



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 167 OF 2019

CAPTAIN (RTD) CHARLES K.W. MASINDE.....PLAINTIFF

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST DEFENDANT

KENYA WINE AGENCIES LIMITED.....2ND DEFENDANT

ETHICS & ANTI-CORRUPTION COMMISSION.....3RD DEFENDANT

RULING

By his plaint dated 1st August 2019, the Plaintiff/respondent is seeking general damages for malicious prosecution, special damages for loss of employment, aggravated and exemplary damages for malicious prosecution, aggravated damages for defamation, costs of the suit and interest.

The 2nd defendant filed a Preliminary Objection dated 1st October, 2020 which is based on the following grounds:-

a) THAT this suit as filed is bad in law, misconceived, incompetent and fatally defective, as the Plaintiff's claim is barred by virtue of section 4(2) of the Limitation of Actions Act Cap 22 and Section 3 of the public Authorities Limitation Act Cap 39 Laws of Kenya.

b) THAT the Plaintiff's claim for Defamation is time barred and fatally defective as the claim in the plaint was filed 4 months after the limitation period being one (1) year had lapsed contrary to Section 20 of the Defamation Act Cap 36 Laws of Kenya.

M/s Aquino & Co Advocates appeared for the 2nd defendant who raised the preliminary objection maintain that a claim for defamation cannot stand for the main reason that it is time barred by virtue of Section 4(2) of the Limitation of Actions Act which provides:-

“An action founded on that tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

Counsels referred to the case of **DANIEL NJUGUNA MUCHIRI –V- BARCLAYS BANK OF KENYA LTD & ANOTHER (2016) eKLR** where it was held:-

“Concerning the claim for damages for defamation of character, I must from the onset make it clear that that claim is not available to the plaintiff as against all the defendants for reasons that to succeed in a claim for defamation, such claim must be brought within 12 months from the date when the cause of action arose. It is not a claim that is necessarily hinged on the outcome of the prosecution of the plaintiff. This is pursuant to Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.”

Counsels for the 2nd defendant also referred to the case of **NZOIA SUGAR COMPANY LTD –V- FUNDUTUTI (1988) eKLR 399** where the court stated:-

“In any event, the Judge could not lawfully have done so because an action in defamation was barred 12 months after the cause of action arose by section 20 of the Defamation Act (Cap 36). On the facts, the respondent’s cause of action arose on the 20th February 1979. The action was brought on the 3rd September 1980 – approximately 19 months from the date the cause of action accrued.”

Counsels for the 2nd defendant further referred to the case of **WYCLIFFE A. SWANYA –V- TOYOTA EAST AFRICA LTD. & ANOTHER (2009) eKLR** where it was held:-

“and we understand this to mean from the date the slanderous remarks are made. (see proviso to section 4 (2) – of the Limitation of Actions Act and section 20 of the Defamation Act). It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified.”

According to the 2nd defendant, the alleged defamatory statements were published on 4th February, 2019 and 9th April, 2018. The plaintiff’s claim was to be filed on or before 4th February 2019 and 9th April, 2019. The suit was filed on 9th August 2018 outside the Statutory Limitation period.

It is further submitted that the alleged defamatory words were published by the Star and Daily Nation Newspapers. None of these Newspapers has been enjoined as a party in the suit.

It is also contended that the Attorney General is a necessary party in a claim for malicious prosecution. Counsels refer to the case of **LAKE VICTORIA SERVICE BOARD –V- MARTIN OKOLA (2015)eKLR** where the Court held:-

“Although the above grounds ought to dispose this appeal, the other issues of failing to enjoin the Attorney-General and police are equally valid. Clearly the complainant in that case was not the one who led to the arrest and prosecution of the respondent. In his testimony he told the court that he was incarcerated for about 5 hours and released at the police station. In the criminal regime it is only the business of a complainant to raise forth a complaint but the decision of arrest and prosecution is left to the wisdom of the police. In that case the police were not enjoined which then made the entire case fatal.”

Reference is also made to the case of **SAMSON KIRERA TURUSHU –V- FRANCIS MUKUNGI (2000) eKLR** where the Court stated:-

“The respondents’ acquittal in the criminal case constituted a determination of the prosecution in his favour and this fact may very well have rendered the police liable for malicious prosecution but that the Attorney General was not enjoined to the case no such finding could have been made.”

On the issue of jurisdiction it is argued that Article 165(5) provide that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). The dispute herein relates to termination of employment. Counsels referred to the case of **GILBERT OTIENO OKITE & ANOTHER –V- KENYA SUGAR RESEARCH FOUNDATION (2020) eKLR** where it was held:-

“The learned Judge held that the issues of termination of employment whether unfair and the issues of outstanding dues could only be ventilated at the Labour and Relations Court. He therefore did not determine any question concerning the employer-employee relationship that existed between the 1st appellants and the respondent.

It is clear to me that the learned Judge was correct in holding that the High Court lacked jurisdiction to determine the employment issues raised by the 1st appellants against the respondent. This is by virtue of the promulgation of the current Constitution which set up the Employment and Labour Court as a specialized court under Article 162(2) (a);

Beyond creating the specialized court and investing it with jurisdiction in these matters, the Constitution left no room for a concurrence of jurisdiction because it expressly removed the same from the jurisdictional purview of the High Court in the clear and unambiguous exclusionary terms of Article 165(5)(6);

In effect, the court had no capacity to issue the orders sought, and the learned Judge did not err by arriving at that conclusion. It could not do otherwise for, as the Supreme Court emphasized in REPUBLIC V KARISA CHENGO & 2 OTHERS [2017] eKLR; “A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

According to counsels for the 2nd defendant, the plaintiff’s suit is not a constitutional petition. The dispute revolves around employment. The Plaintiff cannot defeat the issue of limitation by contending that the claim is a constitution petition. Counsels referred to the case of **JAMES KANYIITA NDERITU –V- A.G. & Another (2019) eKLR** where the Court of Appeal stated:-

“In this matter, the appellants could well have instituted a claim for malicious prosecution and an action for defamation for loss of character and reputation as alleged in the claims in the Petition. It is trite that such an action for malicious prosecution or defamation would be met by the limitation period. In principle, the legal issue in our mind is whether a party should be allowed to circumvent the limitation periods in a statute by instituting a constitutional petition alleging violation of

the Bill of Rights.”

M/s Manyonge Wanyama & Associates appeared for the plaintiff. Counsel maintain that this court has jurisdiction to entertain a claim for malicious prosecution. The court has unlimited jurisdiction in civil matters and is also empowered to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The plaintiff’s claim is purely on constitutional issues as it alleges an infringement of constitutional rights and freedoms. As a result of the malicious prosecution, the plaintiff lost his income and was denied employment opportunities. Counsel referred to the case of **ANTHONY SHIVEKA ALIELO –V- KENYA POST OFFICE SAVINGS BANK & ANOTHER (2019)eKLR** where the court held:-

“On the issue whether the High Court had jurisdiction to entertain an appeal on wrongful termination; the plaint filed by the appellant in the trial Court raised several causes of action including wrongful arrest and confinement, malicious prosecution and wrongful termination. It is also evident that the dispute between the appellant and the 1st respondent was presented as a dispute arising from an employee/employer relationship, where the 1st respondent accused the appellant of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal.

In our view the claim for damages for unfair termination, the claim relating to general damages for malicious prosecution and defamation, flowed directly from the dismissal, was within the jurisdiction of the High court. In the exercise of its powers under Article 165 of the Constitution the High Court had jurisdiction to entertain the dispute in all its aspects and award damages appropriately. This ground therefore fails.”

Counsel for the plaintiff further relies on the case of **PETER KIPYEGON KIRUI –V- AGRICULTURAL DEVELOPMENT CO-OPERATION & 2 OTHERS (2016) eKLR** where Justice Maureen Onyango J. held:-

“It is my opinion that the claim for malicious prosecution in the nature of the plaintiffs suit cannot be prosecuted piecemeal. The claimant cannot be expected to file the suit on malicious prosecution in one court and for unlawful termination in another court on grounds that one court does not have jurisdiction to hear a portion of the claim. It is my opinion that this court has jurisdiction to hear all matters arising out of an employment relationship, and the charges the plaintiff alleges were the cause of the malicious prosecution claim arose out of an employment relationship. Joining the Attorney General in a suit does not oust the jurisdiction of this court merely because there is no employment relationship between the plaintiff and the Attorney General.”

Counsel for the plaintiff contend that the trial court convicted the plaintiff and fined him Kshs.500,000 in default to serve six (6) months in prison. Being dissatisfied with that decision, the plaintiff appealed. Judgment on appeal was delivered on 5th December, 2018 and the suit was filed on 6th August, 2019 which is within the one year period. Counsel rely on the case of **TOBIAS MOINDE KENGERE –V- POSTAL CORPORATION OF KENYA & 2 OTHERS (2019) eKLR** where the court stated:-

“Flowing from the preceding, time for the purposes of limitation must begin to run as from the date when the Plaintiff could first successfully maintain an action and the cause of action is not complete until such a time.

It is further submitted that the suit is not fatally defective for failing to enjoin the Attorney General. Article 157(6) of the Constitution transferred the prosecutorial powers of the Attorney General to the Director of Public Prosecutions. Counsels rely on the case of **SUSAN MUTHEU MUIA –V- JOSEPH MAKAU MUTUA (2018) eKLR** where Charles Kariuki J held:-

“In a public prosecution therefore the Attorney General (now Director of Public Prosecution) is a necessary party who must be joined in the proceedings.

The Attorney General (Director of Public Prosecution) is the party who would be responsible for prosecutions instituted without reasonable or probable cause. See CHRISPINE OTIENO CALEB Supra; JOHN NDETO KYALO Supra. The court defined what constitutes “reasonable and probable cause” then went on to state “.....that it is the police who are liable to such person (accused person) for instituting a proceedings against him.”

The Preliminary Objection raises three issues namely:-

- I. Whether this court has jurisdiction to determine the suit.**
- II. Whether the plaintiff’s claim is time barred.**
- III. Whether the suit is fatally defective for failure to enjoin the two Newspapers and the Attorney General.**

On the issue of jurisdiction, it is submitted that the dispute involves employer/employee relationship and ought to have been filed before the Labour Court. The Plaintiff’s claim seeks different awards. There is the claim for malicious prosecution. Ordinarily, cases involving claims for malicious prosecution have been filed before the High Court. The 2nd defendant is not contending that a claim for malicious prosecution must be filed before the Employment and Labour Relations Court. I do therefore find that the High Court has jurisdiction to determine the claim for malicious prosecution. There is also a claim for aggravated damages for malicious prosecution. This falls within the claim for malicious prosecution and falls within the jurisdiction of the High Court.

The plaintiff’s other claims are for special damages for loss of employment which claim is to be proved at the hearing of the suit. The

plaintiff was not employed by the 2nd defendant but was a contractual director for a period of three years from 15th July, 2003 to 15th July, 2006. This was an appointment and the plaintiff is therefore seeking the allowances and emoluments which went with the appointment but were not paid due to the prosecution. The specific amount being claimed has not been stated. This is not a claim for wrongful termination or loss of salary. There is no evidence that the plaintiff was on monthly salary. The plaintiff was appointed as a director of the 2nd defendant. It is his position that the prosecution was malicious and is seeking to recover what he was not paid as his entitlement as a director due to the prosecution as well as damages for loss of the employment. It could still be a claim for loss of employment from other prospective employers.

In my view, if the plaintiff were to file a claim for damages for malicious prosecution and special damages for loss of employment before the Employment and Labour Relations Court, the same objection on jurisdiction will be raised as arguments will be advanced to the effect that the Employment and Labour Court cannot deal with claims based on malicious prosecution. It would not have been ideal if the plaintiff were to file two separate cases with one filed before the High Court seeking damages for malicious prosecution and a second case filed before the Labour Court seeking damages for loss of employment. This is in line with the sentiments expressed by Justice Maureen Onyango in the case of **Peter Kipyegon Kirui –V- Agricultural Finance Co-operation (supra)**. The suit cannot be done in piecemeal and distributed in the two courts. Doing so may raise the danger of having two contradicting verdicts on a similar and related issue.

From the plaintiff's pleading and the facts of the case, I do find that the court of Appeal decision in the case of **Antony Shiveka Alielo –v- Kenya Post Office Savings bank & Another (supra)** is applicable. The claim for loss of employment flows from the alleged malicious prosecution. Once the dispute is heard and the court is satisfied that the prosecution was malicious, damages for loss of employment, if proved, can be granted by this court. I do find that this limb of preliminary Objection fails.

The other issue involves Limitation. Part of the claim is for Aggravated and general damages for defamation. Section 4(2) of the Limitation of Actions Act provide that a claim based on libel or slander may not be brought after the end of twelve months. The twelve months are to be computed from the date the cause of action accrued. Paragraphs 13 and 14 of the plaint indicate that the alleged defamatory words were published by the Star Newspaper on 4th February, 2018 and by the Daily Nation Newspaper on 9th April, 2018. The suit was filed in August, 2019 outside the twelve months period from the date of publication.

According to Counsel for the plaintiff, time started running from the moment the case for malicious prosecution was finalized on appeal. The line of reasoning is that had the plaintiff been convicted the suit would not have been filed. In my view time started running for the claim for defamation from the moment the alleged defamatory words were published. The Plaintiff felt at that moment that his reputation had been damaged. Any conviction or acquittal could not have erased the publication. I do therefore find that the claim for damages for defamation was filed out of time. However, it is not prudent at this moment to strike out that specific claim as the other claims for malicious prosecution and loss of employment are still active. I do associate myself with the holding in the case of **MWANIKI GACHUBA –V- SPEAKER OF THE COUNTY ASSEMBLY OF KAJIADO & ANOTHER (2018) eKLR** that a Preliminary Objection should be able to dismiss the entire suit and not some parts of the claim.

The last issue relates to the none joinder of the two Newspapers which published the alleged defamatory words. With regard to the Attorney General, it is my view that the old decisions used to require the joining of the Attorney General as he was the prosecutor in Criminal Cases. The state powers of prosecution were handed over to the Director of Public prosecutions as provided by Article 157 of the Constitution. Although the Attorney General handles civil cases for the State, the dispute herein emanates from the alleged malicious prosecution of the Plaintiff by the Director of Public Prosecution in conjunction with the two other defendants. I therefore find that there was no need to enjoin the Attorney General as a party to the suit. In the case of **VICTORIA SERVICE BOARD –V- MARTIN OKULA (2015) eKLR** which was referred to by Counsel for the 2nd defendant, the main issue was the non-joinder of the police who decided to arrest and prosecute the claimant. The police normally prosecute after the DPP allows them to proceed with the prosecution. The authority to prosecute emanates from the DPP and not the A.G. If there is any claim of malicious prosecution, then the DPP is the correct party. In my view, if a party enjoins the DPP or the Attorney General or fails to enjoin one of them, the suit cannot be held as fatally defective to warrant its dismissal at the preliminary stage. At least the office which triggered the prosecution has to be enjoined and this office is usually that of the DPP.

A claim for defamation traces its roots from the person or institution who utters the alleged defamatory words. The Newspapers, Television Stations, radio stations or other forms of electronic media such as Whatsapp and You tube are also part of the chain which convey the alleged defamatory words. In my view, once the source of the alleged defamatory words is enjoined in the suit, the claim should not be struck out due to non-joinder of the media which published the alleged defamatory words. The claimant will be in a position to produce the specific Newspaper which published the defamatory words as part of his evidence. The claimant can as well store the defamatory words in some form of electronic device such as a C.D. or flash disk and have it reproduced while taking into account the requirements of the Evidence Act on electronic evidence. It is my honest view that non-joinder of the Newspapers which published the alleged defamatory words is not fatal to the plaintiff's case. The case is grounded on malicious prosecution. The report carried out by the Star Newspaper of 4th February 2019 was one based on a finding by the trial court. The report by the Nation Newspaper of 9th April, 2018 also refers to the court decision which convicted the plaintiff and fined him Kshs.500,000 for alleged corruption. The plaintiff's claim traces its roots to the alleged malicious prosecution which in turn led to injury to his reputation. The two Newspapers had nothing to do with the prosecution.

The totality of my analysis is that the Preliminary Objection is not capable of having the plaintiff's suit terminated at this preliminary stage. The Preliminary Objection is hereby dismissed with costs to the plaintiff.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2021

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S. CHITEMBWE

JUDGE