



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL CASE NO. 34 OF 2015

ANDREW MULIKA KITHUSI.....PLAINTIFF

VERSUS

BEATRICE NTHAMBI MUYA.....1ST DEFENDANT

ZMM.....2ND DEFENDANT

SECRETARY, TEACHERS SERVICE COMMISSION.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

1. Vide a plaint dated 24.6.2015 as amended on 1.3.2017, the plaintiff instituted this suit against the defendants for recovery of Kshs 196,000/- being legal fees, general damages for unlawful arrest, detention and malicious prosecution, interest and costs of the suit as well as any other relief.

2. It was pleaded that on or about the year 2010, the 1st and 2nd defendants jointly made a false and malicious report to the police officers particularly No. 71005 Pc Anthony Muteti at Sultan Hamud Police station to the effect that the plaintiff had defiled the 2nd defendant and alternatively touched her private parts and that the plaintiff was arrested and detained and later arraigned before Makindu Law Courts vide Makindu PMC Cr No. 289 of 2009; that the plaintiff was later dismissed from his teaching position by the 3rd defendant. It was pleaded that the plaintiff was unlawfully prosecuted from the year 2009 to 2014 when the high court found him innocent of the defilement charge and the conviction was quashed and that the 30 years sentence of the lower court was set aside. It was pleaded that the report to the police, dismissal of the plaintiff, the arrest and detention of the plaintiff and his arraignment in court was actuated by malice of the defendants respectively as pleaded in paragraph 11 of the plaint and as a result the plaintiff incurred costs of Kshs 196,000/- as legal fees.

3. The 3rd defendants in their amended defence admitted dismissing the plaintiff but however maintained that it was based on reports of immoral conduct on the part of the plaintiff as particularized in paragraph 6 of the defence. The 3rd defendant denied malice and pleaded that they acted procedurally in dismissing the plaintiff and that none of the prayers in the amended plaint were attributed to the acts of the 3rd defendant. The court was urged to dismiss the suit.

4. There is no defence to the amended plaint. However, the 1st and 2nd defendants in their joint defence denied malice. They pleaded that they acted within the law as particularized in paragraph 7 of their joint defence by reporting the matter. It was averred that the legal process was beyond the 1st and 2nd defendants. The 4th defendant in their defence denied malice and averred that the criminal case was done after proper investigations and that the same was executed in pursuance of statutory duty as particularized in paragraph 8 of the defence by receiving a report, arresting a suspect, detention of a suspect for further investigations and arraigning the suspect in court. The 4th defendant urged the court to dismiss the suit against them with costs.

5. After the preliminary objection dated 24.3.2017 by the 3rd defendant was dismissed, the matter was set down for hearing of the main suit. The evidence in the trial court was as follows. Pw1 was the plaintiff who sought to rely on his statement dated 24.6.2015. He told the court that in 2009 he was falsely accused of defilement by the 1st and 2nd defendants and that he was later arrested, charged and sentenced by the trial court but however his appeal to the high court was successful in that he was set free. He testified that he did not defile the 2nd defendant. On cross examination, he testified that the 1st and 2nd defendants are not investigators. He testified on further cross examination that the 3rd

defendant did not lodge the complaint with the police and that the police do their work independently. The plaintiff closed his case and the defendants were given an opportunity to present their case.

6. **Dw1** was **ZM** who sought to rely on her witness statement dated 15.2.2017. She told the court that the plaintiff defiled her when she was aged 13 years in 2009. On cross examination, she admitted that the plaintiff was acquitted but did not know the reasons behind his acquittal. She admitted reporting the criminal matter to Sultan Hamud Police station and that Pc Muteti received the complaint.

7. **Dw2** was **Beatrice Nthambi Muya** who sought to rely on her witness statement dated 15.2.2017 and testified that a doctor testified in the lower court and admitted that there was defilement. On cross examination, she testified that she did not witness the incident but however reiterated that the plaintiff had committed the act.

8. **Dw3** was **PN**, an employee of the 3rd defendant who sought to rely on her statement dated 30.4.2018. She testified that the 3rd defendant was not involved in the prosecution of the plaintiff. On cross examination, she admitted that disciplinary proceedings were conducted against the plaintiff who faced complaints and that she was not aware that the decision dismissing the plaintiff was appealed against. She testified that the police do investigations and not the TSC. The defence closed their case.

9. The suit was canvassed vide submissions. Learned counsel for the plaintiff cited the case of **Stephen Gachau Githaiga & Another v The Attorney General** that listed the essential ingredients of malicious prosecution. Counsel submitted that the complaint was instituted by the 1st and 2nd defendants and that the plaintiff was charged as evidenced by the trial in Criminal Case 283 of 2009; that the prosecution was instituted without reasonable and probable cause as evidenced by the evidence that was given in trial which evidence counsel referred to as dubious. It was submitted that the plaintiff was acquitted of the charges on appeal. Counsel submitted that the plaintiff was maliciously prosecuted for 6 years and that he lost his employment hence was justified in his claim for damages. Reliance was placed on the case of **Joseph Wamoto Karani v C. Dorman Ltd & Another (2018) eKLR**.

10. Vide submissions filed on 27.2.2020, counsel for the 4th defendant submitted that the police officers arrested and instituted the prosecution of the plaintiff after a complaint was lodged against him. It was submitted that his prosecution thereto was not actuated by malice. Reliance was placed on the case of **Philip Odari v A.G & 2 Others (2015) eKLR**. It was reiterated that the police were performing their statutory duties and that the fact that the plaintiff was acquitted on appeal did not connote malice on the part of the prosecution. Reliance was placed on the case of **Nzoia Sugar Co Ltd v Fungututi (1988) KLR 399**. The court was urged to dismiss the suit.

11. Submitting on behalf of the 3rd defendant, counsel emphasized that it was not he 3rd defendant who arrested the plaintiff and neither was the plaintiff detained at the 3rd defendant's facility. It was submitted that the 3rd defendant dismissed the plaintiff from teaching service and did not cause the prosecution of the plaintiff. Counsel submitted that the 3rd defendant is a regulatory body and did not report the matter to the police or to the court hence ought to be given a clean bill of health. Learned counsel while appreciating the case of **Eunice Wayua Munyao v Mutilu Beatrice & 3 Others (2017) eKLR** posited that there was no evidence to connect the 3rd defendant with the arrest, detention and prosecution that was complained by the plaintiff. The court was urged to dismiss the suit with costs to the 3rd defendant.

12. In submissions filed on behalf of the 1st and 2nd defendants, it was submitted that the 1st and 2nd defendants indeed made a report to the police that the 2nd defendant had been defiled and that the police and DPP decided to prefer charges. It was submitted that the fact that the plaintiff was acquitted did not render the prosecution malicious. Further that ill will was not proven on the part of the 1st and 2nd defendants hence the plaintiff's claim was not proven. It was submitted that special damages were not proven and the court was urged to dismiss the suit with costs.

13. Having considered the evidence on record, the issue for determination is whether the tort of malicious prosecution as well as unlawful detention and arrest has been proven to the required standard. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of the judicial authorities whose responsibility is to administer criminal justice.

14. According to **Odunga's Digest on Civil Case Law and Procedure** page 5276, the essential ingredients to prove malicious prosecution are as follows:

- a) The criminal proceedings must have been instituted by the defendant.*
- b) The defendant must have acted without reasonable or probable cause.*
- c) The defendant must have acted maliciously.*
- d) The criminal proceedings must have been terminated in the plaintiff's favor.*

15. In this case, there is no doubt that the 1st and 2nd defendants reported the plaintiff and criminal proceedings against the plaintiff were instituted against the plaintiff that were terminated in the Plaintiff's favor hence proving two of the 4 essential ingredients of malicious prosecution.

16. I point out that prosecution is part of a process that if instituted in accordance with section 24 of the National Police Service Act, is considered legal. In the case of **Robert Okeri Ombeka v Central Bank of Kenya (2015) eKLR** it was observed that "Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits" hence there must be proof that the prosecution was instituted without reasonable and probable cause.

17. The plaintiff was charged of defilement before Makindu Principal Magistrates Court vide **Criminal Case No. 283 of 2009**. Has it been proved that the defendants' acted with reasonable and probable cause? Reasonable and probable cause has been defined in the case of **Glinsk v Mclver [1962] AC 726** where Lord Devlin held that;

“reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction...”

18. The learned trial magistrate convicted the plaintiff and on appeal, the High Court noted that there were loopholes in the evidence of the prosecution. The learned judge quashed the conviction and set aside the sentence meted on the plaintiff.

19. I find that that the plaintiff failed to present evidence to show that the police investigations and available evidence was too shallow to make a right thinking person like a police officer to think that the plaintiff was not guilty. From the available evidence, the charges were premised on a report that was made by the 1st and 2nd defendants to the police and there was nothing presented from which it can be implied that the prosecution was malicious. Upon the report being lodged with the police, investigations were commenced and prima facie the police established that a crime had been committed and thus proceeded to arraign the plaintiff in court. During the trial it might have transpired that witnesses contradicted each other thereby creating loopholes which led to the acquittal of the plaintiff on appeal. That in itself did not indicate that the prosecution was malicious.

20. With regard to *False Imprisonment*, the constitution Article 49(1)(f) provides that a person arrested shall be brought to a court of law within 24 hours. The detention of the plaintiff beyond the 24 hours if proved would indeed be a violation of his constitutional fundamental rights which would entitle him to general damages.

21. In the Ugandan case of **Mugwanya Patrick vs Attorney General High Court Civil Suit No. 154 of 2009 Justice Stephen Musota** (as he then was) stated that;

“The civil tort of false imprisonment consists of unlawful detention of the plaintiff for any length of time whereby he is deprived of his personal liberty. It must be total restraint...where an arrest is made on a valid warrant it is not false imprisonment; but where the warrant or imprisonment is proved to have been effected in bad faith then it is false imprisonment.”

22. There is no evidence before me as to when the plaintiff was arrested and detained at the police station. There is no indication of how long the plaintiff was detained so as to establish that the plaintiff was detained beyond the constitutional period of 24 hours hence unlawfully and wrongfully detained. In the absence of proof of false imprisonment then the claim for damages in that regard must fail.

23. I also see nothing that convinces me that the defendants acted without reasonable or probable cause in what resulted in the decision to institute criminal proceedings against the plaintiff. The 1st defendant was then a pupil in a school where the plaintiff was the head teacher and upon being defiled informed the 2nd defendant who is her mother and both thereafter went to report at the police station and then the victim was taken to hospital for medical check- up. Under those circumstances, iam satisfied that there was probable cause which prompted the 1st and 2nd defendants to report the matter to the police.

24. I shall address the element of malice. In **Gwagilo v Attorney General [2002] 2 EA 381 (CAT)**, malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the appellants could prove malice by showing for instance that the prosecution did not honestly believe in the case which they were making that there was no evidence at all upon which a reasonable tribunal could convict that the prosecution was mounted on a wrong motive and show that motive. Relating that to the present circumstances, it turns out that the 1st and 2nd defendants reported the plaintiff and the police then decided to institute criminal proceedings and detain the plaintiff. Therefore in this case the 1st and 2nd defendants could not have been said to have been actuated by malice for any cautious and prudent person would have come to the same decision as that made by the police. There is no indication of the role that the 3rd defendants played in the entire prosecution process.

25. Basing on all the above, the plaintiff has not fulfilled the essential ingredients to prove malicious prosecution being malice and reasonable and probable cause. The suit therefore fails for want of proof and is dismissed. The defendants shall have the costs of the suit.

26. Even though the suit failed, the court is obligated to assess damages that it would have awarded had the matter succeeded. The plaintiff pleaded for special damages, general damages and costs of the suit. The law relating to special damages is settled. In **Bonham Carter v. Hyde Park Hotel Ltd (1948) 64 TL P 177** the guiding principle is that special damages must be specifically pleaded and strictly proved. See also **Hassan v Hunt [1964] EA 201**

27. The plaintiff in the plaint pleaded special damages to a tune of Kshs 196,000/- being expenses paid to the advocate. The receipts were not tendered in court and therefore the special damages were not proved.

28. With regard to general damages, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. In **Joseph Wamoto Karani v C. Dorman Limited & another [2018] eKLR Kshs 2,000,000/-** was awarded as a global sum for malicious prosecution. Had the plaintiff's suit succeeded, I would have awarded the said sum of Kshs 2,000,000/ as general damages for malicious prosecution.

29. The upshot is that the plaintiff's suit is dismissed with costs to the defendants.

It is so ordered.

Dated and delivered at Machakos this 4th day of November,2020.

D. K. Kemei

Judge