REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 19 of 2000

PATRICK MURITHI MUKUHA ……....……..…. PLAINTIFF

VERSUS

EDWIN WARUI MUNENE ……....……..…… 1ST DEFENDANT

ANN WARUI ……...……. 2ND DEFENDANT

MUGO NGURO ……..……..……. 3RD DEFENDANT

WANDIRI RUIGA ……..……..……. 4TH DEFENDANT

O.C.S. YUSUF ……..…… 5TH DEFENDANT

HON. ATTORNEY GENERAL ……..……..…….. 6TH DEFENDANT

JUDGMENT OF THE COURT

The plaintiff herein, Patrick Murithi Mukuha filed this suit on 2.3.2000 claiming both general and special damages and costs and interest. The plaintiff who is a businessman in Embu District complains that on 19.9.98, the 1st defendant herein made false and malicious allegations against the plaintiff and as a result of those allegations, the plaintiff was arrested by the 5th defendant. Later the plaintiff was arraigned in court on a charge of robbery contrary to section 296(1) of the penal Code.

At paragraph 8 of the plaint, the plaintiff avers that after a full trial, he was acquitted of the charge of robbery on the 13.10.99. The plaintiff avers further in the same paragraph that his prosecution on the charge of robbery was malicious, wrongful, unlawful, unjust and vindictive.

At paragraph 9 of the plaint the plaintiff avers that the 1st, 2nd, 3rd and 4th defendants assaulted him and that upon his arrest the plaintiff was further assaulted by the 5th defendant with the help of other police officers and that as a result of the said assault, the plaintiff suffered serious injuries.

During the hearing of the case, only Mr. Njogu for the 5th and 6th defendants appeared. The 1st and 2nd defendants entered appearance and filed their joint statement of defence through the firm of M/S Githinji Karuri & Co. Advocates. The 3rd and 4th defendants appeared in person but they were also absent on the day of the hearing of the case though they, unlike the 1st and 2nd defendants filed no defence.

The plaintiff’s case is that on 19.9.98 at about 10.00pm he was at the home of one Joakim Mbogo who is a neighbour to the 1st defendant. The plaintiff had gone to the area in search of his nephew who was at

the home of the 1st defendant. According to the plaintiff, his nephew been lured to leave school and to engage in beer trade at the home of the 1st defendant. The plaintiff wanted his nephew had to go back to school. When the plaintiff went to the 1st defendant's home, the 1st, 2nd, 3rd and 4th defendants got hold of him and started beating him. The 1st defendant hit the plaintiff above the right eye. The plaintiff was taken outside the house on the allegation that he was a thief.

The plaintiff then managed to crawl to Joakim's home, but he was followed there by the 1st, 2nd, 3rd and 4th defendants and also later that night at about 11.00pm police went to the same home where the plaintiff was and arrested him. Before the arrest, the plaintiff had been tied with twine by the 1st four defendants. When the plaintiff failed to produce Kshs. 9,000/= which he was alleged to have stolen from the 1st defendant, he was handcuffed, roughed up and beaten before being taken to the police station where he was locked up for four days.

The plaintiff testified that during the four days he was in police custody he would be taken out in the night and beaten and that on the last night he was taken to the roof top and beaten senseless. He had his private parts pinched with pliers.

On the 23.9.98, the plaintiff was arraigned in court on drummed up charges of robbery contrary to section 296(1) of the Penal Code in Embu Principal Magistrate's Criminal Case No. 1968 of 1998. The plaintiff produced as exhibit No. 1 proceedings and ruling acquitting the plaintiff under section 210 of the Criminal procedure Code. The plaintiff also produced the P3 form as exhibit 2, the notice to the Attorney General of his intention to sue the Attorney General as exhibit 3 and the Attorney General's reply thereto as exhibit 4. Exhibit 5 was the plaintiff's letter dated 8.6.2001 to the Kenya Human Rights Commission.

The plaintiff's only witness was Dr. Stephen Njeru Warui who examined the plaintiff on 21.5.2003 in respect of the assault visited upon the plaintiff by police officers on 21.9.98. The medical report was produced as P exhibit 6. From that report, the plaintiff sustained the following injuries:- ·

- Loss of the right upper premolar ·
- Loosening of the left upper incisor ·
- Cut on the occipital
- ·Chest injuries with haemoptysis ·
- Blunt abdominal injuries ·
- Tender testicular area then with the right testicle noted missing.

From the examination carried out on the plaintiff in which the above injuries were confirmed, Dr. Warui formed the following opinion:-

"OPINION

Patrick sustained soft tissue injuries following the assault that were treated and healed with multiple scars. The chest injuries caused him to have a bloody cough implying internal damage to lung tissue and the vasculature. He also sustained dental injuries with loss of one and loosening of another tooth. The absence of the right testicle in the right scrotal scar may be an incidental finding since it is palpable at the right inguinal region. This may be a congenital state. However, further surgical history is necessary. This is because were the testicle crushed, surgical removal would have been the treatment of choice. However, the injuries that he sustained were of a serious nature."

When Dr. Warui was examined by Mr. Njogu for the 5th and 6th defendants, he told the court that the empty scrotum could have been due to an undescended testicle and not due to injury.

None of the 1st, 2nd, 3rd and 4th defendants though duly served appeared at the hearing. The 5th and 6th defendants were represented by Mr. Njogu but called no evidence even after Mr. Njogu had asked for and been allowed time to call one witness. Mr. Njogu did not also make any submissions in support of his client's case.

Mr. Charles Kariuki for the plaintiff submitted that the plaintiff had proved his case against the six defendants jointly and severally on a balance of probability, and that he ought to be compensated by way of damages for the injuries sustained due to acts of assault occasioned upon the plaintiff at the time of the arrest and also for the malicious prosecution. Mr. Kariuki cited to the court the cases of **Kagane & others V. A.G. (1963) EA 643 and Coleta Wanyama V. Hon. A.G. – HCCC No. 2433 of 1991 (unreported).**

On quantum, Mr. Kariuki proposed a figure of Kshs. 1,500,000/= as damages for malicious arrest and prosecution. He cited the case of **Teresia Mwana Nyaga V. G.K. Mutunga & 4 others – Nairobi HCCC No. 1444 of 1997** in which the sum of Kshs. 200,000/= was awarded to compensate the plaintiff for unlawful arrest, false imprisonment and any humiliation she may have suffered.

In respect of bodily injuries sustained by the plaintiff, Mr. Kariuki proposed piecemeal awards. For the plaintiff's loss of his ability to perform his conjugal duties, a figure of Kshs. 10,000,000/= was proposed. The following cases were cited:- **1. Meru HCCC No. 134 of 1995 (unreported – Mwaniki Njeru V. Kagau Enterprises** in which a sum of Kshs. 800,000/= was awarded for sexual impotence and other injuries **(2) Nairobi HCCC No. 3904 of 1989 – Isaak Kefa Lumbaya v. Morris &** Company Ltd in which a sum of Kshs. 450,000/= was made for the loss of a right testis and **(3) Nairobi HCCC No. 664 of 1991 – Muchoki Gakobo & another v. Joseph Kamau Mere**. The plaintiff in the **Gakobo case** lost his sex life and was awarded the sum of Kshs. 1,500,000/= as general damages.

For the lost and loose teeth, it was proposed that the plaintiff should be awarded the sum of Kshs. 500,000/=. The following two cases were cited in support of that claim. **(1) Nrb HCCC No. 1073 of 1990 – Kevin Odongo V. Kamunge & another** in which the plaintiff was awarded the sum of Kshs. 120,000/= for the loss of one tooth and a deep cut wound, (**2) Nrb HCCC No. 3359 of 1987 – Meme Mucheke V. Simon Njoroge & 4 others** in which the plaintiff was awarded Kshs. 100,000/= for the loss of 3 incisor teeth.

For the other injuries sustained by the plaintiff i.e. cut wound on the occipital region, chest injuries and the blunt abdominal injuries the proposed figure of Kshs. 300,000/= was made. In support of this figure, counsel for the plaintiff relied on the following cases **(1) Nrb HCCC No. 1344 of 1989 – Mwalim Zani Kau V. Boniface Kombo Tunga** in which the plaintiff was awarded the sum of Kshs. 70,000/= for soft tissue injuries to the chest, **(2) Nrb HCCC No. 2707 of 1990 – Denys Mabwaka Khabusi V. Mawingo Bus Service Ltd & Another** where the sum of Kshs. 120,000/= was awarded for cuts of the legs, arms and face.

In total, the plaintiff submitted that he was entitled to the sum of Kshs. 12,300,000/= in general damages.

What remains for determination by this court is whether, as submitted by the plaintiff, he has proved his case against the six defendants jointly and severally on a balance of probability. In order for the plaintiff to succeed on his claim for malicious prosecution he must show (1) that the prosecution was instituted by the defendants or by someone for whose acts the defendants are responsible, (2) that the prosecution terminated in the plaintiff's favour (3) that the prosecution was instituted without reasonable and probable cause, and (4) that it was actuated by malice. See the case of **Murunga V. Attorney General (1979) KLR 138.**

In this case, it has been shown that none of the six defendants has adduced any evidence to counter the plaintiff's allegations that his arrest and subsequent prosecution were both malicious and with reasonable and probable cause. The plaintiff testified that he was arrested on 19.9.98 and taken to the police station where he was confined for four days until 23.9.98 when he was arraigned in court on a charge of robbery with violence contrary to section 296(1) of the Penal Code. The plaintiff was charged in Embu Principal Magistrate's Criminal Case No. 1968 of 1998.

There is evidence before this court as seen from P exhibit No. 1 that on 13.10.99 the plaintiff was acquitted of the charge of robbery by G.C. Mutembei under section 210 of the Criminal Procedure Code. This is what the learned principal magistrate stated when acquitting the plaintiff:-

"After weighing and evaluating the evidence adduced, I find that the complainant's evidence that he identified the accused from his voice is not sufficient to warrant the accused being placed on his defence. The accused has no case to answer and I acquit him."

The plaintiff has adduced further evidence that he made a complaint to the police who issued the plaintiff with a P3 form and he produced the same as P exhibit 2. The P3 form shows that the plaintiff had sustained some injuries and these injuries are the same injuries Dr. Warui testified about as per P exhibit No. 6.

After carefully considering the evidence adduced before the lower court and all the circumstances of this case, it is clear to me that there was no reason to charge the plaintiff and as has been clearly contended on behalf of the plaintiff, and from the evidence that has been adduced before this court, the plaintiff's prosecution was actuated by malice on the part of the defendants jointly and severally. It is my finding therefore that the plaintiff has shown and proved all the four conditions as set out in **Murunga V.Attorney General (above)**. The decision in that case was followed in the case of **Coleta Wanyama V. Hon. Attorney General (above)**. In short I find that the plaintiff has proved his case on a balance of probability against the six defendants jointly and severally.

I now turn to the issue of damages. Mr. Kariuki has split the damages he seeks to have awarded to the plaintiff under several heads, the bulk of which are claimed under the alleged injury to the plaintiff's testicles resulting in loss of libido. As contended by Mr. Kariuki, the plaintiff is as good as impotent. The plaintiff's evidence is that his private parts were pinched by the police using pliers during the plaintiff's confinement at the police station between 19.9.1998 when he was arrested and 23.9.98 when he was arraigned in court. He also testified that as a result of this injury his wife ran away and has never returned. That todate, he is not only wifeless but also childless as even the only child he and his estranged wife had had died. The plaintiff's allegation is a serious matter. I however find that the plaintiff has not proved this allegation. The medical evidence is clear on the issue and in Dr. Wariu's opinion, the defect in the plaintiff's testicular area may be a congenital state, which needed further surgical history to verify the same.Dr. Warui amplified this point during cross-examination when he testified that the empty scrotum sack could have been due to an undescended testicle and not due to the injury. In the absence of any other evidence to prove that the injuries inflicted upon the plaintiff by the defendants and especially the 5th defendant for whose actions the 6th defendant is responsible, I would agree with Dr. Warui's expert findings that the loss of sexual power on the part of the plaintiff was not as a result of the injuries inflicted upon him by the defendants. The court would have expected the plaintiff to call evidence to prove even such a simple fact as the death of his alleged child and the further fact that he was infact once married and that the wife deserted him. This could have been through production of documents such as birth/death certificates or the oral evidence of a parent/neighbour/sibling to prove the same. Also as regards further medical evidence on the issue, the court would have expected further medical evidence to counter Dr. Warui's findings on the plaintiff's missing right testicle.

Having found however that the plaintiff has proved that his arrest and prosecution were malicious, I award him the sum of Kenya Shillings seven hundred thousand (Kshs. 700,000/=) as damages against the six defendants jointly and severally.

What about damages for other injuries sustained by the plaintiff? In the case of **Cavito V. Di Pilippo (1957) EA 535** which case was applied and followed in the case of **Kenya Bus Services Ltd V Jane Karambu Gituma – Civil Appeal No. 241 of 2000** (Court of Appeal at Nyeri – unreported), the Court of Appeal for East Africa held that general damages must be assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of independent assessment for each injury. In other words, compensation in personal injury cases is to be made for heads of loss or damage and not heads of injury. In the circumstances of this case, I make an award of Kshs. 500,000/= (shillings five hundred thousand) for pain, suffering and loss of amenities.

In the result, I enter judgment for the plaintiff as against the six defendants jointly and severally in the sum of Kshs. 1,200,000/= (Kenya shillings one million two hundred thousand). The plaintiff shall also have costs of the suit plus interest thereon at the rate of 12% (twelve per cent) per annum from the date of

judgment until payment in full.

Orders accordingly.

Dated and delivered at Meru this 30th day June 2005.

RUTH N. SITATI

JUDGE

30.6.2005