



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.1880 OF 1998**

MORRIS NYAMASYO MASILA ..... PLAINTIFF

VERSUS

NATIONA MEDIA GROUP LTD. .... 1ST DEFENDANT

THE HON. ATTORNEY GENERAL ..... 2ND DEFENDANT

**J U D G M E N T**

This is an action by the Plaintiff for damages for malicious prosecution and false arrest. The Plaintiff was working with **NATION MEDIA GROUP** the 1st defendant as an acting cashier from July, 1992 up to 19th December, 1994 when he tendered his resignation intending to proceed to USA for further studies. He had been employed as a clerk and due to his hard work, he was promoted as an acting cashier. His resignation was accepted and he was issued with clearance certificate. He was issued with the clearance certificate after the company was satisfied that his record was clean.

The Plaintiff in his evidence said he had obtained an admission letter from **ESSEX COUNTY COLLEGE** and payment had been made through his sister for accommodation and books. He had paid 900 US Dollars for books and 900 US Dollars for fees US Dollars for accommodation.

He was to report for admission on 4th December 1995, 13th November, 1995 he was summoned to the District Officer's Office where he was arrested and escorted to Nairobi. He was identified by one Kosigei an employee of the 1st defendant, and was arrested by a police officer by the name **KINYUA**. He was informed that after he had left the company, the company had discovered that some cash was missing and he was escorted to Central Police Station where he was charged with 13 counts. In count 1 he was charged jointly with another with stealing by servant contrary with section 281 of the penal code. In count 2 his co-accused was charged alone with destroying evidence contrary to section 116 of the Penal Code and in counts 3 to 13 he was charged alone with fraudulent false accounting contrary to section 330 (b) of the Penal Code. He was arraigned in court but was acquitted of the charges.

This was in Criminal Case No.594 of 1995 at Nairobi Law Courts. He produced certificate copy of the proceedings Exh.p.6. He could not proceed to USA during the pendency of this Criminal Proceedings. He further testified that the Criminal charges against him were investigated by malice and his acquittal would bear him testimony. The 1st defendant having cleared him had no good reason or reasonable cause to cause his arrest. He sued the 2nd Defendant because it preferred charges against him without proper and conclusive investigations.

Because of the arrest and arraignment in court, the Plaintiff has sufficient loss and damages for which he

is claiming for which he is claiming against the defendants jointly and severally.

He sought compensation for the fees he had paid in the college in USA as well as **Shs.160,000/=** legal fee he paid the counsel who had defended him in the criminal proceedings. He also spent a sum of **Shs.13,550/=** travelling expenses during the trial. He also prayed for general damages as well as the costs of this suit and interest.

The defence had no evidence to offer since their witnesses were unavailable and an application for adjournment was rejected by the court. There was no appearance for the 2nd defendant who had been duly served with the hearing notice.

Counsel for the Plaintiff submitted that the Plaintiff's testimony was credible consistent and largely uncontroverted.

As against the first defendant he submitted through investigations on the Plaintiff and issued him with a clearance letter, the equitable doctrine of estoppel emerged from purporting to cause criminal charges relating to the same matter to be instituted against the Plaintiff. He went further to submit that the conduct of the first defendant was such that the only natural and local inference to be drawn in favour of the Plaintiff was that he was from the date of receipt of the clearance letter free of any future liability emanating from the matters relating to his former employment with the first defendant. He further submitted that in view of the foregoing the first defendant proceeded recklessly, maliciously and without probable cause in lodging a complaint with the police against the Plaintiff leading to his arrest and trial in the lower court.

As for the second defendant he submitted that his officer did not proceed diligently and professionally to investigate the matter before preferring any charge against the Plaintiff. A perusal of the proceedings in the lower court reveals that the prosecution could not even produce any of the originals of the purported exhibits in support of the case. In a case of malicious prosecution the Plaintiff needs to prove malice and want of reasonable and probable cause on the part of the defendants in causing him to be prosecuted without just cause.

Counsel for the defendant submitted that the issuance of a clearing letter did not estop the first defendant from instituting criminal charges against the Plaintiff. In the case of **LAWFORD NDEGE IMUNDE VS THE ATTORNEY GENERAL** in High Court Miscellaneous Application No.180 of 1990 it was held that

**“ NO ESTOPPEL ARISES IN CRIMINAL CASES”**

Further counsel for the defendant company submitted that the clearance process is not conclusive and final as it does not bar the Defendant Company from conducting audits subsequent there to and if there any discrepancies and shortfalls occasioned by any employee it has all the rights in law to seek redress from the courts of justice.

On this limb of the Plaintiff's case that the Defendant's Company had by its conduct presented to the Plaintiff that it was free from all liability is not only unfounded but runs counter to the law. Therefore the submissions that the preferring of charges on this account was without probable cause is baseless. He also submitted that the fact that the Plaintiff was an accountant is more the reasons why the prosecution was brought. It is reasonable that evidence could have emerged at after he had left employment. This is more so in regard to the offence, for which the accused was charged, stealing and false accounting.

The Burden of Proof in cases of Malicious Prosecution has now been settled in this country. The case of **MURUNGA VS. THE ATTORNEY GENERAL { 1979} KLR 138** sets out the indicia **COTRAN J.** had this to say: In proceedings malicious prosecution the Plaintiff must show:- (i) That a prosecution was instituted by the defendant or by someone for whose acts he is responsible

(ii) That the Prosecution terminated in the Plaintiff's favour.

(iii) That the prosecution was instituted without reasonable and probable cause, and

(iv) That it was actuated by malice.

(v) In **KAGANE & OTHERS VS THE ATTORNEY GENERAL & ANOTHER {1969} E.A 643 RUDD J.** had this to say: The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence.

At the time when the Plaintiff was arrested and charged the said offences, the original documents had already been destroyed. All that the prosecution produced were copies and had promised to bring the originals.

In count II of the charge the Plaintiff together with one **FRANCIS MUIA NZIUO** with destroying evidence contrary to section 116 of the Penal Code. The particulars of the charge stated:-

On diverse dates between 10th September, 1994 and 18th December, 1994 at **CABRIAN HOUSE** in Nairobi within Nairobi Area, jointly with others not before court knowing that books may be required in evidence in a Judicial proceedings willfully destroyed duplicate copies receipt book copies of the receipt numbers **4813, 4885, 4199, 4137, 4944, 4200, 5000, 5869, 5871, 5874, and 5905.**

The Plaintiff was arrested on 14th November, 1995. At that time the evidence having been destroyed way back between 10/9/1994 and 18/12/1994, the material known to the prosecution would not have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence.

For the above reasons I am satisfied that the Plaintiff has proved that his prosecution was instituted without reasonable and probable cause. It was malicious. The Plaintiff has proved his case on liability.

I now proceed to assess the damages as follows:

(i) Tuition, registration fees, accommodation expenses, books, charge paid to Essex County College Shs.1,145,000 but since he did not report, he could not be expected to pay the total amount required for accommodation and books. I reduced the amount to half. This would work out as follows:-

$1.145,000 \times \frac{1}{2} = \text{Kshs.}575,000$

(ii) Legal fees paid to the advocate to defence the Plaintiff in Criminal Case No594 of 1995: Shs.160,000/=

(iii) Other related expenses. The Criminal Proceedings started on 13th February, 1995 when the Plaintiff appeared in court for plea, and it went through up to 25th June, 1998 when the ruling was read and he was acquitted.

This is about **3 ½** years. The Plaintiff in his evidence stated throughout this period he incurred **Shs.13,550/=**. This he proved by producing receipts. I allow the claim under this heading and I award him **Shs.13,550/=**. The Plaintiff had also claimed general damages. A part from his desire to proceed for further studies being disrupted, the Plaintiff has not proved that he has suffered mentally or otherwise. He has not said he was depressed or suffered any other injury to his feelings or otherwise.

Therefore under this heading I award him **Shs.50,000/=**. The figure may be brought forward as follows:-

1. Special damages incurred in respect of the Tuition, registration fees accommodation expenses, books charge paid to Esses County College **Shs.575,000/=**

2. Legal fees paid to the Advocates to defend the Plaintiff in Criminal Case No.594 of 1995: **Shs.160,000/=**

3. Other related expenses in the Criminal Proceedings in case No.594 of 1995 **Shs.13,550/=**

4. General damages: **Shs.50,000/=**

This comes up to a figure of **Shs.798,550/=**.

Accordingly there shall be Judgment for the Plaintiff and against the defendants jointly and severally for **Shs.798,550/=** with costs and interest.

**Delivered and dated at Nairobi this 22nd Day of March, 2000**

**J.LA. OSIEMO**

**JUDGE**