for the defence.

In his evidence the Appellant testified that he was employed by the 1st Respondent, National Hospital Insurance Fund as an Accounts Clerk. At the material time his duties were examination of vouchers for payment and dispatching cheques written by the firm to those they were written for medical claims or to contributors. He as well entered the details of the cheques into the cheque dispatch Register. A creditor raised a complaint to the employer and the employer reported the same to the police housed in National Hospital Insurance Fund Building. The Appellant and several other workers were requested to write statements in a police investigation of the complaint by a creditor. The police then after further interrogating the Appellant, arrested him and took him to Milimani Police Station where he was criminally charged. Some of the charges, according to his evidence, related to the cheques he had entered the Dispatch Register. The Appellant had also confirmed in his evidence in this case, that as creditors had complained about failing to receive their cheques, it was proper and necessary and justified that his employer, the National Hospital Insurance Fund, the 1st Respondent herein, to request the police to investigate the complaint, as it happened in this case.

The Appellant also confirmed in his evidence that he was arrested on 10th June, 1999 and acquitted on 27th February, 2000 but did not file this suit until 25th July, 2003 because he had no money with which he would file the suit before then. His salary had been stopped after his arrest and his wife who got a road accident drained him of funds before she died. That he got leave of court to file this suit out of the limitation period prescribed by law. He could not say who else among his co-workers was investigated.

The Appellant also testified that the criminal case had reduced his reputation in the eyes of the right thinking members of the society since they began regarding him as a thief. He produced receipts to prove special damages being receipts for transport during the trial and legal expenses to counsel who represented him.

The Plaintiff/Appellant's only witness testified that he was the Appellant's friend until it was alleged that he had stolen from his employer for which he was indeed arrested, charged and tried. That he stopped dealing with him anymore. Their friendship was a business relationship which the witness terminated. He however concluded that Appellant is still his friend and there is no grudge between them.

The General Manager of the 1st Respondent, the National Hospital Insurance Fund, also testified against the Appellants claim. He confirmed that the Appellant was an accounts clerk with others. He received cheques written to creditors or contributors, entered them in the dispatch book and sent them or had them collected by owners. When one creditor failed to receive his payment cheque he filed complaint in writing whose initial internal investigation by the cashier revealed that the cheque had been cashed at the bank over the counter with two forged signatures that had opened the cheque for cashing. Then more other cheques were noticed to have been opened for cashing over the counter by forged signatures. This is what made the witness and the Chief Accountant, to report the matter to the police for proper investigation and possible criminal prosecution. The witness confirmed it was his legal duty to hand over the matter to the police and had no malice against the Appellant or anybody else in the Accounts office.

In her judgment the honourable trial magistrate concluded that the General Managers report to the police and the request for proper investigation to be carried out and proper action be taken, was lawful and reasonable. His action, according to the trial magistrate was not too far-fetched, or without probable cause or in any way malicious.

I have, as an Appellate court properly perused and considered the evidence before the lower court. I take into account the fact that the Appellant was subsequently acquitted of all the charges filed against him as aforesaid. He accordingly was innocent. However, it is also clear and without doubt, that the General Manager of the 1st Respondent, had an administrative and legal obligation, to report the possible criminal activity of the firm's accounts section to the police. The evidence shows that he did not at the relevant time know who was involved in the particular possible criminal conduct of withholding creditor's payment cheques or forging signatures on them to enable encashment of them over the bank counters.

Furthermore, the Appellant did not produce evidence to prove that the police, to whom the witness reported, acted thereafter on his orders and under his control. What is clear from the record is the fact that the Police carried out an independent investigation by taking statements from the Appellant and others who worked with him in the same section. There was no evidence on record, that the Police did not act independently, in deciding who to charge and prosecute and with which possible offences after they completed investigations. In fact the record of evidence confirms that after reporting the matter to the police, the only other contact with them is when the police recorded a police statement from the General Manager and when the latter testified in court on being summoned to do so in support of the Police prosecution of the criminal case against the Appellant.

The trial court found that the police independently investigated the possible crimes committed and as an arm of the government which is entrusted with the maintenance of law and order, used its power and authority to prefer and prosecute the criminal charges suspected to have been committed. I come to the same conclusion as the trial magistrate and make similar findings.

In this court's view, malicious prosecution may be found where as in this case, the prosecution of a possible crime is dismissed and accused acquitted. However, in this case the accused (Appellant) was not arrested by the complainant. The police arrested him only after carrying out investigations and being satisfied independently that there was evidence upon which the Appellant should be charged and prosecuted. Such actions by the police cannot be attributable to the 1st Respondent who was not shown by evidence to have had power or authority over the police. Indeed, there is no evidence on the record to the effect that the Appellant's arrest and prosecution was brought without reasonable or probable cause.

A similar situation as above arose in the Ugandan case of Egbema VS West Nile District Administration [1972] EA where the court of Appeal stated: -

“The decision whether or not to prosecute was made by the Ugandan police, who are not servants or agents of the respondents after investigation. I can see no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared... In my view, the circumstances of this case reasonably pointed to the Appellant as a suspect and there was no sufficient evidence that in handing the Appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted the respondent was actuated by malice.”

The above statement applies fittingly in this case before me. Indeed while in the cited case the Appellant was arrested by the Respondent who handed him over to the police for investigations, in this case the police independently arrested the Appellant after carrying out independent investigations which satisfied them that the evidence which they had obtained was sufficient to sustain a criminal prosecution.

Similarly in the Nairobi Civil Case No. 2463 of 1993, Benjamin Kaswi Vs Capital Construction Limited at page 3, Visram J, as he then was stated thus: -

“Although there is no doubt that the criminal prosecution was determined in the Plaintiff's favour, the Plaintiff has been unable to establish the other elements. It cannot be said that the Plaintiff was prosecuted by the Defendant. The evidence on record shows that the Defendant only made a complaint to the police. He was not involved in what happened after that. It was the police who prosecuted the plaintiff and not the defendant...”

The conclusion from the above decision is that for malicious prosecution to be proved, the onus of proof that the prosecutor or complainant did not act honestly or reasonably, lies with the person prosecuted who becomes the plaintiff. Acquittal alone in a criminal charge does not become a sufficient basis to ground a suit for malicious damage. So in this case, it was necessary for the Appellant to prove spite or ill-will on the part of the General Manager or even the police who investigated and eventually charged the Appellant.

In the above circumstances and considering the evidence on record, this court comes to the conclusion that the Appellant failed to prove the claim of malicious prosecution against its employer, the National Hospital Insurance Fund. Indeed the Appellant further failed not only to link the conduct of the General Manager with that of his employer the National Hospital Insurance Fund by joining the General Manager in the pleadings but also failed to prove that he acted maliciously.

As to the second claim of defamation, the Appellant had not stated in detailed particulars the actual conduct of the 1st Respondent that defamed him. If it was words of the 1st Respondent to the police that defamed him, it was necessary for the appellant to quote those words and their context. If the words so spoken were claimed to be false or malicious the same were required to be particularly stated. In this case the Appellant quoted or specified no false or malicious statement. The claim would, as found by the trial court, have failed on that aspect alone. We confirm the findings of the trial court in respect of the claim for damages arising from defamation since none were proved.

Finally, the claim for special damages specified in the plaint, would depend on whether the claims for malicious prosecution and defamation succeeded. Since they failed and were dismissed as this court has also dismissed them, the claims for general damages also are hereby found untenable and dismissed.

As concerns the issue of suit of the Appellant having been filed out of time prescribed by several statutes, the Appellants did not appear to respond thereto. It is however, clear to this court that the suit was filed outside the period of three (3) years prescribed by a statute in respect to any tortious suit and one (1) year in any tortious suits against the state or Local Authority. While it is noted that the Appellant had obtained leave to file the suit in court out of the prescribed time, it is trite law that such leave is subject to being questioned and being justified under Limitation of Actions Act Cap. 22 if disputed during the hearing. It is the view of this court that lack of money given by the Appellant in justification for failing to file the suit in time, was not legally adequate to justify his failure to file the suit within the time prescribed.

In the above circumstances, this court confirms the lower court findings that the suit was fatally incompetent for being filed out of the prescribed period.

For the above reasons, this court finds that this Appeal has no merit. It is hereby dismissed with costs to the Respondents. Orders accordingly.

Dated and delivered at Nairobi this 4th day of May, 2012.

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D A ONYANCHA

JUDGE