



**MICHAEL KAGOMA MAINA.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....DEFENDANT**

### **J U D G M E N T**

**MICHAEL KAGOMA MAINA** the Plaintiff herein has filed a claim against the Hon. Attorney General for damages for unlawful arrest, false imprisonment and/or detention, malicious prosecution and defamation.

In his plaint he pleads that on several occasions and in particular 28<sup>th</sup> June 2001, 15<sup>th</sup> May 2002 and 12<sup>th</sup> October 2004 he was arrested and detained by the DCIO Eastern Province for interrogation and finger printing and on 19/10/2004 he was arraigned before the Senior Principal Magistrate's Court Embu vide Criminal Case No. 3034/04 which was later consolidated with Criminal Case No. 1309/04 where him and 6 others were charged with the following offences :-

- 1. Stealing by persons employed in the public service contrary to Section 280 of the Penal Code.**
- 2. False claims by persons employed in the public service contrary to Section 100 of the Penal Code.**
- 3. Stealing by persons employed in the public service contrary to Section 280 of the Penal Code.**
- 4. False claims by persons employed in the public service contrary to Section 100 of the Penal Code.**
- 5. Stealing by persons employed in the public service contrary to Section 280 of the Penal Code.**
- 6. False claims by persons employed in the public service contrary to Section 100 of the Penal Code.**

He states that no proper investigations were carried out and he was purposely charged to have him removed from the police force where he had diligently served for over 30 years. He was interdicted on 22/10/2004 and was unable to progress in life including failure to raise his children the way he should have.

He pleads that his arrest, detention and prosecution was actuated by malice. He itemizes the particulars of malice in para 20 of his plaint as:

- (a) Maliciously causing the Plaintiff to be investigated without any reasonable or justifiable cause.**
- (b) Arresting the Plaintiff without any reasonable, probable and/or justifiable cause.**
- (c) Fabricating criminal charges against the plaintiff.**

- (d) Arraigning the plaintiff in court without any tangible and/or evidence at all.**
- (e) Proceeding to charge the plaintiff and to prosecute him without any reasonable and/or evidence at all.**
- (f) During the date of plea on 19<sup>th</sup> October, 2004 and after the accused was released on a free bond hiding the court file with a view to delay the free bond being processed so as to have the plaintiff remain under detention for (8) eight hours.**
- (g) Interdicting the plaintiff from duty by word of mouth in contravention of the civil servants code of regulations and the Kenya Police Force Standing Orders.**
- (h) Failing to vacate the illegitimate interdiction even after the plaintiff submitted his application to retire from the police force under the mandatory 55 year period.**
- (j) Infringing the plaintiff basic human rights by backdating his retirement date to 27<sup>th</sup> September 2007 instead of extending the same.**

He itemises the particulars of pain, anguish and loss as follows:-

- (a) The plaintiff having no criminal record has suffered mental pain for being arrested and detained.**
- (b) the plaintiff being a devoted and honest employee of the police force and after rising through the ranks purely on merit has suffered defamation by the said proceedings.**
- (c) That the charges having been preferred at the time the plaintiff was due for promotion having resulted in loss of promotion.**
- (d) The plaintiff's daughter Brenda W. Maina who was pursuing a Higher Diploma Course at Kenya Institute of Professional Studies had to drop out prematurely due to shortage of funds.**
- (e) The plaintiff's son Simon W. Maina who was pursuing Diploma Course at Nairobi Institute of Business Studies had to drop out prematurely due to shortage of funds.**
- (f) The plaintiff's last born daughter Sylvia Wanjiru Maina could not proceed to college after her KCSE in 2006 due to shortage of funds.**

Particulars of defamation are:-

- (a) That the charges and the trial have portrayed the Plaintiff as a criminal in the eyes of his then colleagues and has lowered the plaintiff's estimation in the minds of the right thinking members of the society.**
- (b) the charges and the trial have portrayed the Plaintiff as an officer, who had no integrity and/or dignity in the performance of his duties.**

The plaintiff through Olonyi & Co. Advocates issued the Attorney General with a notice of intention to institute proceedings dated 17/3/2011. He received a letter to the Commissioner of Police from the Attorney General dated 28/3/2011. (copy on file). He filed the plaint, his statement, list of documents, notice to produce, list of witness and exhibits.

The Attorney General filed a defence on 27/12/2011 denying the plaintiff's claims. The plaintiff filed a reply to the defence on 17/1/2012. a hearing notice was served on the Attorney General on 13/4/2012. There is an affidavit of service filed by the process server, plus a stamp by the State Law Office.

On 6/6/2012 the matter came for hearing. The Attorney General did not appear though served. The matter proceeded later in the afternoon with the plaintiff as the only witness. He indicated that he was recruited into the police force on 19/7/1971 and rose through the ranks and was appointed Superintendent of Police in 1986. he was OCPD Mwingi. In December 2000/January 2001 there was a problem of Somalis coming to Mwingi with their herds of cattle. This raised a security issue and he had to act in his capacity as the OCPD. This was a continuous process and he had to feed the officers on duty through the assistance of the traders. He had also to organize for First Aid competition and inter district police athletics in Embu and this involved money.

On 17/5/2001 he was transferred to Nairobi. He handed over to Mr. Ekring Njeru and signed the relevant certificate. In June 2001 he got information on inquiries over misappropriation of funds in Mwingi Police Division. He was even arrested. He recorded a statement under caution on this. He was released. Five days later he was asked to do another statement which he did on 30/8/2001.

The money complained of was used in the running of police activities as explained. In May 2002 he was informed he would be charged. He was arrested and was kept under watch up to midnight when he left. He was later arrested on 12/10/2004 by the DCIO Embu and he was charged and bonded to appear in court on 19/10/2004 which he did.

It took 8 years for the case to be finalized. He was eventually acquitted. He complains of malice because the external auditors who did their investigations were never called as witnesses. The document examiner also declined to come and testify. After this he was discharged from the police force backdated to 27/9/2007 when he attained the mandatory age of retirement.

The plaintiff availed to court as instructed a certified copy of the proceeding in the lower court criminal case. He also filed written submissions.

After the plaintiff first appeared before Embu Chief Magistrate's Court on 18/10/2004, there were several adjournments in the criminal case but finally judgment was delivered on 2/3/2011 and thereafter the plaintiff filed this case. The verdict of the court in the criminal case was an acquittal of all the accused who were 3, the plaintiff herein included. One can clearly see the journey the plaintiff has had to make in order to get the judgment therein. A period of 7 years!

The Attorney General though served with copies of all the plaintiff's documents had not filed any documents nor any statements of potential witnesses. The plaintiff rightly applied for his matter to be heard because in the past Order 11 of the Civil Procedure Rules has been used by some defendants to cause unnecessary delays to plaintiff's who are ready to have their matters heard under the pretext that directions had yet to be taken.

I will therefore proceed to analyze the evidence before me. The claims before me arise from the criminal case that was conducted before the Chief Magistrate's court at Embu. I have read through the proceedings. The learned trial Magistrate who did the Judgment acquitted the plaintiff and others for 2 reasons viz:-

1. Failure to call the hand writing expert to rule out the possibility of these witnesses having signed the vouchers.
2. Forgery had not been established.

The investigations into these claims began in the year 2001 after the plaintiff was transferred from Mwingi to Nairobi. A Mr. Ekining Ajelo replaced the plaintiff at Mwingi. It is him who raised the issue of false claims after he had signed some imprests/vouchers. He was never charged and he was not called as a witness. It took over 3 years investigating the case and another 7 years prosecuting the case.

I rightly agree with the learned trial Magistrate that without evidence of the hand writing expert it would be difficult for the court to know whether the witnesses had been paid and they signed the

vouchers. Some of them claimed they had been paid but they did not sign the vouchers.

Secondly it was proved that the events the plaintiff talked about had taken place. It was also proved that even if there was no money the OCPD had the duty of ensuring that the services were rendered and officers had to eat. Where was he expected to get that money from? Security matters should never be compromised. Besides the hand writing expert there is no external auditor who came to audit the transactions and accounts. None testified in the criminal case. There are witnesses who said they were being paid money by the cashier/accounts clerk who was not recording anywhere. Since when does an AIE holder make payments? The criminal case was very poorly investigated and in spite of the statements made by the plaintiff explaining himself I read a lot of malice in the manner the plaintiff was handled. There was really no basis for the charges framed against the plaintiff.

The mere fact that the co-accused had said they used to bring money to the OCPD was not sufficient for any one to jump up ;and charge the OCPD. Proper investigations had to be done to ascertain what the accounts clerks were saying. By virtue of their training or by experience in handling money, those clerks knew that upon receipt of any money one must sign for it whether it is your boss or who.

This file has a lot of documents/letters to various offices but I choose to confine myself to the issues of the claim herein.

My finding therefore is that had the officers investigating the criminal case acted diligently they would never have charged the plaintiff herein. Why had they to investigate a simple case like this for 3 years and take another 7 years to prosecute it? The blame in this delay was not on the Court but the police whose witnesses were not readily available and their Prosecutors were hardly ever ready to proceed.

The claims for damages for false imprisonment/detention and defamation do not lie. There is no evidence to show that the Plaintiff was falsely imprisoned or detained. The plaintiff has also not shown how he had been defamed. There is no one who has testified to show that their respect for the plaintiff had been lowered and they looked at him as a criminal and a dishonest person lacking in integrity.

The issue about his employment and the premature retirement date is a matter to be addressed at a different forum on employment relations now that we have a High Court set up for that under Article 162(2)(a) of the Constitution.

I will therefore now proceed to assess damages for malicious prosecution. The issue of award the of general damages is the discretion of the court. In assessing the damages herein, I will consider the following:-

- At the time of his arrest the plaintiff was at the rank of Superintendent which is a very senior post in the police service.
- He had served for over 30 years.
- He was interdicted and placed on half salary and thereafter on no salary at all.
- And due to the financial embarrassment he was not able to meet his parental obligations e.g. paying fees for his children.
- He spent a lot of money by making trips from his home to Embu law Courts from September 2004 – March 2011.
- All the above amount to pain and suffering.

Relying on the case of **KARUIKI VS EAST AFRICA INDUSTRIES LTD. & ANOTHER Civil Case No. 144/1980 [1986] KLR 383** where a case of malicious Prosecution succeeded and the Plaintiff was awarded Shs.18,000/= on 3/11/1986. I am however, considering the elements I have narrated above, the

suffering the Plaintiff went through and even the value of the shilling. I do find an award of Shs.6,000,000/= to be appropriate for him.

I therefore enter Judgment for **Shs.6,000,000/=** with costs for the Plaintiff against the Defendant who is vicariously liable for the acts of Government Servants.

Costs to the Plaintiff.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2012.**

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JUDGE**

**In the presence of:-**

**Plaintiff**

**Njue CC**