



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS LAW COURTS)**

Civil Suit 1173 of 2002

LEORNARD ATARO PETER AJARO.....PLAINTIFF

- VERSUS -

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

The plaintiff herein Leornard Ataro Peter Rajoro moved to this court by way of a plaint dated 10th July 2002 and filed against the Attorney General. The main complaint against the Attorney General is found in paragraph 5 of the plaint. It is to the effect that:-

- (i). On or about 8.11.2000 while doing banking business at KCB Kisumu, branch he was arrested by personnel from the Banking investigation Fraud Unit Police.
- (ii). He was subsequently charged with 5 counts of forgery, attempting to steal, stealing and handling stolen property in Nairobi criminal case No. 2579 of 2000.
- (iii). He was acquitted on no case to answer on 20th December 2001.
- (iv). It is his contention that the said arrest, detention and prosecution of the plaintiff by the defendant, was unlawful, malicious and caused the plaintiff damages, pain and mental anguish, degradation and loss of business.
- (v). They duly gave the Attorney General notice of intention to sue dated 6th February 2002 which the defendant acknowledged vide its letter reference number 5401/37/4175 dated 12th February 2002.
- (vi). The defendant refused, failed and or neglected to compensate the plaintiff for the said loss and damage, hence this action. In consequence of which the plaintiff sought as per the amended plaint, presented to court vide an application by way of chamber summons dated 21st September 2007 and filed the same date which was allowed as prayed as per consent order of 28.09.2007. Prayer 2 thereof sought an order that the amended draft plaint annexed hereto be deemed duly amended and filed. Since the application was allowed as prayed it rendered the second order of 28.09.2007 requiring the amended plaint to be filed forthwith superfluous.

The reliefs sought by the amended plaint are:-

- (a) Exemplary damages.
- (b) General damages for malicious prosecution.

- (c) Costs and interest at court rates.
- (d) Any other relief that this Honourable court may deem fit and just to grant.

The plaintiff was the sole witness on his side. The evidence simply reiterates the content of the amended plaint and the salient features of the same are:-

- (a) On 8.11.2000 he accompanied Dr. Osewe Omocho now deceased to the KCB Kisumu Industrial Area branch. Dr. Osewe was deceased as at the time of the testimony of PW1.
- (b) The reason the two went to the bank was because Dr. Osewe had prepared a proposal for the plaintiff to get an agro based business loan from the said bank.
- (c) While at the bank, they went to the bank managers office for Dr. Osewe to introduce the plaintiff to the bank manager.
- (d) While in the managers office is when they were arrested by persons who introduced themselves as police officers from Kisumu acting on information/instructions from Nairobi.
- (e) It was alleged that a cheque had been stolen from Nairobi and him plaintiff was responsible for that theft, but he does not recall if he was shown the cheque.
- (f) Upon arrest he was put in police cells in Kisumu, then transferred to Kilimani Police Station Nairobi.
- (g) He was taken to court arraigned, remanded in custody, treated roughly while in custody, denied medication for diabetes and blood pressure. But was eventually released on bond.
- (h) The charges took him by surprise as he had a clean working record with Mitchell Cotts from whose services he retired at the age of 65 years at a salary of Kshs.35,000,000.00. Upon retirement from Mitchell Cotts, he joined a company by the name East Africa Trade Options Ltd. A company of good repute as shown by commendation letters from customers namely exhibits 3, 4, 5, 6, 7 and 8.
- (i) He complied with the statutory requirements of issuing a statutory notice exhibit 9, replied to by the Attorney General vide exhibit 10.
- (j) When the proceedings commenced, he was not put on his defence.
- (k) By reason of the above he seeks compensation in the manner sought.

When cross-examined by the state, the plaintiff reiterated the evidence in chief and then stressed the following:-

- (a) He did not know the bank manager, and Dr. Osewe was going to introduce him to the bank manager as a possible customer.
- (b) He is not aware that it is the bank manager who called the police.
- (c) He was not aware of any cheque that was to be cashed.
- (d) He had no account in the said bank and he was not aware of the other attributes of Dr. Osewe and denied the allegation that the two of them had gone to the bank to cash the cheques allegedly stolen.

The defence called no witnesses. Both parties filed written submissions. The plaintiffs counsel reiterated the averments in the amended plaint, evidence and then stressed the following points:-

- (1). That the plaintiff lost prospects of earning income of 30 million from potential customers as a result

of this case.

(2). That all the ingredients required for the satisfaction for a claim for damages for unlawful arrest, confinement and malicious prosecution have been established in that:-

(i). The proceedings were instituted by the police.

(ii). The said proceedings were terminated under Section 210 CPC in favour of the plaintiff on 20.12.2001.

(iii). The police acted without reasonable or any probable cause hence maliciously.

(iv). That the trial went on for 3 years during which time the plaintiff kept on reporting to court either for mention or for trial and was thus put to great stress and trauma over unwarranted charges and as such he is entitled to damages.

As stated earlier on, the defence called no evidence but rely on the content of the defence dated 4th September 2002 and filed on 10th September 2002. The salient features of the same are:-

(1). They denied that the plaintiff was unlawfully and maliciously arrested and prosecuted.

(2). That if the plaintiff was arrested and prosecuted, then the arrest and prosecution was lawful, based on reasonable suspicion and information that the plaintiff had committed a criminal offence and mere acquittal of the plaintiff is not proof of illegality or malice on the part of the officers involved.

(3). That the plaint does not disclose any reasonable cause of action against the defendant.

(4). That they would raise a preliminary point of law that the suit herein is incompetent for failure to comply with the mandatory provisions of Section 13 A of the Government Proceedings Act Cap 40 of the Laws of Kenya.

In their written submissions, the defence counsel reiterated the content of the defence and then stressed the following points:-

(1) That one Dr. Walter Dan Osewe presented a cheque for Kshs.2.7 million for deposit at Kisumu West KCB Branch while in the company of the plaintiff on 19th day of October 2000.

(2) They went back again on 23.11.2000 to make another deposit of Kshs.23.5 million also in the company of the plaintiff.

(3) That the result of the prosecution was that Dr. Walter Dan Osewe Omocho was sentenced to two years. Whereas the plaintiff was acquitted under Section 210 CPC.

(4) They maintain that on the facts presented to the lower court the arrest and prosecution was initiated in good faith and not with malicious interest.

(5) The fact that the plaintiff accompanied Dr. Walter twice to the bank gave the prosecution reasonable and probable cause to arrest and prosecute the plaintiff, more so when the plaintiff confirmed that he was not known both to the bank manager and the arresting officer inspector Yegon.

On case law the plaintiff relied on the case of **DR. ODHIAMBO OLEL VERSUS THE ATTORNEY GENERAL, KISUMU HCC NUMBER 366 OF 1995** decided by B. K. Tanui J. as he then was on 23rd day of January 2006. In this case the plaintiff was a medical Doctor by profession. He was arrested on 20.3.1987 and detained till 6.4.1987 when he was physically tortured and subjected to inhuman treatment.

? He was forced to plead guilty to an offence he had not committed and he was maliciously prosecuted and sentenced to serve 5 years imprisonment out of which he served 2 years before he was discharged.

? For the period he was in detention, he was held incommunicado and without access to medical attention and as a result of which his health deteriorated and suffered severe shocks leading to loss and damage. Like in the present case, the plaintiff gave evidence and called one witness and filed written submissions. The defence called no witness and filed submissions. As a result of the said activities, he lost 8 years salary as he was dismissed from his employment and also lost terminal benefits and developed subsequent persistent ailments as a result of the torture.

On damages the learned Judge found all the special pleadings proved and awarded:-

? Medical expenses Kshs.1,547,435.00.

? Loss of salary – Kshs.930,240.00.

? Loss of pension – Kshs.1,500,000.00.

On general damages for unlawful arrest, confinement and malicious prosecution the learned Judge set out the ingredients as follows:-

- (i). That the proceedings have been instituted by the defendant.
- (ii). That the said proceedings were terminated in favour of the plaintiff.
- (iii). That the defendant acted without the reasonable or probable cause.
- (iv). That the defendant acted maliciously.

These were discussed by the learned Judge from page 8 line 7 from the bottom upto line 1 from the bottom on page 9 where upon the learned Judge found them established and awarded Kshs.4,500,000.00.

On exemplary damages the learned Judge discussed the ingredients at page 10 line 6 from the bottom, in that it had been alleged that the defendants' agents had conducted themselves in a high handed manner, arbitrarily, and oppressively against the plaintiff.

At page 11 line 3 from the top, the learned Judge quoted with approval, the court of appeal decision of **OBONGO VERSUS KISUMU MUNICIPAL COUNCIL [1971] EA 91** where the court of appeal had held inter alia that exemplary damages are appropriated in 2 classes of cases:-

- (i). Oppressive, arbitrary and unconstitutional action of the servants of the Government, and/or,
- (ii). Conduct of a defendant calculated to make a profit for himself, which may exceed compensation payable by the plaintiff.

The learned Judge found the ingredients for exemplary damages proved and awarded Kshs.4,000,000.00.

There is also reference to the case of **RICHARD NGATIA WAWERU AND ANOTHER VERSUS JOSEPH MUTHAMIA MACHARIA, NAIROBI HCCC NUMBER 537 OF 2002** which related to a claim of general damages for defamation and false imprisonment, exemplary and punitive damages and costs of the suit. D. M. Rimita J. as he then was decided the matter on 4.6.2003 and awarded Kshs.1,000,000.00 as general damages, defamation and false imprisonment and Kshs.500,000.00 exemplary damages.

Also the case of **ISIAH NGOTHO KARIUKI VERSUS THE COMMISSIONER OF POLICE**

AND ANOTHER, NAIROBI HCCC NUMBER 2450 OF 1993 whereby the plaintiff and another were arrested and detained for 14 days, thereafter prosecuted, found guilty and sentenced to serve imprisonment ranging from 4 – 7 years. They appealed against conviction and sentence which fact was conceded by the respondent. Upon allowance of the appeal the plaintiff filed a civil action seeking general damages, exemplary and aggravated damages.

The defendants defended the claims on the grounds that they were acting in pursuance to the duty imposed upon them by the law in a bid to preserve public security which was threatened. The duty being to ensure that law and order were maintained, prosecute probable offences and to preserve public security. They defendants denied having acted maliciously or having brought against the plaintiff charges that were politically motivated.

After due consideration of the evidence and the law, Ang'awa J. found that the plaintiff was maliciously prosecuted and awarded general damages of 2 million shillings. The factors taken into consideration as influencing the award were:-

- (a) The state conceded that they were given notice on time on the filing of the suit.
- (b) By reason of the arrest and prosecution he had lost his employment and the confidence of those around him.
- (c) The plaintiff ought to have been taken to court within 24 hours.
- (d) The plaintiff was acquitted on appeal on the ground that the state did not support the conviction.
- (e) The defendants had arrested the plaintiff, had had him held in a trial for over one year and later had him acquitted at the appeal stage.
- (f) The learned Judge was satisfied that the plaintiff was maliciously prosecuted.

The state on the other hand referred the court to the case of **MURINGA VERSUS THE ATTORNEY GENERAL [1979] KLR 138** where it was held that in proceedings for 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 plaintiffs' favour,
- (3) That the prosecution was instituted without reasonable and probable cause and,
- (4) That it was actually by malice.

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.

The case of **KATERREGGA VERSUS ATTORNEY GENERAL [1973] EA 287** where it was held inter alia that the plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill-will or improper motive.

- (2) Lack of reasonable and probable cause cannot be relied upon by itself to shown malice.

This court, given due consideration to all the relevant facts presented by pleadings of both parties, evidence tendered by the plaintiff, and submission and case law relied upon by both counsels, and it proceeds to make the following findings:-

There is no dispute that the plaintiff herein was arrested in the company of one Dr. Walter Dan Osewe

Mocho. He was later arraigned in court alongside the said Walter and another in Nairobi Chief Magistrates Court, criminal case number 22579/00 as shown by the charge sheet exhibit 1.

He pleaded not guilty to all the charges pertaining to him on 16.11.2000 and thereafter he was made to go through a trial which lasted till 13th February 2002 when he was acquitted under Section 210 CPC. The plaintiff thereby became aggrieved and moved to this court seeking reliefs by reason of the said arrest, prosecution and eventual acquittal. He gave evidence and was cross-examined. The defence defended the action by filing a defence but called no evidence. However from submissions on record, they rely on the lower court, proceedings exhibit 1 in their attempt to show that the arrest was justifiable and that the same was not malicious.

It therefore follows that in order to succeed, all that the plaintiff needs to do is to demonstrate presence of the ingredients established by case law namely:-

- (1) That there is a prosecution instituted by the defendant or by someone whose acts he is responsible. It is common ground on both sides that indeed the plaintiff, was arrested and prosecuted.
- (2) It has to be demonstrated that the prosecution terminated in the plaintiffs favour. It is common ground that the plaintiff was not convicted but acquitted under Section 210 CPC.
- (3) It has to be demonstrated that the prosecution was instituted without reasonable and probable cause and
- (4) That it was actuated by malice. In support of the ingredient the plaintiff has maintained that his going to the bank with one Walter Osewe was innocent. That the said Walter Osewe was preparing a project for the plaintiff in respect of which he had promised to assist the plaintiff get funding from the bank and that he had gone to introduce him to the bank manager. He pleads ignorance and or innocence to knowledge of the other activities surrounding the cheques and the said Osewe.

The stand of the defence from their submission is that the very fact that the plaintiff accompanied the said Walter Osewe to the bank twice, on which occasions stolen and forged cheques were banked is sufficient proof that the prosecution had reasonable cause to link him to the commission of the offences. To which the plaintiff has pleaded innocence.

The test to be applied in order to establish presence or non presence of reasonable cause is that set out in the **MURINGI VERSUS ATTORNEY GENERAL CASE (SUPRA)** which is to the effect that *“whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.”*

Applying this test to the facts demonstrated by the plaintiff in order for this test to operate as a shield for the defence, it was to be shown that there was sufficient grounds for the prosecution that the plaintiffs’ accompanying of the said Walter was not innocent. This would have been satisfied by calling the bank manager to prove that the sole purpose of the plaintiffs’ two visits to his office was in connection with the said cheques and not a project as alleged by him.

This court has revisited the lower court proceedings and traced the evidence of the KCB Manager Mr. Gilbert Ologi Asongo running from page 9 – 12 of the criminal proceedings record. This court has skimmed through that evidence and confirmed that the first cheque was written in the name of Osewe. It is Mr. Osewe who talked to the manager though he was accompanied. It appears Mr. Osewe’s companion did not enter the managers office.

On the second occasion it is Mr. Osewe who presented the cheque also in his name. There is no mention that he was accompanied. Mr. Osewe is the one who talked to the manager when he presented another cheque. Towards the end of his evidence the manager said that the plaintiff is the person Mr. Osewe used to come with.

In cross-examination by counsel, then representing the plaintiff in the criminal proceedings, the manager confirmed that the plaintiff had no account with them but was a potential customer. He was not a beneficiary of the said account and nothing was discussed between the manager and the plaintiff as regards the said account. The manager confirmed that at no time did the plaintiff attempt to obtain money from the said branch and that he had no reason to suspect the cheques.

Also on record is the evidence of PW 12 the investigating officer. It runs from page 26 – 29. The salient features of the same is that he went to Kisumu and found the two already arrested and in custody. In his testimony he mentions that the second accused had informed him that he had picked the cheque from the 3rd accused and when they went to the officer he was identified by the 2nd accused (3rd accused).

When cross-examine PW 12 said that there was nothing wrong in one accompanying another. He confirmed that the statement of the bank manager does not reveal that the plaintiff told him that he delivered the cheque to the first accused from the 3rd accused. He concedes he took specimen hand writing from the second accused but he never took them to the document examiner. When pressed further PW 12 said “I felt that the second accused was involved.”

When this evidence of PW 12 is applied to the test or the test is applied to it, this court, is of the opinion that what was required of PW 12 was not his personal feeling that the plaintiff who was the second accused in the lower court was involved in the commission of the offence. But satisfaction based on some tangible facts that he was involved in the commission of the offence. In the absence of such tangible evidence, PW 12 acted on nothing but malice when he recommended the plaintiff for prosecution. Malice may either be express or inferred from the conduct. Herein it was both express and was also capable of being inferred from his careless manner in handling the plaintiff’s case. The court, is therefore satisfied that all the ingredients for malicious prosecution have been established. The defendants defence has been thus ousted and the plaintiff is entitled to call upon the defendant to make good that damage by paying damages.

On damages the plea for special damages was dropped upon amendment of the plaint. It therefore follows that its mention in the submissions is to be ignored as in order for it to succeed it has to be pleaded and specifically proved.

This leaves the plea for exemplary and general damages. Case law set out herein above shows that in order to qualify for an award of exemplary damages, one has to show that the defendant acted in a high handed, arbitrary and oppressive manner. Applying that to the facts herein, the court, is satisfied that PW 12 was in an un advantageous position as opposed to that of the plaintiff. He knew that, if he recommended prosecution as he did, even in the absence of sufficient evidence to support a conviction, the plaintiff would undergo prosecution and this is what happened. In failing to exercise his discretion to recommend only where there is sufficient grounds PW 12 failed to act prudently and cautiously and in the process acted in an oppressive manner thus entitling the plaintiff to an award of exemplary damages of Kshs.700,000.00.

As for general damages this court, has to bear in mind the following guiding principles established by case law by the court of appeal:-

- (1) An award of damages is a matter of discretion on the part of the court, making the award.
- (2) The said discretion is unfettered save that the only fetter attached to it is that it has to be exercised judiciously and with reason.
- (3) An award of damages should not be inordinately too low or too high.
- (4) An award of damages is not meant to enrich a party but to compensate the victim for the loss suffered and where possible to restore him in the position he were in before the damage was caused.
- (5) Awards in past decisions are mere guides and each case should depend on its own circumstances.

There have been applied to the circumstances prevailing herein and doing the best I can and find that the figure suggested by the plaintiffs counsel is too exorbitant. The relevant factors to be considered by this court are as follows:-

- (i).** Indeed the arrest, detention and prosecution was malicious.
- (ii).** No doubt the plaintiff was traumatized by the trial.
- (iii).** At the time the plaintiff was incarcerated he already had the medical condition of high blood pressure and diabetes. The incarceration though it may have aggravated the condition, did not cause its on set.
- (iv).** There is no medical report made before incarceration or after incarceration to show that it is the incarceration which led to the necessity for coronary artery by pass surgery, recommended vide exhibit 11 more so when it was coming more than 3 years after the close of the trial.
- (v).** The plaintiff did not suffer any imprisonment as a result of the said prosecution.
- (vi).** Him plaintiff was arrested on 8.11.2000 and by 21.1.2000 he was released on bond.

In this courts opinion an award of Kshs.1,200,000.00 would be adequate compensation as general damages.

The court, therefore enters judgment for the plaintiff on the following terms:-

(a) Exemplary damages – Kshs.700,000.00

(b) General damages – Kshs.1,200,000.00

Total – Kshs.1,900,000.00

(c) Interest on the said sum at court rates from the date of judgment till payment in full.

(d) Costs of the suit also with interest at court rates.

DATED, READ AND DELIVERED AT NAIROBI THIS 26th DAY OF SEPTEMBER 2008

R. N. NAMBUYE

JUDGE