



REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 54 of 2008

RICHARD SIMON KUNGU.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERALDEFENDANT

JUDGMENT

The plaintiff's plaint dated 14th May 2008 prays for the following reliefs:-

- (1) Loss of earning from the date of illegal termination to the date the plaintiff would have lawfully retired**
- (2) General damages**
- (3) Interest on (a) and (b) above**
- (4) Any other relief of the above**

It was the plaintiff's testimony that he was employed as the Assistant Chief of Kabar Central Sub Location within North East Kano location of Nyando District on 10th August 1993.

On 20th February 2000 a robbery took place in his area of jurisdiction. He arrived on time at the scene and caused some people to be arrested. Later on 22nd February 2000 the said person were released and instead he was arrested on suspicion of having been involved in the robbery.

The plaintiff together with others were arraigned in court and were charged with the offence of robbery with violence. This was done vide **Kisumu CMCCRC No. 74 of 2000**. The matter proceeded to full trial and on October 2000 the rest were acquitted but he was found guilty and sentence to death.

The plaintiff appealed to the High Court vide **Kisumu HCCRA No. 180 of 2000**. He was acquitted and set free.

Meanwhile and while he was in custody the plaintiff was interdicted on 23rd March 2000. The plaintiff was put on half salary among other conditions.

After mounting various appeals to his employer, the plaintiff stated that on 25th November 2002 he received a letter dated 21/10/2000 signed by one J. W. Mwaniki (Miss) which stated as follows:-

“It was reported to this office that on 23rd February 2000 you neglected your duty of maintaining law and order in your sub location and as a result one of your subjects was murdered.

In view of the above act of omission and commission your public image as a leader has been dented. It is therefore contemplated to retire you from the service in public interest. However, before the same is done you are hereby called upon to show cause why you should not be retired in public interest.....”

After several correspondence between the plaintiff and Nairobi he received a letter dated 9th July 2003 which lifted the interdiction, confirmed the appointment and retired him in the public interest with effect from 2003.

The plaintiff produced letters from the District Officer and the District Commissioner requesting the Ministry to reinstate him since there was no sufficient reasons to have terminated his service and that whatever reasons that were available had been sorted out by the High Court.

The subtotal of the plaintiffs case is that all his efforts to appeal were futile and that the Ministry had actually made up its mind not to allow him into its employment for the sake of public interest.

The defendant called one witness a Mr. Bernard Otieno Ngaa. He works as a deputy secretary in charge of administration and discipline. His testimony dwelt largely on the procedures followed by the Ministry when carrying out disciplinary cases. He basically reiterated all the steps that they went through within the department.

According to him the termination was not illegal as he was given reasons for such termination. However on cross examination he was not able to defend that position. He however insisted that the plaintiffs image had been tainted hence his termination.

I have read both submission by the plaintiff and the defendant. The test to be applied by this court was well captured by **Cotran J in Murunga =vs= The Attorney General (1979) KLR 138** where he said:-

“In proceedings for malicious prosecution, the plaintiff must show

- (1) That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.**
- (2) That the prosecution terminated in the plaintiff favour.**
- (3) That the prosecution was instituted without reasonable and probable cause and**
- (4) that it was actuated by malice.**

The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence”.

To answer this question, its prudent to get back to the proceedings at the lower court. It is necessary to establish whether indeed the prosecution acted maliciously or not in prosecuting the plaintiff although of course the High Court quashed the lower courts judgment.

I have perused the entire lower courts proceedings and none of the witness indeed claimed that the plaintiff robbed or injured any of them. One of them PW8 said :

“When people wanted to beat us the 1st accused stopped them. Another person came in a motor

vehicle..... They took us to the motor vehicle. It is the 1st accused who searched me. They told us to strip the clothes and the shoes. Later my shoes only were returned. They took us back to the motor vehicle and found that the canvas and the charcoal and two batteries and 4 spanners and head lump, blanket and a jerrycan of petrol which was empty had been taken”.

The 1st accused said he would go and get a tractor to tow our motor vehicle. He got two people Robert and Michael and me and Daniel remained behind. The people were left with bound our hands at the back. An A. P. arrived and took us to the D. O. 's office. He took two of us. We found the other two at the D. O's place. When the A. P. came he found us still bound.

At Masogo D. O's office and spent the night there. The next day the 1st accused came at about 8:00 a.m. - 9:00 a.m. and bought tea for us. Later a police vehicle from Ahero came. We got in and it took us where we had left the lorry. At the scene we found that the charcoal had all disappeared and the canvas. We went to the 1st accused place. He talked to the officers but was left there. He said that he would look for the stolen items”.

On cross examination he said: “The people wanted to beat us. It is accused 1 who stopped them from beating us. They were all alleging that we were cattle rustlers”

“Later accused 1 took Michael and Richard to look for a tractor to tow the lorry.... The 1st accused came and bought tea the next day. Its the police officer who told us that the 1st accused had said that he would look for the stolen items because he had spoken in Dholuo”.

The cross examination of the investigating officer shows that the only reason the plaintiff was suspected of the robbery was because some shoes were found in his house. He said:-

“It is me who made a decision to charge the accused with this offence. I went to the 1st accused place only once. I however visited the scene severally. I cannot recall the exact date that I went to the 1st accused's place. I discovered the shoes in the bedroom of the 1st accused. He was by then under arrest”.

Was the plaintiff's action on the material day consistent with his line of duty? The answer to this is found in the scheme of service for Chief's and Assistant Chief's, where clause three states:-

“The Chiefs and Assistant Chiefs function entails:- coordination of Government activities, promotion of law and order, dissemination and over seeing the implementation of Government policies resources for development, organization and coordination of Government functions, coordination of community response to disaster and emergencies, promotion and coordination of community peace building, conflict resolution and environmental management activists, initial identification of citizens for both National and Civil Registration, Coordination and promotion of Community policing; promotion of good governance at community level and mobilization of communities to participate in socio-economic activities”.

In my mind, on the material night the plaintiff was indeed performing several of these functions. From the proceedings it will appear clearly that as the Assistant Chief of the area he was within his mandate to ascertain that the “strangers” who were passing his territory were or were not cattle rustlers. It is equally evident that he took part greatly in ensuring that the complainants were not harmed by the members of the public.

Another positive gesture include the arrangement to have the lorry towed and buying tea for the suspects the following morning. So why was the plaintiff prosecuted?. I think there was great element of malice and dishonesty on the part of the investigating officer. He did not carry out adequate investigation. The states submission is basically on procedures in carrying out interdiction and the relevant disciplinary protocols.

I have no doubt in my mind that the proper disciplinary procedures were adhered to by the

state. However was there any need or reason to subject the plaintiff to criminal process then pursue the disciplinary process?. Was there sufficient reason to retire the plaintiff in the “Public interest”?

Miss Mwaniki's letter earlier own quoted clearly stated that as a result of the plaintiff's negligence one of his subjects was murdered! Where did this come from? Nowhere in the proceedings at the lower court was anybody murdered.

In the case of **Hicks =vs= Faulkner (1878) 8 Q. B. D. 167 at page 171** and quoted extensively in Kagane VAG (1969) E. A. 643 the court said:-

“Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecution in which the sole issue is whether the case for the prosecution was so fabricated or not the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say too constitute reasonable and probable cause the totality of the material within the knowledge of the prosecution at the time he instituted the prosecution whether that material consisted of facts discovered by the prosecution or information which has come to him or both must be such as to be capable of satisfying an ordinary reasonable prudent and cautions man to the extent of believing that the accused is probably guilty. If and in so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautions man could honestly believe to be substantially true and to afford a reasonable strong basis for the prosecution”

The finding of the High Court on appeal materially seals the argument whether or not the prosecution had any strong and arguable case against the plaintiff. The evidence against the plaintiff to say that least was scanty and wanting.

The letter from the permanent secretary stated that he was retired on public interest. How did they establish the public interest? By the time they were writing the D. O., the D. C. among other were pleading to them that the plaintiff's record was impeccable in fact he was a member of the local Land Disputes Tribunal which is a government agency.

The subtotal of my finding therefore is that the prosecution of the plaintiff was actuated by malice initiated by an overzealous investigation officer. And as Ojwang J (as he then was) said in **Thomas Mboya Oluoch & Another =vs= Lucy Muthoni Stephen & Another (2005) e KLR**

“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense”.

I do find that the plaintiff has on a balance of probability establish his case against the defendant.

On damages therefore, I do find the arrest and detention of the plaintiff for 11 months for a non existence offence was not only deplorable but unacceptable. Had the prosecution not been overzealous the plaintiff would not have been incarcerated even for one day. His reputation obviously was damaged. As a compensation therefore I shall award him the sum of Kshs. 800,000 which I think is reasonable.

The plaintiff was retired on 1st August 2003. Ordinarily he could have retired at 55 years, that is sometimes in September 2017. The retirement age was later raised to 60 years. He therefore had 19 years to work. In the premises and taking into account his salary which was 4780 at the time of being retired I shall award him the sum of Kshs. 1,089,840 calculated at 19 years x 12 months x 4780 = 1,089,840. The amount due to the plaintiff for the plaintiff thereof shall be:-

Kshs.1,089,840.00
Kshs 800000.00

Total Kshs. 1,889,840.00

The above sum shall also attract interest from the date of filing of this suit till payment in full. The plaintiff shall have the costs of this suit.

Orders accordingly.

Dated, signed and delivered at Kisumu this 24th day of October 2012.

H. K. CHEMITEI

JUDGE

In the presence of:

Kopot for the Plaintiff

.....State

HKC/aao