



**Stephen Kinyanjui Kibunja t/a Kibunja & Associates v Commissioner of Police & another
(Civil Case 332 of 2007) [2023] KEHC 4093 (KLR) (Civ) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4093 (KLR)

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

CIVIL

CIVIL CASE 332 OF 2007

AN ONGERI, J

MAY 2, 2023

BETWEEN

STEPHEN KINYANJUI KIBUNJA T/A KIBUNJA & ASSOCIATES .. PLAINTIFF

AND

THE COMMISSIONER OF POLICE 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. The Plaintiff in this case Stephen Kinyanjui Kibunja T/a Kibunja & Associates (hereafter referred to as the Plaintiff only) has sued the two Defendants, The Commissioner Of Police and The Hon Attorney General (hereafter referred to as the 1st and 2nd Defendants respectively) seeking general damages for malicious prosecution, wrongful confinement, loss of business and also aggravated exemplary damages for breach of the Plaintiff's fundamental rights.
2. The Plaintiff in his plaint filed in court on April 12, 2007 is also seeking special damages in the sum of Kshs 5,000,000 on account of legal fees.
3. He avers in his plaint that sometimes in or about August 2003, police officers attached to Kiambu Criminal Investigations Department (CID) arrested the Plaintiff on false and unsubstantiated and malicious allegations and charged him in court on January 26, 2004 with the offences of stealing by servant and obtaining money by false pretences c/s to Section 313 of the *Penal Code*.
4. The particulars of the charge were that between June 29, 2001 and March 11, 2003 at Nairobi, the Plaintiff jointly with others beings agents of Settlement Fund Trustee and Ndumberi Farmers Company in liquidation stole Kshs 16,509,0000 (in respect of count 1 which came to his possession by virtue of being an advocate of the said Ndumberi Farmers' Company Limited (in liquidation) and



- also obtained Kshs 23,320,000 (in respect of count 2) from the Settlement Trust Fund by purporting to be receiving the said amount on behalf of Victoria Bank Ltd which information the Plaintiff knew to be false.
5. The 1st and 2nd Defendants entered appearance on May 17, 2007 and filed a defence of even date and denied the Plaintiff's claim.
 6. The Plaintiff filed a witness statement dated June 9, 2020 whose evidence he adopted as his evidence in which he stated that he is an advocate of the high court of Kenya. On or about January 2001 he was engaged by one Vinubhai Shah to negotiate on his behalf the sale of properties; LR No 7595, 7596 and 9675 Mau Summit to the Settlement Fund Trustee, a department of the Ministry of Land & Settlement. The negotiations culminated in an agreement for sale of the said properties at an agreed price of Kshs 44,829,000 which was to be paid in instalments from June 29, 2001 through to March 5, 2002.
 7. The settlement Trustee after due diligence established that there was a prohibitory order imposed on the titles. The plaintiff inquired with the vendor who revealed that the prohibitory order was registered by the firm of Kaai Mugambi & Company due to some misunderstandings and that he would obtain a raising order which he duly did. The vendor thereafter instructed that all payments due to him should be disbursed on the directions of his agent, Burton Kihika Kariuki.
 8. The liquidators of Ndumberi Farmers Company Limited instructed him to take over their legal affairs in particular the disbursements of monies due to them in their initial transfer of the properties which belonged to the company before liquidation and which had been transferred to Mr Vinubhai Virpal by Kaai Mugambi & Co Advocates. They instructed him to disburse their proceeds amounting to Kshs 15,680,000 to them and demand accounts from Kaai Mugambi & Co Advocates.
 9. On or about August 2003 one Ezekiel Kamau Kariuki went to his offices and demanded Kshs 250,000. Upon enquires the plaintiff established that he was a brother to Burton Kihika Kariuki who was allegedly the perpetrator of the fraud in the transfer of the lands from Ndumberi Farmers Company Limited in liquidation to Vinubhai Virpal Shah.
 10. Around the same time inspector Shadrack Wachira summoned him to Kiambu CID office. He was taken to the District Criminal Investigations Officer where Daniel Muite made allegations that he had embezzled Kshs 43,000,000 belonging to Ndumberi Farmers Company. He was interrogated and made to write a statement where he made a detailed explanation of what occurred. Inspector Wachira told him that he had information that he was holding 5 million on account of Mr Vinubhai and suggested that Mr Ezekial Kamau Kariuki and his group be paid 2 million and himself 1 million and the DCIO 1 million, Mr Burton 1 million and he would retain 1 Million and was threatened with prosecution.
 11. He was summoned by the DCIO again on October 28, 2003 to which he presented himself in the company of his friends. He was interrogated again and placed in police cells up to 8pm when he was released on cash bail of Kshs 20,000 and was to report on October 31, 2003 to be charged.
 12. He was continuously harassed thereafter and on January 26, 2004 he was charged on two counts; Stealing by Agent and obtaining money by false pretenses. He went through an agonizing and stressful criminal trial and on February 9, 2007 he was acquitted under section 210 of the [Criminal Procedure Code](#).
 13. As a result of the said arrest and charge he suffered both general and special damages. He was unable to attend to his business, mental anguish, embarrassment, social censure. He was treated with contempt, suspicion, and disfavor by members of the public particularly his clients and business associates. His



integrity and character were impugned to the extreme he has never recovered and may never recover his dignity and reputation.

14. In cross examination, the Plaintiff said Ndumberi Farmers Company was granted leave to appoint his firm to represent them.
15. The Plaintiff also said one Ezekiel Kariuki went to demand Kshs 250,000/= from him and threatened to report him to the CID.
16. He said police officers also attempted to extort money from him and he wrote a letter to the Director of CID. He said those days there were OBs and his report was not captured in the OB.
17. The Plaintiff further said in cross-examination that on October 29, 2003 one Wachira asked him to meet him at a hotel in Kiambu. He told the Plaintiff to give him one million shillings so that he would not charge him in court.
18. He said before his arrest he was a board member of various companies but after his name was tainted he lost the appointments and in some he opted to pull out.
19. The Plaintiff annexed receipts for legal payments amounting to five million shillings. He also attached statements of accounts from his law firm.
20. The Plaintiff also said the reason he was acquitted was that there was a lacuna in investigations.
21. He said after the case was terminated he went through financial turbulence and he started selling his assets for sustenance.
22. The Defendants did not call any witnesses.
23. The plaintiff filed his submissions and argued that he gave an account of the events of August 2003, that some police officers attached to the Directorate of Criminal Investigations in Kiambu without any lawful reasons and acting on false, unsubstantiated and malicious information, purported to commence investigations against the Plaintiff alleging that he was a suspect involved in the commission of some offences.
24. He was eventually charged on 2 counts to which he was denied bail and remanded at Industrial Area Reman Prison at the Instance of the defendants and ultimately granted bail after more than 30 days. Based on this the defendants set in motion against the plaintiff, two fabricated criminal charges.
25. It was argued that the defendant only charged the plaintiff because he refused to comply with their extortionist demand and the charges were actuated to punish him. That further PW8 admitted in his testimony that he was instructed by the DCO to charge the plaintiff no matter what he says and what the investigations establish.
26. It was submitted that The Defendants ignored all the evidence including Court orders, instruction notes, statements of accounts on how the money the Plaintiff received was disbursed and more importantly the fact that money was disbursed at the instructions of the Plaintiff's instructing Client who was never the complainant and or the witness. To buttress his argument he cited Justice Nyakundi in *James Kabindi Simba Vs Director of Public Prosecution & 2 others [2020] eKLR* while discussing this element thus stated;

' The tort of malicious prosecution involves situations where the defendants distorted the truth in order to achieve an unjustified end, such as falsely accusing the plaintiff and



subjecting them to investigation, arrest, and detention without reasonable and probable cause.'

27. The plaintiff specified that at trial the Magistrate did not just acquit the Plaintiff herein but also picked a bone with the Defendants' agents. In admonishing them, the Court felt compelled to issue a strong reprimand to the prosecution and police for bringing such malicious and unsubstantiated charges.
28. It was submitted further that the Defendants only filed a defence but did not call any witnesses or file any documents. All the officers (Inspector Wachira and Daniel Mutie) mentioned by the Plaintiff and who persistently threatened, intimidated and extorted him did not testify, rebut or file any documents in court.
29. The defendants in their submissions argued that the lack of reasonable cause cannot be relied upon by itself to show malice. That the plaintiff must prove malice in fact and in the matter herein there is no evidence by the plaintiff which malice either by spite or ill will or by direct or improper motive has been adduced.
30. On the allegation of extortion, the 1st defendant agents the defendant submitted that the plaintiff failed to produce any acceptable evidence before the court. that further on cross examination the plaintiff admitted that he did not make any formal complaint in respect to the alleged extortion.
31. The defendant submitted that the agents of the 1st Defendant had reasons to believe that the offence that the Plaintiff had committed was one which could be tried in a Court of Law. that the information coupled with their independent investigations, while believing it to be credible was enough to satisfy a prudent and cautious man that the Plaintiff was guilty of the offence and hence the reason he was charged.
32. It is nonetheless the duty of the Plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities. In [*James Muniu Mucheru v National Bank Of Kenya Ltd CA Civil Appeal No 365 Of 2017 \[2019\] eKLR*](#), the Court stated as follows: -

' Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.'
33. The elements of the tort of malicious prosecution have been discussed in various authorities including *Murunga vs The Attorney General (1976-1980) KLR 1251* where Cotran J listed them as follows: -
 - 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/or probable cause.
 - iv. That the prosecution was actuated by malice.
34. The issues for determination in this case are as follows;
 - i. Whether the prosecution of the Plaintiff by the Defendants was malicious.
 - ii. Whether the plaintiff proved his case to the required standard in civil cases.
 - iii. Whether the Plaintiff is entitled to the remedies he is seeking against the Defendants.



35. I find that the Plaintiff's evidence was not challenged since the defence filed by the Defendants herein is a mere denial and the Defendants did not call any witnesses.
36. There is undisputed evidence that the Plaintiff was arrested and charged in criminal case no 358 of 2004 with two counts of stealing by servant and obtaining by false pretences.
37. The Plaintiff was arrested and incarcerated before he was arraigned in court.
38. There is unchallenged evidence that after the case was prosecuted, he was acquitted under Section 210 of the Criminal Procedure Code. The court found that the Plaintiff had no case to answer.
39. The Plaintiff said one Ezekiel Kariuki attempted to get Kshs 250,000 from him and further police tried to get money from him before he was charged in court.
40. I find that there was an attempt to extort money from the Plaintiff and when he declined to give the bribes he was charged with trumped up charges.
41. I find that in the absence of any evidence to controvert the Plaintiff's evidence, the Plaintiff has proved his case to on a balance of probabilities.
42. On the issue as to whether the Plaintiff is entitled to the remedies he is seeking, I find that the Plaintiff having proved his case to the required standard, he is entitled to general damages for malicious prosecution and wrongful confinement.
43. The Plaintiff is seeking the following remedies
 - i. General damages for malicious prosecution and wrongful confinement.
 - ii. General damages for loss of business.
 - iii. Exemplary and aggravated damages for breach of the Plaintiff's fundamental rights.
 - iv. Special damages of Kshs 5 million.
44. I grant the Plaintiff the following remedies
 - i. General damages for malicious and wrongful confinement Kshs 5 million
 - ii. General damages for loss of business Kshs 5 million
 - iii. Aggravated and exemplary damages Kshs 500,000
 - iv. Special damages in respect of legal fees kshs 5 million Total Kshs 15,500,000
45. Judgment be and is hereby entered in favour of the Plaintiff and against the Defendants jointly and severally in the sum of Kshs 15,500,000/= together with costs and interest at court rates from the date of this judgment until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
2ND DAY OF MAY, 2023.**

.....
A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff



..... for the 1st Defendant

..... for the 2nd Defendant

