



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 24 OF 2010

(FORMERLY NAIROBI HCCC NO 797 OF 2007)

PATRICK KIMATHI MUCHENA.....PLAINTIFF

V E R S U S

- 1. ATTORNEY-GENERAL**
- 2. WILLY LUGUSA**
- 3. NYALI MUNGA**
- 4. STANLEY KIPTANUI**
- 5. CHALES WANJOHI**
- 6. AMOS**

GICHUKI.....DEFENDANTS

J U D G M E N T

The Plaintiff herein is an advocate of this court in private practice, and he was such at all material times.

The 1st Defendant has been sued in his statutory capacity on behalf of the then Kenya Police Force (it is now, i believe, Kenya Police Service). The 2nd to 6th Defendants have been sued in their personal capacities at the material time as police officers.

The Plaintiff claims general (including punitive and/or exemplary) damages and also special damages for unlawful arrest, false imprisonment and malicious prosecution. His case as set out in the **plaint dated 22nd November, 2007** is that on or about 8th September 2006 the 3rd Defendant, under instructions from the 2nd Defendant, and in company of the 4th, 5th and 6th Defendants and other police officers, wrongfully and forcibly arrested, confined and detained the Plaintiff at Central Police Station, Nairobi where he had gone in the course of his duties as an advocate responding to his client's call, in connection with allegations of having committed various offences under the Penal Code.

It is the Plaintiff's further case, that he was subsequently arraigned in court vide **Nairobi CM Criminal Case No. 1654 of 2006** and charged with various offences. He pleads that the 1st Defendant in the

course of the proceedings but before hearing of the case commenced, entered a *nolle prosequi* and he was set free on 13th December 2006.

The Plaintiff further pleads that his prosecution was actuated by malice on the part of the Defendants. Particulars of malice have been pleaded.

Particulars of special damages have also been pleaded.

The Defendants entered appearance and filed a **joint statement of defence dated 18th July, 2008**. They denied the Plaintiff's claims. They further pleaded that the Plaintiff's arrest and prosecution were premised upon reasonable and probable cause and belief that the Plaintiff had committed an offence. They therefore sought dismissal of the suit.

In a **reply to defence dated 8th September, 2008** the Plaintiff joined issue with the Defendants upon their statement of defence.

I cannot see on the record an agreed statement of issues. But the Plaintiff filed a **statement of issues dated 3rd March 2009** in which the following issues are set out –

1. Did the Defendants unlawfully, wrongfully and forcibly arrest the Plaintiff as alleged while in the course of their duties?
2. Did the Defendants, maliciously and unreasonably, cause the Plaintiff to be prosecuted in Nairobi CM Criminal Case No. 1654 of 2006?
3. Was the Plaintiff acquitted?
4. Is the Plaintiff entitled to damages, and if so, what damages?
5. Who should bear the costs of the suit?

At the commencement of the hearing, the bundle of documents in the Plaintiff's **list of documents dated 14th October 2008** was by consent admitted in evidence as **Exhibit P1**. There were no documents from the Defendant's side.

The Plaintiff testified as PW1. He called one other witness, **CAESAR NGIGE WANJAU (PW2)**, a fellow advocate in private practice.

Though the Defendants indicated that they would call the 2nd, 3rd and 6th Defendants to testify, on the appointed day of hearing of the defence case there was no appearance for the Defendants without any explanation. In the event therefore the Defendants did not lead or call any evidence. At the close of evidence, an order was made that parties do file written submissions. The Plaintiff filed his on 31st May 2010. The Defendants did not file any submissions.

I have considered the testimonies of the Plaintiff and PW2. I have also considered the written submissions filed on behalf of the Plaintiff, including the cases cited.

The Plaintiff testified thus. He was admitted to the bar in January 1992. Legal practice has been his basic occupation since then. He is a Christian and worships at Lavington United Church, Nairobi. He married in 1998 and has 3 children. He plays golf and has been an active member of Muthaiga Golf Club, Nairobi since the year 2000. He is also an active social and sports member of Nairobi Club where he interacts with clients, friends and professional colleague.

The Plaintiff further testified that on 8th September, 2006, a Friday, he was in Bungoma. On the way back to Nairobi he received a call from one Sammy Ndung'u, a director of a company client of his (Plaintiff). Mr Ndung'u informed him that he had been arrested by police and taken to Central Police Station, Nairobi over a transaction involving a property situated at Siokimau in Mavoko. He wanted legal representation by the Plaintiff.

The Plaintiff said that his client company was **Ng'ombe Holdings Ltd**, and that sometime back he had drawn an agency agreement between Ng'ombe Holdings Ltd on the one hand and one **Grace Mutavi Kioko** and **Daniel Kaloki Kioko** on the other hand. The Plaintiff further said that to the best of his recollection the agreement had not been executed. The Plaintiff further said that Mr Ndung'u asked him to visit him at the police station as soon as he got back to Nairobi.

At about 5 pm on 8th September 2006, the Plaintiff arrived in Nairobi. He testified that he went straight-away to Central Police Station and proceeded to the CID office at the back of the station. He found Mr Ndung'u sitting together with the 4th, 5th and 6th Defendants. He then did not know that these were police officers but subsequently learnt that they were.

The Plaintiff asked Mr Ndung'u what the matter was and Mr Ndung'u asked him to talk to the 4th, 5th and 6th Defendants. He did so. The 6th Defendant then asked the Plaintiff for the agency agreement. The Plaintiff called for it from his office and a short while later it was brought by a taxi driver. The Plaintiff said he pointed out that the agreement was actually a draft and he gave it to the 5th Defendant who in turn showed it to the 4th Defendant who was sitting behind the Plaintiff.

The Plaintiff further testified that he was then 'grabbed' from behind. He looked back and saw that it was the 4th Defendant who had grabbed him while shouting that the Plaintiff wanted to tear the document. The Plaintiff told him that the document had just been brought from his own office and he had no reason to destroy it. The 4th Defendant then told him that he was under arrest. The 4th Defendant ordered the 5th and 6th Defendants to go out and arrest the taxi driver who had brought the agency agreement from the Plaintiff's office, one Mr Hinga. Shortly, Mr Hinga was brought back under arrest.

The Plaintiff further testified that Mr Ndung'u, Mr Hinga and he were then held in one corner of the room. In the same office there happened an advocate called Mr Naville Amollo who had some other business. Mr Amollo intervened and asked the 4th Defendant to treat the Plaintiff with some dignity. Mr Amollo added that he did not see the Plaintiff try to tear the agreement. With this intervention by Mr Amollo, tension eased a bit and the Plaintiff was allowed to sit on a chair.

The Plaintiff then called two of his professional colleagues by phone, PW2 and one **Mr G. K. Kimondo**. He told them what had happened. At about 6.30 pm Mr Kimondo came to the police station. PW2 followed 15 minutes later. The Plaintiff briefed them as to what had happened. PW2 and Mr Kimondo then tried to engage the 5th and 6th Defendants so that the Plaintiff might be released on bail. They did not succeed.

At about 8 pm the Plaintiff together with Mr Ndung'u and Mr Hinga were taken to an office upstairs. There they found the 3rd Defendant who was the Divisional Criminal Investigation Officer (DCIO). The 3rd Defendant asked the Plaintiff to explain what had transpired leading to his arrest. As the Plaintiff

started to explain in the presence of PW2 and Mr Kimondo, the 3rd Defendant ordered the 5th and 6th Defendant to lock him and the other two arrested persons up until Monday. They were then taken downstairs, booked in the Occurrence Book and placed in one cell.

At about 9 pm, the Plaintiff further testified, he was called out. He was told that the OCPD wanted to see him. He was taken to an office upstairs where he found the 2nd and 3rd Defendants. PW2 and another advocate called **Steve Njiru** had followed him there.

The 2nd Defendant said he wanted to know why the Plaintiff had been arrested. The Plaintiff explained to him all that had happened. The 2nd Defendant then ordered that the Plaintiff be taken back to the cells. He was indeed again placed in the cells.

On the following day, 9th September, 2006, at about 1 p.m. the 5th Defendant called the Plaintiff and the other two arrested persons from the cells. He made an entry in the Occurrence Book that the Plaintiff had been taken to Syokimau. The three of them were then handcuffed and placed in a police Land Rover. They were driven to Kamunkunji Police Station. The Plaintiff alone was booked into the station and placed in the cells there.

On 10th September, 2006 about mid-day the Plaintiff was removed from the cells. He found the 5th Defendant outside and he was then handcuffed and placed in a Peugeot 504. Mr Ndung'u and Mr Hinga were already in the car. They were all then driven to Central Police Station. PW2 followed them there.

At Central Police Station the Plaintiff's statement was recorded. He and the others were then locked up in the cells.

At about 9 pm the Plaintiff and the others were escorted to the OCPD's office. There they found the Plaintiff's wife, PW2 and others. PW2 and the others pleaded for the Plaintiff to be released on bail. The Plaintiff was then charged and released on bail. This was on Sunday 10th September 2006 at about 11 p.m.

On Monday 11th September, 2006 the Plaintiff and the other two were jointly arraigned in court. They were charged with various offences. They pleaded not guilty and were released on bail pending trial. They attended court several times for mention of their case pending trial. The case was never heard. Ultimately, on 13th December, 2006 a *nolle prosequi* was entered and the Plaintiff was discharged.

Thereafter Plaintiff instructed counsel and due notice was given to the Attorney-General. The present suit was then filed.

The Plaintiff also testified that the police retained the agency agreement and that they never gave it back to him. Before he was arrested and charged, the police never questioned him at his offices, nor seek explanation from him over any complaint. He did not know the complainant, **Peter Anjisanga Njeremani**, mentioned in the charge. Of the other witnesses named in the charge, the Plaintiff said he met Daniel Kioko on the date he took instructions to prepare the agency agreement. The said Kioko had come in with Mr Ndung'u. The agency agreement he prepared was never signed except by Daniel Kioko, and he (Plaintiff) never witnessed that signature.

The Plaintiff testified that his arrest was malicious because he was never given a chance to explain why he had visited his client, Mr Ndung'u, at the police station; that the offences with which he was eventually charged were bailable, yet he was not admitted to bail for three days; and that the manner in which he was arrested, handcuffed and transported between Police stations demonstrated malice. He further stated that he and his advocates and friends pleaded many times during the three days he remained in custody to be released on bail.

The Plaintiff gave further indications of malice as follows. There was delay in prosecuting or terminating the case; there was no resistance for the court releasing him on bail; and there were threats at the police station to charge him with more serious offences.

The Plaintiff therefore seeks general damages. He also seeks punitive and/or exemplary damages on account of the Defendants' malice displayed in arresting and manhandling him while he was carrying out his professional duties as an advocate. He said that his status was thus diminished. It was the only time that he had ever been arrested and charged with a criminal offence.

The Plaintiff also seeks special damages of KShs 300,000/- being legal fees for his defence in the criminal case. A receipt for the same is one of the documents contained in Exhibit P1. The charge sheet and proceedings of the criminal case are also contained in Exhibit P1.

In cross-examination the Plaintiff denied that his arrest and prosecution were on reasonable grounds. Nothing of significance or contradictory of his testimony-in-chief was elicited in cross-examination.

PW2 in his testimony corroborated the Plaintiff in all material particulars. He testified to his and other professional colleagues' repeated efforts to have the Plaintiff released on bail by the police. He observed what he said was the determination of the police to hold the Plaintiff in custody as long as possible. He witnessed the various transfers of the Plaintiff between police stations, all the while being handcuffed and sand-witched between armed police officers.

PW2 was one of the team of 10 lawyers who defended the Plaintiff in the criminal case.

The only significant thing that came up in cross-examination of PW2 was that initially he stated that he did not charge the Plaintiff any professional fees for representing him, that he did not raise any fee note and that he offered his services to him for free. When he was shown a receipt for KShs 300,000/00 (page 15 of Exhibit P1) he confirmed that it was from his firm. He then revised what he said and stated that his firm indeed charged the Plaintiff fees of KShs 300,000/00, and that the money was paid.

I find this hard to believe. PW2 could not have forgotten that he had indeed charged the Plaintiff KShs 300,000/00 as professional fees, or that it had been paid. He was initially categorical that he had not charged the Plaintiff any fees and that he had offered his professional services for free, obviously as a close professional colleague, if not friend.

PW2 appeared embarrassed when he was shown the receipt issued by his firm for KShs 300,000/00. It is apparent that receipt was procured by the Plaintiff from PW2's firm without consultation with PW2. I do not believe that it represents any payment for professional fees paid by the Plaintiff to PW2's firm. I do not believe that any such fees were charged or paid.

As already pointed out the Defendants did not lead or call any evidence. The only available evidence regarding the circumstances surrounding the arrest, detention and prosecution of the Plaintiff is contained in the testimonies of the Plaintiff himself and PW2. Those testimonies are by and large uncontroverted.

In proceedings for malicious prosecution, the plaintiff must prove the following on a balance of probability:-

- 1. That the prosecution was instituted by the defendant or by someone for whose act he is responsible.**
- 2. That the prosecution terminated in the plaintiff's favour.**
- 3. That the prosecution was instituted without reasonable and probable cause.**

4. **That it was actuated by malice.**

See the case of **Muranga vs Attorney General [1979] KLR 138.**

The court further held in that case (following **Kagane vs Attorney-General [1969] EA 643**) that the test whether the prosecution was instituted without reasonable and probable cause is *whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.*

It is not in dispute that the Plaintiff's prosecution was instituted by the Defendants, or that it terminated in his favour. The two main issues to be decided therefore as far as liability is concerned are one, whether the prosecution was instituted without reasonable and probable cause, and two, whether it was actuated by malice.

Reasonable and Probable Cause

As already noted, the Plaintiff's testimony is basically uncontroverted. It was corroborated in all material particulars by the testimony of PW2.

The Plaintiff visited the police station concerned in his professional capacity as an advocate upon being called by his client, who had been arrested, to represent him. At the police station he was not accorded the necessary dignity, assistance and facilitation in order to carry out his professional duties. Instead, he was immediately treated as a suspect in whatever complaint had been reported to the police. He was manhandled and denied the basics of fair and dignified treatment, which ought to be accorded to every Kenyan, even those reasonably suspected of having committed an offence.

Was there any reasonable or probable cause to prosecute the Plaintiff? We have seen that the test is whether the material known to the Defendants would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offences he was charged with. The Plaintiff was charged with three counts: -

1. Making a document without authority contrary to section 357 of the Penal Code.

2. Forgery contrary to section 349 of the Penal Code.

3. Uttering a false document contrary to section 357 (b) of the Penal Code.

The particulars of offence show that the three counts related to the agency agreement that featured in this trial.

The criminal case never went to trial. *A nolle prosequi* was entered. In the present case the Defendants did not lead or call evidence. So, this court simply does not know what material was known to the Defendants as would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offences he was charged with. The Defendants did not bother to place such material before the criminal court, and they did not bother to place it before this court.

I am therefore satisfied on a balance of probabilities, that the Plaintiff's prosecution was instituted without reasonable and probable cause.

Malice

Was the Plaintiff's prosecution actuated by malice? The Plaintiff had prepared the agency agreement in the course of his duties as an advocate upon instructions received from his client. He readily surrendered the agreement to the police when he was required to do so. If the police had any queries regarding it, they did not seek any explanations from him before arresting and charging him.

The Plaintiff, as already noted, was treated with extreme callousness and indignity at the police station, notwithstanding that he was there in his professional capacity as an advocate representing a client who was in police custody. He was denied bail for 3 days without justifiable cause, and despite the pleas of a number of his professional colleagues who no doubt would have been ready to stand surety for him should the same have been required.

What the Defendants were doing, in dealing with the Plaintiff the way they did, was actually to undermine the rule of law, no less. Legal representation is the constitutional right of every Kenyan. When an advocate of this court goes to a police station in order to represent a client who is already in custody, and the advocate himself is subjected to all manner of indignity and is without reasonable or probable cause incarcerated so that he needs representation himself, the intention of the police is then clear, and that is to undermine the rule of law. When those who are mandated by law to offer legal services in protection of any person's rights are prevented so callously from performing their duty, what else is left of the rule of law?

I find, upon close scrutiny of the circumstances in which the Plaintiff was arrested, incarcerated and prosecuted, that his prosecution was actuated by malice.

DAMAGES

I need not repeat the extreme callousness and indignity to which the Plaintiff was subjected. He was victimised on account of having dared to go to the police station in his professional capacity to represent a client who was in custody. He was humiliated, repeatedly denied bail and shunted between police stations in hand-cuffs and sand-witched between armed police officers, notwithstanding that there was no chance at all of him escaping.

The conduct of the Defendants must be discouraged. The general damages I will award will therefore include a significant element of punitive damages. But I will not separate the punitive element from the general damages. The defendants' conduct towards the Plaintiff was bad from the beginning to the end. I have already said that it was designed to undermine the rule of law.

I have looked at the cases cited by the Plaintiff's learned counsel. But each case must depend on its own circumstances, and awards of general damages should be generally conservative.

I have considered that the Plaintiff was an advocate who was subjected to arrest, false imprisonment and malicious prosecution primarily on account of the fact that he had dared to go to the police station to

represent a client who had been arrested. I have also considered his social and personal circumstances.

Doing the best that I can, I will award the Plaintiff all-inclusive general damages of KShs 3 million.

As for special damages, the same, as already seen, were not strictly proved, and that claim is dismissed.

There will thus be judgment for the Plaintiff in the sum of KShs 3 million as general damages. This sum will carry interest at court rates from the date of judgment till payment in full.

The Plaintiff shall also have costs of this suit plus interest thereon at court rates from the date of filing suit.

Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2011.

H.P.G. WAWERU
JUDGE