REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 84 OF 2007

JOHN NGARI NJIRU……..…….....
…….PLAINTIFF
VERSUS
MBEERE COUNTY COUNCIL…….....…..…….1ST DEFENDANT
HON. ATTORNEY GENERAL.…….....……..2ND DEFENDANT

J U D G M E N T

John Ngari Njiru hereinafter referred to as the plaintiff has sued the Mbeere County Council (1st defendant) and the Honourable Attorney General for damages for malicious prosecution and unlawful confinement. He also prays for costs of the suit and interest thereon at court rates. The AG is sued on behalf of Kenya Police, Siakago. According to the plaintiff he was arrested following a robbery incident at the premises of the 1st defendant on the night of 25th and 26th October 2005. Although he states in paragraph 4 of his plaint that the robbery report was made by the 1st defendant's agents, servants and/or employees, there was no OB report produced in evidence to that effect. Nor did any of the witnesses who testified on behalf of the 1st defendant admit having made the report. Even the investigating officer who testified in the trial court as PW14 did not say that the 1st defendant made any such report to the police station. I will nonetheless come to that issue later. The plaintiff was arrested by several police officers and taken to Siakago police station. He was later charged along with several other persons with the offence of **Robbery Contrary to Section 296(2) of the Penal Code** for which he could not be released on bail. The state called evidence after which the plaintiff was found with a **no case to answer** and **acquitted under Section 210 of the Criminal Procedure Code**.

Unfortunately, the copy of the ruling which was produced in court as exhibit is totally illegible and I am not therefore able to decipher its contents. According to the plaintiff's evidence in court however, he was not mentioned by any of the witnesses who testified either in their testimony in court or in their statements to the police. His conclusion therefore was that the prosecution was actuated by malice and ill will. He has therefore urged the court to find that he has proved that he was maliciously prosecuted and that the 2 defendants should be held 100% liable for his incarceration. It is not denied that he stayed in custody for about 11 months as the case was proceeding in court.

Both defendants filed statements of defence in which they denied liability. According to the 1st defendant, it made a complaint to the police station following the robbery but did not give the name of the plaintiff or any other suspect. It stated that the report was genuine and not malicious as alleged and it was not the 1st defendant's decision to arrest the plaintiff and have him charged with the robbery but that of the police. The 1st defendant therefore asked the court to dismiss the claim against it as the same has not been proved on a balance of probabilities.

On its part, the 2nd defendant in its statement of defence dated 31.07.07 avers that if the plaintiff was indeed arrested, it was following a report that he had committed the offence. The 2nd defendant denied the particulars of malice as particularized in the plaint. It further denies that the plaintiff suffered any loss and urged the court to dismiss the plaintiff's claim with costs.

The defendants did not call any evidence. Written submissions were filed by the plaintiffs counsel and by counsel for the 1st defendant. The 2nd defendant neither testified nor filed any submissions. It is the duty of the court nonetheless to consider the submissions in question along with the law applicable and the relevant authorities.

I will deal with the issue of liability first. There is no doubt that the plaintiff herein was arrested and charged in court as the plaint and his evidence in court attest. There is also no dispute that he was found with a no case to answer and acquitted under section 210 of the CPC. For liability to attach to the 1st defendant, the plaintiff must prove that it is the one who made the robbery report and further, that it is the agents of the 1st defendant who mentioned the plaintiff's name to the police and thus caused him to be arrested. As mentioned earlier on, there was no evidence adduced before the trial court even from the Investigating officer to show who had mentioned the plaintiff in connection to the robbery in question. No OB extract was produced either which would have clearly shown if the 1st defendant had given the name of the plaintiff to the police. A complainant has an inherent right to report any wrong doing against him/her to the police or other authorities for action to be taken. In doing so he or she cannot be faulted. What attracts liability however is a report against a person which report later turns out to be malicious, capricious or spiteful. In this case, the 1st defendant or any of its servants had a right to report the robbery. They did so. They did not mention any suspects but left the police to carry out their investigations. If the police thereafter arrested the plaintiff without the intervention of the 1st defendant, then the 1st defendant cannot be held liable for the arrest or locking up or incarceration of the plaintiff.

In this case, there is not even an iota of evidence to show that it was the 1st defendant that was responsible for the arrest of the plaintiff. The 1st defendant cannot therefore be blamed for whatever befell the plaintiff either in the hands of the police or of the court. Even in their evidence in court, the representatives of the 1st defendant did not mention the plaintiff. No liability can therefore attach to the 1st defendant or its servants whatsoever. For these reasons, the plaintiff has failed to prove his case against the 1st defendant on a balance of probabilities as by law required. The claim against the 1st defendant is therefore dismissed with costs.

On the 2nd defendants, there is no dispute that once the robbery report was made at Siakago police station, it was the responsibility for the police who are the agents/servants of the 2nd defendant to investigate the same. It was up to them to arrest the suspects in respect of whom they had sufficient evidence to prefer the charges on. The police recorded all the statements of the intended witnesses and the investigations officer therefore knew all the evidence available to them before they charged the suspects in court. According to the plaintiff, none of these witnesses mentioned him in their statements to the police. Actually none of them mentioned him even in court. In his evidence in chief, PW14 CI Jafred Mateche stated***"I further received information that A1, 2… were also involved in the robbery"***

He did not disclose the source of the said information. On cross examination by the plaintiff, he stated***"I have given the court all the evidence I have against you."***

He had actually no evidence at all against the plaintiff and he must have known that even as at the time he caused him to be charged with the said offence for which he knew there was no bond.

It is trite law that an acquittal *per se* on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. As stated earlier, the plaintiff must establish malice, spite or ill will. In this case it is clear that there was absence of good will or bona fides when the plaintiff was charged. Even if he was charged on the basis of suspicion, such suspicion was very weak. There was definitely some malice or ill will in this matter as there was no honest or genuine reason advanced as to why the plaintiff herein was

charged with robbery. The evidence adduced against the plaintiff did not link him to the offence at all and this was a fact that must have been within the knowledge of the police officers who arrested and charged him. I find this prosecution malicious and ill intentioned. The 2nd defendant is therefore responsible for malicious prosecution and is liable to compensate the plaintiff by way of damages.

On the issue of quantum of damages, I must say that counsel for the plaintiff did not place before me any legal authorities that would persuade me to assess the quantum of damages one way or another. All he annexed to his submissions were some extracts of some pages downloaded from a website. The pages do not even have the full cases i.e. from the heading to the conclusion. He just seems to have downloaded some pages which are actually disjointed and which cannot be referred to as authorities. If counsel wants to cite authorities, he should do so. Maybe he could learn from counsel for the 1st defendant who although he relied on only 1 authority, it was a proper court authority which one can cite.

I will therefore ignore the said papers as they are of no value at all in this case or any other case for that matter.

In conclusion, I am satisfied that the plaintiff has proved his case against the 2nd defendant on a balance of probabilities. I therefore enter judgment in his favour and award him a global sum of **KSh.300,000** as damages for malicious prosecution and wrongful confinement. He is awarded costs against the 2nd defendant, but he will pay costs to the 1st defendant as his case against the 1st defendant has been dismissed with costs. I so order.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 24th day of November 2010
In presence of:- N/A