



REPUBLIC OF KENYA



**Kongo v Attorney General (Civil Suit 927 of 2004)
[2023] KEHC 23231 (KLR) (Civ) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 23231 (KLR)

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

**CIVIL
CIVIL SUIT 927 OF 2004
DO CHEPKWONY, J**

JULY 4, 2023

BETWEEN

DAVID KIMANI KONGO PLAINTIFF

AND

THE HONOURABLE ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. This suit was commenced against the Defendant by way of a Plaint dated August 31, 2004, filed in court on September 1, 2004, seeking for the following prayers;
 - a. General damages as particularized or specified herein above.
 - b. Special damages of Kshs 9,010,000/=
 - c. Costs of this suit.
 - d. Interest on (a) (b) and (c) herein above at court rates.
 - e. Any other relief or remedy this Honourable Court may deem to be just and expedient.
2. The brief facts of this case are that on February 14, 2001, the plaintiff was conducting business in Nairobi, as a director and shareholder of several companies, a politician and was the KANU Nairobi Branch Assistant Treasurer. The Plaintiff was informed by his secretary that police officers had called at his office earlier that morning and directed that he should report at Kilimani Police Station, in connection with ongoing inquiry or investigation, whose particulars they did not give.
3. The Plaintiff presented himself at the Police Station at 11.30am where he was detained without any reason being offered and later Inspector Francis Njeru recorded a statement from him.



4. The Plaintiff was notified that he would continue to be held at the police station in connection with the murder of one Charles Yao Sosah, as the police continued with investigations.
5. On February 22, 2001, he was arraigned before the Chief Magistrate Court, Nairobi and formally charged with the offence of murder and on July 16, 2001, the Chief Magistrate committed him to the High Court for trial. He was remanded and detained at Kamiti Maximum Security Prison for two years and seven months.
6. The Plaintiff averred that during his detention underwent a protracted and rigorous trial for the offence of murder and which trial culminated in his acquittal on 8th September, 2003 on the grounds that:-
 - a. The prosecution had not made out a prima facie case against the Plaintiff and there was no case to answer;
 - b. The prosecution case against the Plaintiff was worthless and full of discredited evidence; and
 - c. The decision to charge the Plaintiff and his co-accused appeared to have been influenced not from the evidence on record but from some other undisclosed factors way beyond the powers of the Investigating Officer.
7. The Plaintiff avers that his arraignment and subsequent was expressly or impliedly authorized by the Defendant, the Commissioner of Police and the Director of Public Prosecutions. He states that his arrest and false imprisonment would not have occurred had the Commissioner of Police through the Investigating Officer, the Divisional CID officer and Provincial CID officer.
8. The Plaintiff states that his arrest and imprisonment was false, unlawful, actuated by malice and instituted without reasonable and probable cause and his prosecution for the offence of murder was actuated by malice.
9. The Plaintiff pleaded malice and absence of reasonable and probable cause on the part of the Attorney General as particularized under Paragraph 12 of the Plaint as follows:-
 - a. Arresting the Plaintiff when they knew or ought to have known that he could not have had and did not have anything to do with the murder.
 - b. Depriving the Plaintiff of his personal liberty and subjecting him to false imprisonment, by keeping him in police custody from February 14, 2001 up to February 21, 2001.
 - c. Arraigning the Plaintiff on the charge of murder when they knew that there was no credible witness to sustain the charge.
 - d. Arraigning the Plaintiff without cause and in pursuit of extraneous consideration, despite the fact that the Police Officer investigating the crime were convinced that there was credible evidence against the Plaintiff.
 - e. Authorizing, allowing and abetting the arraignment of the Plaintiff on the charge of murder while fully aware that murder is a non-bail able offence and the Plaintiff would have to be deprived of his freedom and liberty during the trial.
 - f. Allowing the trial to run for two years and seven months.
10. The Plaintiff was wrongfully held in custody and deprived of his liberty and was injured in his credit, character and reputation, was subjected to mental anguish and loss esteem, injured in his business and lost the opportunity to vie for the Dagoretti Constituency Parliamentary Seat in 2002 elections and therefore suffered loss and damage and special damages amounting to Kshs 9,010,000.00.



11. In response, the Defendant entered appearance and filed defence dated November 18, 2004 on December 1, 2004. The Defendant denied the contents of the Plaintiff and stated that the arraignment and subsequent prosecution of the Plaintiff was lawful and justifiable. The Defendant stated that the police carried out investigations before the plaintiff was arrested and charged and the allegations that the police were influenced by extraneous considerations are denied. The Plaintiff's claim is bad in law, misconceived and discloses no cause of action and seeks the same to be dismissed with costs.

Evidence

12. The matter proceeded for hearing on May 16, 2019. PW1-David Kimani Kong'o in his testimony stated that he recorded a statement dated March 16, 2015 which he adopted as his evidence in chief. In addition he stated that he went to Kilimani Police Station after he heard that the police are looking for him. At the Station, he learnt about the murder of Charles Yao Sosala in Woodley Estate. The police named him as one of the suspects amongst other people who had bought land in Woodley estate. he had bought a plot in Woodley for Kshs 2.5 million from one David Kigochi and the house was occupied by a former tenant of the then Nairobi City Council who was yet to start paying rent to him. He bought the house in 1997 by installments which were to be completed in 2000. He was arraigned in court on February 22, 2001. When he went to see the tenant she was hostile and the police were called. He did not know Charles Yao Josiah and had never met him nor knew him.
13. He stated that he recorded his statement at the station on February 11, 2001. He was placed under arrest with one more suspect Kuria wa Gathoni who was the former Director of Planning. He was a businessman at the time. He was arraigned in court on February 22, 2001 and thereafter remanded at Kamiti Maximum Prison. He denied that charge and the case was in court for two years seven months. That at the end of the case he was acquitted as there was no case to answer. There was no appeal by the prosecution. He was unlawfully detained and suffered during the detention. His health deteriorated and was treated by Dr. Ngunjiri Wambugu of Meridian Clinic alongside his children and wife at a total cost of Kshs 1,840,000/=. He stated that his business suffered due his absence.
14. He was interested in politics at the time and in 1997 he vied for Dagoretti Parliamentary seat but was knocked out in nomination. In 2002 he was still in Kamiti and though he was interested he could not view after his reputation and self-esteem had been destroyed. While he was in custody he lost his salary and allowances as a director of his company. He used to be paid a total of Kshs 70,000/= per month which came to Kshs.2,170,000/= for the period of incarceration. He also incurred legal expenses for the criminal case and by the time it was determined he had paid a total of Kshs 5,000,000/=.
15. He prayed for special damages, general damages, costs and interest as prayed in the Plaintiff. He proceeded with his testimony on October 28, 2021. He recalled testifying and produced bundle of documents dated March 20, 2015 and further list of documents dated May 7, 2015.
16. On cross examination, he knew Kuria wa Gathoni the Nairobi City Planner. He said that it's Kuria who allocated him the house. He was charged with the offence of murder and 35 prosecution witnesses testified. That David Kigochi sold him the plot for Kshs 2.5 Million at Woodley estate. The plot had a house on it but did not recall the plot number. The damages is for legal fees of Kshs 5,000,000/=. The receipts are contained in the bundle and marked as exhibit 3. He also lost business.
17. The defence closed their case without calling any witness to testify in the matter.
18. At the close of the hearing, parties were directed to file written submissions. The Plaintiff's submissions are dated January 20, 2022 whereas the Defendant's submissions are dated January 22, 2022. This court will proceed to consider the submissions in determination of this matter.



Analysis and Determination

19. I have carefully considered the rival submissions in support and in opposition together with the authorities relied upon. I find the following issues crystalizing for determination:-

- a. Whether the Plaintiff has proved a case for malicious prosecution?
- b. If so, whether the Plaintiff is entitled to any damages?

20. Before I proceed to determine the issues, it is important that I define malicious prosecution. The term was defined in the case of *Stephen Gachau Githaiga & another v Attorney General* (2015) eKLR, as follows;

“Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without probable cause and for a purpose other than that of bringing the alleged offender to justice...malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution.”

21. The principles governing malicious prosecution were enunciated in the case of *Kagane & others v Attorney General & another* [1969] EALR 643, as follows:-

- a. The Plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;
- b. That the prosecution terminated in the Plaintiff's favour;
- c. That the prosecution was instituted without reasonable and probable cause; and
- d. That the prosecution was actuated by malice.

22. To succeed in a suit of malicious prosecution, the Plaintiff must prove the above outlined elements. Further, the East Africa Court of Appeal in the case of *Mbowa v East Mengo District Administration* [1972] EA 352, stated that:-

“The Plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the Plaintiff does not prove them he would fail in his action.”

23. It is not in doubt that the Plaintiff was charged in Criminal Case No 70 of 2001 and later acquitted on a no case to answer. It is evident that the Plaintiff has proved the first two elements that the Plaintiff must show that the prosecution was instituted by the Defendant and that the prosecution was terminated in the Plaintiff's favour.

24. The third element the Plaintiff must prove is that the prosecution was instituted without reasonable and probable cause. Reasonable and probable cause was defined by Rudd J. in the case of *Kagane & others v Attorney General & another (supra)* while adopting the definition in *Herniman v Smith* (1938) AC 305 stated that;

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent



and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

Further, His Lordship set out the objective test as follows:-

“Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was so fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable, prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

25. It was the evidence of PW1, the Plaintiff that he was informed by his secretary that police officer had called at his office earlier that morning and directed that the Plaintiff should report at Kilimani Police Station. In compliance with the summons the Plaintiff presented himself and without any reason, he was detained and later charged for the offence of murder. The matter was heard and the Plaintiff was acquitted on a no case to answer. There was no evidence to challenge the Plaintiff's case as the defence failed to call any witness to testify to explain the circumstances leading to the arrest of the Plaintiff.
26. In the absence of such evidence I would conclude that the Defendant's agents acted without reasonable and probable cause in arresting and charging the Plaintiff with the offence of murder.
27. Finally on whether the prosecution was actuated by malice. According to the case of *Mbowa v East Mengo District Administration (supra)* criminal proceedings are malicious if instituted with an improper and wrongful motive that is with intent to use legal process in question for some other than its legally appointed purpose.
28. I have found that the arrest and arraignment of the Plaintiff as unreasonable. In my view he was subjected to a trial where there was no evidence linking him to the offence of murder of the deceased. I would agree with the Plaintiff that his arrest, detention and the charge was a clear manifestation of malice by the agents of the Defendant. In sort they applied the criminal legal process to their improper and indirect motives and not for justice. There was no justification for preferring the charges against the Plaintiff and it was therefore malicious.

If so, whether the Plaintiff is entitled to any damages?

29. The Plaintiff having proved and succeeded in a claim of malicious prosecution, he is entitled to some relief. The Plaintiff prayed for special damages, general damages, costs and interest. He specifically pleaded Kshs 9,010,000/= for special damages in his Plaintiff.
30. The Plaintiff must establish damages, including harm to the Plaintiff's reputation, loss of liberty, or harm to person or property as a result of the malicious prosecution. Depending on the Plaintiff's actual reputation and the seriousness of the crime for which he was punished, the level of reputational harm would vary. The Plaintiff's reputation should be assessed objectively rather than being focused on his personal circumstances.



31. The Plaintiff proposed what he called special damages and attached several receipts from different advocates who he alleged handled the criminal case he had been charged with. They are not even alluded to in his witness statement dated March 16, 2015. In my view these figures termed as special damages are either cooked or imaginary. It is trite law that special damages must be pleaded and specifically proved short of which they cannot be granted. For that reason, the claim for special damages fails.
32. The Plaintiff has also asked for damages for loss of business as well as medical expenses for the family as a result of his detention. I have noted the documents relied upon by the Plaintiff and the authors of both documents were never called to produce such documents. Section 35 of the *Evidence Act* provides that;
- (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say
 - (b) If the maker of the statement is called as a witness in the proceedings.”
33. In my considered view, it was important for the Doctor and the author of the letter from Aquatech International Co. Ltd to give testimony so that they can form basis for admissibility of the evidence they tendered. In the absence of such testimony, this court will consider such evidence as inadmissible.
34. General damages are a matter of court’s discretion. It is a general principle for awarding damages that they are always within the discretion of the Court and are meant to reinstate the injured party into their position before the wrong or at least to cushion them for the wrong suffered. In the case of *Attorney General v Peter Kirimi Mbogo & another* [2021] eKLR, this Court considered the three causes of action of unlawful arrest, wrongful imprisonment and malicious prosecution are all parts of the same unlawful transaction and there is an element of overlapping compensation. In the end, the Court substituted the trial Courts finding on quantum with a total an award of Kshs 2,700,000/=.
35. The Plaintiff sought for Kshs 20 Million for general damages for malicious prosecution and relied on the cases of *Geoffrey M. Asango & 3 others v Attorney General* [2014]eKLR and *Otieno Mak’Onyango v Attorney General & another* [2012] eKLR, where the Court awarded the Plaintiff a sum of Kshs 20 Million in both cases.
36. Taking into consideration all the circumstances of this case including the status of the Plaintiff as a teacher and the number of years during the pendency of the criminal case, I award the Plaintiff a global sum of Kshs 3,000,000/= as general damages for malicious prosecution. The Plaintiff shall also have costs and interests of this suit.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF JULY, 2023.

D. O. CHEPKWONY

JUDGE

