

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 238 of 2000

MACHARIA WAIGURU PLAINTIFF

Versus

1. ATTORNEY GENERAL)
2. INSPECTOR WANGECHI)
3. CORPORAL WERE)

DEFENDANTS

RULING

The plaintiff brought this action against the Defendants seeking damages for malicious arrest and prosecution. The plaintiff averred in the plaint that he was arrested and taken to court and charged with a criminal offence on 14th July 2000. He was charged with the theft of car battery. He was acquitted under section 204 of the Criminal Procedure Code. The attorney general filed a defence on behalf of the all the defendants. It was averred in that defence that the defendants arrested and prosecuted the plaintiff pursuant to their statutory duty and that the prosecution was founded on probable and reasonable suspicion that the plaintiff had committed an offence punishable at law. The plaintiff has now brought a chamber summons dated 21st April 2008 which is the subject of this ruling. At the hearing of that application, it escaped the courts attention that the plaintiff was represented by a firm of advocates namely Kamau and Kamau advocates. When the matter came up the plaintiff appeared in person and urged the court to grant him prayers as sought. The defendant had been served with a hearing notice on 30th September 2008. There was no appearance for the defence. The application is brought under order VI rule 13(1) (b) of the Civil Procedure Laws. That rule provides as follows:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(b) it is scandalous, frivolous or vexatious;”

The plaintiff seeks that the defendant defence dated 10th April 2001 be struck out as being frivolous and vexatious and a waste of court time. In support of that application the plaintiff swore an affidavit alongside with two other persons who also swore affidavits in support. The plaintiff deponed that the car battery which was the subject of the criminal charge had been borrowed by Peter Karanja Mwangi and William Kamau with the aim of starting the plaintiff’s motor vehicle. That the complainant the owner of that battery gave consent to the borrowing of that battery. After the battery was used it was stated that one of the complainant’s employee detained the battery for some time. When the battery was returned to its owner of the terminals was damaged. It was this damage which was the cause of the charge of theft of the car battery against the plaintiff. The plaintiff accused the police of being involved in a private dispute. He denied that he had seen or used that battery personally. He ended by alleging that the criminal prosecution was activated by malice and a desire to punish the plaintiff. Peter Karanja Mwangi also swore an affidavit. He confirmed that they used the complainant’s car battery to start the plaintiff’s vehicle. That battery had been given to him by the owner. He confessed that after its use he did not return the battery immediately and attributed the criminal case to that delay. He confirmed that the plaintiff did not see the battery. Further that the police did not question him even though he was involved in taking of the battery. Benson Njoroge Kamau in his affidavit stated that he was authorized to release

the battery by its owner to be used by peter Karanja Mwangi and William Kamau. He too confirmed that there was delay in returning the battery to its owner. He finally confirmed that the battery was not stolen but rather it was freely given for use by its owner.

As stated before the defendant did not attend the hearing of the application nor did the defendant file any papers in opposition to the application. In making the present application the plaintiff alleges that the defendant's defence is scandalous, frivolous and vexatious. Having summarized the defence that was filed by the defendant it becomes clear that the defence cannot be described as being scandalous. Further it cannot be said to be frivolous or vexatious. The defendant set out clearly the statutory duty laid upon the police in arresting and prosecuting for criminal offences. The defendants further in their defence stated that the plaintiff's acquittal did not divest the defendant or its authorized officers of their duty to function in carrying out the prosecution duties. I make a finding that the defence is not scandalous and is not frivolous. The application before court has no merit. The evidence that is contained in the affidavit in support of the application should rightly be brought before court in a full hearing. To allow the application on the basis of the affidavits before court will be to allow this case to proceed in a summary manner without giving the defendants the opportunity to test that evidence. In the end the chamber summons dated 21st April 2008 is hereby dismissed with no orders as to costs.

Dated and delivered at Nyeri this 16th day of October 2008.

MARY KASANGO

JUDGE