



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1 OF 2019

MORRIS KYENGO MAKOVU.....PLAINTIFF

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST DEFENDANT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JOSEPH BUURI MUGUNA.....4TH DEFENDANT

JUDGMENT

1. Morris Kyengo Makovu the plaintiff herein filed a plaint dated 3rd January 2019 against the four defendants namely:

- Inspector General of Police1st defendant
- The Director of Public Prosecutions2nd defendant
- The Hon. Attorney General3rd defendant
- Joseph Buuri Muguna4th defendant

2. He sought the following prayers against them:

- a) General damages for malicious arrest, confinement and prosecution.
- b) Exemplary and punitive damages for malicious arrest, confinement and prosecution.
- c) General damages for defamation
- d) General damages for loss of future expectations.
- e) General damages for pain and suffering.
- f) Special damages as stated in paragraph 20
- g) Costs of the suit and interest at court rates
- h) Any other or further relief that the court may deem fit to grant.

3. He pleaded that he is the legal administrator of his late father's estate (David Makovu Ndambo) having been issued with letters of administration on 23rd November 2012 vide succession cause No 291 of 2007 at the High court Nairobi. About the year 2014 the 4th defendant who was the Divisional Criminal Investigation officer (DCIO) Mwala sub county Machakos County, falsely accused him of being a fraudulent, dishonest, conman, swindler. The 4th defendant had claimed that he had forged various documents which were filed in the said succession cause.

4. As a result, he was arrested by the 1st defendant and charged by the 2nd defendant for various counts in the Chief Magistrate's court at Machakos vide criminal case No. 1395 of 2014. He was later acquitted on 31st January 2018 under section 215 of the Criminal Procedure Code.

He pleads that his woes started when he filed a complaint against Kenya Power and Lighting Company (KPLC) concerning his father's estate on Land Parcel No. Mwala/Mango/179. It is then that the 4th defendant conspired with officers of KPLC and initiated criminal proceedings against him.

5. He outlined the particulars of malice and negligence against the 4th defendant in the criminal case, at paragraph 12 of the plaint. He did the same for the 1st and 2nd defendants at paragraph 13 of the plaint. He outlined particulars of defamation at paragraph 15 of the plaint in respect to the 4th defendant. That the defamatory letter predicted him as a dishonest person who had no respect for morals and was untrustworthy.

6. Further that the defamatory letter caused him a demotion whereby he was transferred from the Army Commander's office in Nairobi to a lower position at the Kenya Military Academy. He almost lost his job and finally developed health complications like high blood pressure, ulcers diabetes and arthritis.

7. He claimed special damages of Kshs. 205,000/= as pleaded at paragraph 20 of the plaint.

8. The Attorney General (A.G) filed a defence on behalf of all the defendants denying all the claims. In the alternative and without prejudice he stated that if at all the plaintiff was arrested and charged the same was done after a legitimate complaint was made to the Kenya Police and proper investigations done in execution of the police statutory duty.

9. At paragraph 6 a-d he has outlined the particulars of the statutory duties of the police.

10. In reply to the defence, the plaintiff reiterated what he stated in his plaint. He denied that the arrest was done after proper investigations had been conducted by the 4th defendant.

11. After all the preliminaries the suit was set down for hearing.

12. The plaintiff testified as PW1 and stated that he is an army officer based at Kenya defence forces headquarters at Hurlingham. He confirmed having been arrested, charged and acquitted. He produced a bundle of documents (PEXB1) among them was the charge sheet, certified court proceedings and judgment, copy of limited grant and the grant itself. He was accused of forging the Chief's letter. A letter had been written inquiring about the grant issued to him and the deputy registrar responded. He produced letters to and from the Directorate of Public Prosecution (DPP) (items 8-10)

13. A letter was written to the Military Police by the 4th defendant and he was then sent to Nakuru on demotion. After the arrest and prosecution, he developed illnesses and also incurred expenses. He produced all the documents in support. He issued a notice of his intention to sue to the 3rd defendant and a demand letter to the 4th defendant. His witness statement which he adopted as part of his evidence contains basically what he told the court in his evidence in chief.

14. Upon cross examination by Mr. Emacar for the defence he said he did not know the functions of the Kenya Police. He admitted that the police arrest, investigate and seek advice from the DPP. That the police and DPP in doing all this were simply discharging their duty.

15. In re-examination he said he blamed the 1st and 2nd defendants because they did not carry out investigations and only relied on malicious reports.

16. There was no evidence adduced on behalf of the defendants.

17. Upon the close of the case both counsel filed submissions.

18. Mr. Wachira for the plaintiff submitted that the circumstances leading to the prosecution of the plaintiff are stated in paragraphs 10 and 11 of the plaint. It all started when he obtained letters of administration of his late father's estate to enable him pursue compensation against KPLC for erecting high voltage power lines on their land and this annoyed the 4th defendant.

19. Counsel submitted that the judgment in the lower court case indicated that there was no complainant and no formal complaint had been made prior to actuating the criminal process. He referred to paragraph 4 of page 53 of the judgment which states:

“the accused person sought to file the succession cause to obtain a grant of letters of administration in order to pursue his compensation with K.P.L.C He is an officer with the Kenya Defence Forces, a senior sergeant based at the Military academy,

Nakuru. He is a person expected to act with candour and dignity in all his undertakings. He reported the KPLC Wayleaves officer to the police to take action. He took a suspect document; a way leave consent executed under wraps by his brother without the family's consent. He was affected by the wayleave and feels aggrieved; enough to warrant compensation. He is the one who activated the criminal justice process. He has been most mistreated."

20. He cited the case of **Mbowa v East Meno District Administration [1972] E.A.C.A** where the court expressed itself as follows:

"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...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. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could (sic) have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

21. On whether the criminal proceedings met the threshold for action for malicious prosecution counsel relied on the case of **Gitau v Attorney General [1919] KLR13**. He further submitted that the law enforcement agencies are required to investigate the complaint before referring a charge against a suspect. The officers are to act impartially and fairly after considering the versions by both parties.

22. He relied on the case of **Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another Nairobi HCC No. 1729 of 2001** where Ojwang J (as he then was) held.

"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

23. He contended that the prosecution failed to investigate and consider the followings issues:

i. They failed to properly interrogate the D.C.I.O Mwala on how, in 2014, he initiated the forgery of a letter drafted in 2006, while there was no person who initially complained to him about the matter.

ii. They failed/ did not consider to interrogate the accused person, on how he acquired the forged letter of chief and consent. They failed to interrogate the family of the accused on whether they had a consensus during obtaining the grants of letters in the succession cause which were issued to the accused in 2012.

iii. The police called and incited family members including brothers and even the mother of the accused person to give false testimonies against the accused. They ended up admitting that they signed the consent that the accused was being accused of forging. The investigation ought to have considered it immoral and improper to influence family members against each other.

iv. The police failed to consider that the matter was purely civil and involving succession and in such a situation where the Chief's letter and consent to grant was in question during issuance of the grant, the remedy was revocation of the grant, which has never been revoked to date.

v. It was evident that they were influenced by the said D.C.I.O to prefer the charges and that amounted to abuse of office and the police agreed to participate in that abuse.

vi. The police did not call an expert to analyze the signature specimens produced as exhibits.

vii. There was no complaint in the matter as well noted in the Judgment dated 31st January 2018.

24. On the claim of defamation counsel relied on the case of **Dr. Willy Kaberuka v Attorney General Kampala HCCs No. 160 of 1993** where it was held (in Uganda) that:

“The plaintiff suffered injury to his reputation..... He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff’s feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant’s conduct. The plaintiff’s status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”.

25. On the claim for exemplary damages counsel referred to the following cases:

i) Bank of Baroda (Kenya) Ltd v Timwood Products Ltd Civil Appeal No 132 of 2001;

ii) Obongo & another v Municipal Council of Kisumu [1971] EA 91

iii) Rooke v Bernard & others [1964] A c 1129.

26. In the case of **James Alfred Koroso v Attorney General [2008] eKLR** the court made the following awards.

- False imprisonment and false prosecution – Kshs. 10,000,000/=

- Violation of constitutional rights – Kshs. 10,000,000/=

- Exemplary damages - Kshs. 1,000,000/=

In **Jacob Juma and another v The Commissioner of police and another [2016] eKLR** the court awarded the following:

- False imprisonment – Kshs. 200,000/=

- Exemplary damages for false imprisonment – Kshs. 400,000/=

- General damages – Kshs. 2,000,000/=

- Exemplary damages for malicious prosecution Kshs. 400,000/=

27. Counsel cited various authorities showing that since the defendant did not adduce any evidence the plaintiff’s evidence remained unchallenged.

28. The state counsel Mr. Emacar Andrew filed submissions dated 5th July 2021. He submitted that the prosecution of the plaintiff was not actuated by malice. He referred to the **case of Kagane & others v Attorney General EA 643** as quoted in **Michael Ochieng Odera V.AU [2012] eKLR** which laid down the principles to be proved in a case of malicious prosecution. These are:

i) The prosecution must have been instituted by a police officer

ii) The prosecution must have been terminated in the plaintiff’s favour

iii) The prosecution was instituted without reasonable and probable cause; the test for this condition is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

iv) That the prosecution was actuated by malice; malice means that the prosecution was motivated by something more than to vindicate justice.

29. It is his submission that police officers from Masii police station arrested and instituted prosecution against the plaintiff after receiving a complaint, investigation done and the plaintiff found triable. That the plaintiff in his plaint and during the hearing before this court confirmed that it is the 4th defendant who made a complaint to the police that led to his arrest. Further that he said thorough investigations were conducted before he was arraigned in court. On the 2nd principle he submitted that no evidence was adduced to show that the prosecution was actuated by malice, either by spite or ill will or by indirect or improper motive.

30. He relied on the case of **Katerrega v Attorney General [1973] 289** as quoted in **Philip Odari v Attorney General & 2 others [2015] eKLR** where the court observed as follows:

“It is well established that in a claim for damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives.”

31. He therefore submitted that the police had good intentions and were only performing their statutory duties which includes among others; to receive and act upon information that an offence had been committed or was about to be committed; to investigate and pursue every credible evidence; to apprehend and detain in custody any suspects; to institute criminal proceedings against any person in respect to the alleged offence. He argued that each officer carried out his duties as required with no malice or spite.

32. On the 4th principle counsel relied on the case of **Kagane** (supra) as quoted in **Morris Nyamasyo Masila v Nation Media Group Ltd & another [2000] eKLR** where it was held:

“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.”

33. He contended that the information presented to the prosecution was credible. There was no evidence to show that a prudent and cautious man would not have believed that the accused was guilty. There was also no evidence showing that the prosecution did not honestly believe in the truth of the prosecution.

34. With respect to malice counsel submitted that the mere fact that a person has been acquitted of the criminal charge under section 215 of the criminal procedure code clearly shows that the court did find that there was a case to answer and does not connote malice on the part of the prosecutor. Counsel in support of this submission relied on the case of **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**.

35. He therefore submitted that the information relayed to the police officers by the 4th defendant who believed it to be credible, was enough to satisfy a prudent and cautious man that the plaintiff was liable. That is why he was arrested and prosecuted. He submitted that the plaintiff had failed to prove any malicious prosecution and arrest. He was therefore not entitled to any damages and his case should be dismissed with costs.

Analysis and determination

36. Having duly looked at the proceedings and judgment of the trial court, the pleadings (plaint, defence and reply to defence) both submissions and authorities cited, I find the only issue falling for determination to be whether the threshold for proof of a case of malicious prosecution has been established.

37. Before I analyze the evidence, I wish to point out that its not clear whether the 3rd defendant (A.G) represented the 4th defendant. The memorandum of appearance dated 8th March 2019 shows that the Hon. A.G “entered appearance in this suit for the defendants”. The defence filed by the A.G refers to “Defendants Defence.” Nowhere in the defence does it show that the A.G was not representing the 4th defendant. It is the submissions dated 5th July 2021 by Mr. Emacar Andrew State counsel that refer only to the 1st, 2nd and 3rd defendants as the beneficiaries of the same.

38. The burden of proof in cases of this nature lies on the plaintiff. In the case of **Murunga v Attorney General [1979] KLR 138** the elements to be proved in a case of malicious prosecution were stated to be as follows:

- i) That the 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.
- iv) That it was actuated by malice.

Also see **Mbowa v East Meno District Administration** (supra).

39. The above test will apply in this case. There is no dispute that the plaintiff was charged vide Machakos Chief Magistrate’s court Criminal Case No 1395 of 2014 with five (5) counts of forgery contrary to section 350 of the Penal code; five (5) counts of uttering a false document contrary to section 353 of the penal code; one (1) count of making a document without authority contrary to section 357 of the penal code. He was acquitted under section 210 of the criminal procedure code of all the forgery counts and placed on his defence on the remaining counts. He was later acquitted under section 215 of the criminal procedure code on all the remaining counts of uttering a false document and making a document without authority. The elements under no (i) and (ii) and in the case of **Mbowa** (supra) have therefore been established.

40. What is key in this case is whether the prosecution of the plaintiff lacked reasonable or probable cause and was actuated by malice. It was the plaintiff’s submission that the 4th defendant initiated the **malicious prosecution out of personal interest and spite**. Further that the 1st and 2nd defendants did not investigate the complaint before charging him and that a number of issues were not investigated as outlined at paragraph 23 of this judgment.

41. In the trial before the Magistrate’s court the prosecution availed eight (8) witnesses to establish its case. The record of proceedings shows that the DCIO who testified as PW8 was Chief Inspector Joseph Njuguna. I take it that he is the same person as the 4th defendant who is referred to as Joseph Buuri Muguna. He explained how he received a file from DCIO Machakos where the plaintiff was complaining that

KPLC had directed lines across their shamba to Mwala Market. Him and his team of investigators carried out investigations and recorded statements from the plaintiff's family members on the issue. He found that the plaintiff had used some forged documents to file a succession cause No 291/2007 in Nairobi. After the investigations he sent specimens to the document examiner who found them to be forgeries.

42. PW1 (Assistant Chief), in his testimony confirmed that the letter used by the plaintiff in filing the succession cause and purported to have been issued by him was not done by him. PW4 (Tabitha Wandia Makovu) is the plaintiff's mother. She too testified how she was made to sign a document in the plaintiff's house over a case in Nairobi and in the presence of a person she was told was a Judge. What was this document? PW2 and PW5 are brothers of the plaintiff. They too explained how the plaintiff had been over bearing and they denied signing the questioned documents.

43. PW7 (the document examiner) in his report confirmed that the questioned documents were forgeries. These documents were filed in court in the succession cause by the plaintiff. The 4th defendant explained that after piecing together all this evidence and seeking advice from the DPP he went ahead and had the plaintiff arrested and charged. The above is just a summary of what the court was told during the hearing of the criminal case. And this is the evidence that the 1st -3rd defendants relied on to have the plaintiff charged.

44. There is no law that provides that every charge by the DPP **MUST** end up in a conviction. It all depends on what evidence is presented before the court. It equally follows that an acquittal in itself is not evidence of malice. In the case of **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399** the Court of Appeal held:

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellants but there must be evidence of spite in one of its servants that can be attributed to the company.”

45. The issue is whether there was tangible evidence in possession of the defendants to sustain a charge against the plaintiff. From the evidence that was adduced, I find that the 1st and 2nd defendants cannot be accused of not having carried out investigations. Secondly the evidence shows that the plaintiff, his siblings and even his mother had issues concerning the administration of their father's estate.

46. There are accusations and counter accusations. There was already another succession cause filed in Machakos High court No 278 of 1998 by the plaintiff's brother (Willy by name). The plaintiff did file a second succession cause in Nairobi over the same estate. Why did he do that? Having received an inquiry file over the matter the 4th defendant had to act. He never on his own initiative carried out the investigations. He was moved by a complaint.

47. There is no evidence that the 4th defendant was malicious and connected to any of the family members for the plaintiff to allege personal interest against him. It is not true that the 4th defendant did not enter any appearance or file defence. As mentioned earlier at paragraph 37, the memorandum of appearance and defence by the A.G covered all the defendants. It is only the submissions that excluded him. Being a police officer and being accused of something he allegedly did in the course of duty one would have expected him to be represented by the A.G just as the other defendants in terms of submissions.

48. In a case of this nature it is the duty of the plaintiff to prove that there was no basis for the complaint, no investigations were conducted and the plaintiff ought not to have been charged in the first place. A perusal of the criminal case proceedings clearly brings out the fact that the complaint was raised by the plaintiff himself. In the course of the investigations it was found that indeed the plaintiff had uttered forged documents. The forensic examination did not link Willy (PW2) to any of the documents as claimed by the plaintiff. Before uttering the false documents, he was found to have had them. He possessed them.

49. The plaintiff had forged documents which he uttered. He was aware of the succession cause already filed in Machakos yet he went ahead to file another succession cause in Nairobi. His own mother and siblings distanced themselves from what he had done. All this evidence was in possession of the defendants and the court. I find no proof of malice and ill will in the action taken by the defendants

50. My overall finding is that the defendants carried out their duties well and placed their material before the court for a determination. The plaintiff may have gone through a trying moment, embarrassment as the trial went on. It was a season and he had to go through it because of the charges he faced. For the claim of defamation to succeed it had to be directly linked to the prosecution lacking a reasonable and probable cause which has failed.

51. The upshot is that the plaintiff has not proved on a balance of probabilities his claim for general and special damages for malicious prosecution. The same is dismissed with costs to the defendants.

Orders accordingly

DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE