



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 55 OF 2014

ANDREW MONINGETI MWANGURA.....PLAINTIFF

-VERSUS-

HON. ATTORNEY GENERAL

(Sued in a Representative capacity for and on behalf

of the Government of Kenya Office of the

President, Ministry of Internal Security and

Provincial Administration, Department of Police).....DEFENDANT

JUDGMENT

1. By a **Plaint** dated **17th May, 2010** filed in the High Court Civil Division and subsequently **amended** on **26th June, 2015**, **Andrew Moningeti Mwangura**, who is the Plaintiff herein, sought Judgment against the Hon. Attorney General seeking reliefs for, General damages for wrongful arrest, detention and malicious prosecution, aggravated and exemplary damages in defamation, special damages of **Kshs.150,000/=**, cost of the suit and interest at court rates from the **year 2008**.

2. The Plaintiff pleaded that on or about **1st October, 2008** the Criminal Investigations Department's (C.I.D's) officers from **Urban Police Divisions and C.I.D Headquarters, Mombasa** without reasonable cause of action or justification arrested the Plaintiff without a Warrant of Arrest, detained and arraigned him in court whereby they charged him with the offences of "**Alarming publications contrary to Section 66(1) as read with Section 36 of the Penal Code, Cap 63 (count 1) and Being found in possession of Narcotic Drugs contrary to Section 3(1) as read with Sub-section 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act**". This was vide **Mombasa Criminal Case Number 2979 of 2008**".

3. He avers that as a result of the said charges, his reputation was damaged in the eyes of the family members, friends and right thinking members of the society, a result of which he has suffered loss and has been shunned by the people resulting to much embarrassments.

4. The Plaintiff avers that on the **22nd May, 2009**, the prosecution withdrew/terminated the charges against him under **Section 87(a) of the Criminal Procedure Code, Cap 75 laws of Kenya**. Consequently, he was acquitted of all charges against him. He contends that the said charges against him were baseless, malicious and without any reasonable cause. He has set out the particulars of malice/absence of reasonable and probable cause at paragraphs 6 and 7 of the amended Plaintiff. He has also set out the particulars of injuries and of defamation as well as for special damages at paragraph 7A of the amended Plaintiff.

5. The Defendant filed a statement of defence to the **amended Plaintiff** on **21st March, 2016** in which it has denied the Plaintiff's claim. In particular, the Defendant contended that it intended to raise a **Preliminary Objection** to the effect that the Plaintiff's claim as pleaded under **paragraph 7A of the amended Plaintiff** is time barred. The Defendant avers that no criminal proceedings were whatsoever instituted against the Plaintiff, and that in the alternative and without prejudice, the Defendant avers that if the Plaintiff was arrested, charged and prosecuted as alleged, which is denied, the same was done pursuant to a reasonable and probable cause in execution of a statutory duty, after a complaint was lodged, investigations conducted and a probable and reasonable cause to prefer criminal charges punishable in law was established.

6. With regard to the allegations of defamation as pleaded by Plaintiff, the said words were never spoken, written or in any manner disseminated by the Defendant and or its agents. The Defendant also avers that the information published was in public domain and not consequence of the Defendant's actions

7. However, the Defendant asserts that the Plaintiff was acquitted before any evidence was adduced and no prejudice was whatsoever caused.

The Defendant has prayed for the dismissal of the suit with costs.

8. When the matter came up for hearing, only the Plaintiff and his witnesses testified. The Plaintiff who testified on **13th November, 2018** as **PW1** opted to adopt his statement dated **10th February, 2012** and filed on **1st November, 2012** as evidence in chief. The said statement reiterates the contents of the Plaint. However, he told the court that he was as at that time a seafarer, a freelancer writer with the International Maritime Journals and an independent consultant on maritime safety and security.

9. He testified that he was detained on **1st October, 2008** and remanded until **9th October, 2008** thereby denied the right to speech, movement and movement.

10. His case is that after the prosecution, he stopped working as a seafarer and worked for a welfare office of a Trade Union as a Member of the Seafarers Assistance Program. He said that he also served as an Apostle Ship of the Sea for the Catholic Church and has as a result thereof travelled to 47 countries all over the world. Copies of visas were produced with the last one in the bundle showing the date of **26th July, 2016**.

11. **PW 1**, further told the court that the Police Officers who arrested him had no Warrants of Arrests and even arrested him in a public place at the KTN Offices where he was waiting to attend a Telecommunication Conference in Somalia. He went on to state that even after the arrest, he has never felt safe. He has not been able to travel as he used to and yet his life highly was dependant on travelling, public speaking and advising families.

12. **PW1** also avers that his visa to America dated **26th July, 2016** was cancelled and the speech he intended to deliver was as well cancelled. Similarly, his relationship with KTN was discontinued vide an **email** dated **15th February, 2009** and it is difficult to win back his reputation.

13. On cross examination, **PW1** conceded that the reports which caused defamation were not published by the prosecution but stated that they were caused by him being prosecuted. He also reiterated that everyone turned to avoid him including Landlords. When re-examined, he asserted that even if the reports were not published by the Attorney General, he is an advisor of the Government and hence responsible.

14. **Thomas Lewanga Mwaingia** testified as **PW2**. He also adopted his statement filed on **26th July, 2016** as his evidence in chief. He told the court that he knew the Plaintiff as a re-known activist in the Seafarer's Association. He also stated that he officially met him in the **year 1997** when his brother (PW 2's brother) had been stabbed to death while aboard a ship known as "**Bahari Kubwa**". He claims that the Plaintiff helped him in following up on his brother's predicament and even filing a claim in court. Further, he said that the Plaintiff introduced him to a Catholic Father who happens to be the National Director Apostleship to the Sea Men in the Arch-diocese of Mombasa.

15. According to **PW2**, he later heard over the news that the Plaintiff had been arrested in an armed shipment and had also been forced to be possession of bhang. **PW2** averred that although he knew **PW1** as a good man, he had lost much trust in him. He also averred that although **PW1** was appointed to hold the Office of Seafarers Union, he had lost hold of the office after a short time since the Union had lost faith in him.

16. When cross-examined, he stated that the Plaintiff was working as a Sea Farers Programmer and had assisted many people. However, he denied having any personal relationship or friendship with **PW1** and did not even know his personal life. On re-examination, **PW2** told the court that he only Knew the Plaintiff after the death of his brother and not before. Further, he confirmed that the Plaintiff had suffered a lot after his arrest.

17. **PW3, Joseph Ayoro Obondo**, testified that he knew the Plaintiff as a fellow Sea Farer having met him in the **year 1993**. Further that the Plaintiff was a Sea Farer Activist and used to help them in publishing articles and letters even to Government agencies. He averred that he heard of Plaintiffs arrest over the radio and later by friends who had seen it on Television. He reiterated that the Sea-Farers Associations had lost faith in the Plaintiff owing to his arrest.

18. The Defence did not call any witness and thereafter parties were directed to file their closing written submissions in closing their respective cases. The records confirm that both parties obliged with the Plaintiff filing his submissions on **13TH March, 2020** while Defendant filed its on **28th September, 2020**.

Analysis and Determination

19. I have carefully gone through the records in this case, the evidence that was adduced before court in line with their submissions, the law and cited cases. The main cause of action herein is that of malicious prosecution. The law on this tort is well settled in the case of **Sammy Kiprotich Tangus...Vs...Attorney General [2015]eKLR**, where the Judge referred to the case of **Muringa...Vs..The Attorney General [1979] KLR**. In those cases, it was stated that the essential elements of malicious prosecution are 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) The prosecution ended in favour of the Plaintiff.

c) The prosecution was instituted without reasonable and probable cause.

d) The prosecution was actuated by malice.

20. On the first ingredient, it is clear that the prosecution was instituted by the State and thus the Defendant being the Chief Government Advisor on legal matters is sued as the Defendant.

21. The second element of a tort demands evidence that the prosecution was terminated in the Plaintiff's favour. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the Plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal or a stay. Here the Plaintiff was acquitted.

22. On the third ingredient, what constitutes a reasonable and probable cause was defined in the case of **Simba...Vs...Wambati (1987) - KLR 601** as;

“The plaintiff must prove that the setting of the law in motion by the Inspector was without reasonable and probable cause ... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.”

23. The case of **Samson John Nderitu...Vs...The Attorney General [2010] Eklr**, is also relevant on the issue at hand thus;

“It is trite and this court has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose function fall under the office the defendant, usually carry out investigations, record statements from potential witnesses and analyzed the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

24. In the case at hand, the Police arrested and arraigned the Plaintiff in Court. He was acquitted of all the charges that were preferred against him on account that the Attorney General entered a *Nolle Prosequi*.

25. The Plaintiff laments that he was arrested without a warrant and with no probable cause. The prosecution on the other hand, argued that the offences involved touch on public security and although misdemeanors, it warranted a situation where police can arrest without warrant.

26. **DW1, Sergeant Charles Kamau** testified that he received a call on **1st October, 2008** at around 4.30pm. That he was summoned by **DCIO, Urban** and instructed with other (four) 4 officers to ambush KTN offices at Mombasa and arrest one **Andrew Mwangura** who was in the offices. That they waited until 10.00pm when **Andrew** left KTN offices accompanied by his advocate and other human rights activists. They informed **Andrew** of their intention to arrest him and he agreed to go with them to **Central Police Station**. He reiterated that he was only acting on instructions given to him.

27. When cross-examined he stated that he was aware that the Plaintiff was in possession of narcotic drugs but did not have time to conduct a search on the accused. No other witness was ever called even after the prosecution being granted numerous opportunities to canvass its case. However, on **22nd May, 2009** the prosecutor applied to enter a *Nolle Prosequi* in the case against the accused, who is the Plaintiff herein.

28. The Counsel for the Plaintiff avers that there was no reasonable and probable cause based on the chronology of the criminal proceedings, bearing in mind that the Plaintiff was acquitted. On the other hand, it is argued by the Respondent that the police were exercising their duty and added that the Appellant was never acquitted but only discharged as the proceedings were terminated by a *nolle prosequi*.

29. Was there reasonable and probable cause? According to **Halsbury's Laws of England, 4th Edition - Reissue, Vol. 45 (2)**.

“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime ...”

30. I also note that at the opening statement, the prosecution informed the trial court that the Plaintiff was arrested for making press conferences and issuing statements concerning hijacked things named **Motor Vessels Faina** which statements were causing tension and threat to the State security. The issue is not whether there was sufficient evidence at the trial but whether at the time of the arrest, there was reasonable and probable cause. It is not denied that the **Motor Vessel Faina** had been hijacked. The Plaintiff did not also deny having made any press conference with regard to the hijacked **Motir Vessel Faina**. In this case, I find and hold that there was existence of a state of circumstances which, assuming they were to be true, would reasonably lead to the conclusion that the Plaintiff herein as charged was probably guilty of the crime. I therefore hold that there was reasonable and probable cause established to charge and prosecute the Plaintiff with respect to the first count.

31. On the second Count, **DW1** told the court on cross examination that he was aware that the accused was in possession of the narcotic drugs but he never searched him to establish that the Plaintiff was indeed in possession of the drugs. There is no evidence on record to show the reason for charging and or prosecuting the Plaintiff with the offence of being in possession of any drugs since there was no evidence that he was found in possession any drug. The officer who arrested him told the court that he never searched the Plaintiff. I am of the view that the officer who charged the Plaintiff on the second Count based the same on fabrication.

32. With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. Actual spite or ill will must be proved. In the case of **Nzoia Sugar Company Ltd...Vs...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 appellant but there must be evidence of spite in one of its servants that can be attributed to the company”.

33. Malice may be implied from the lack of a reasonable and probable cause. 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. Having established that there was no reasonable and probable cause established to charge and prosecute the Plaintiff with respect to the second count, I am inclined to imply that the same was actuated with malice and the tort of malicious prosecution against the Defendant proved.

Whether the Plaintiff suffered any loss and damage as a result of being maliciously prosecuted to the extend indicated above

34. The Plaintiff testified that he was confronted by Police Officers at the police station who threatened him, and confined in conditions that deprived him the rights to liberty, freedom and worship. He averred that he incurred expenses in defending himself in the criminal case. He also claimed for damages for defamation of character following the publication of the charges against him in the Newspaper and on Press.

35. Concerning the claim for damages for defamation of character, I must from the onset make it clear that the three elements of tort of defamation must be present, to wit, **(a) the words must be defamatory** in that they must tend to lower the Plaintiffs reputation in the estimation of right minded persons in the society or they must tend to cause the Plaintiff to be shunned or avoided by other persons. **(b) The statement must refer to the Plaintiff.** **(c) The statement must be published by the Defendant** **(d) the statement must be false.** Put in other words, a Plaintiff in a defamation case must prove that the words were spoken or written by the Defendant, that those words refer to him/her, that those words are false. That the words are defamatory or libelous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result.

36. In this case, the articles and gazette publications produced as exhibits in this case were published by a third party other than the Defendant herein. I am also of the view that reporting the existence of a criminal charge against the Plaintiff, which was in any event, was the truth, was in my humble view, not defamatory or at all. However, as was held in the case of **Dr. Willy Kabenuka...Vs... Attorney General Kampala HCC No.160 of 1998**, 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 probably suffer as a result of the wrong done to him for which the Defendant is responsible.

37. In the instant case, I find that the Plaintiff who was a Sea-farer and a qualified maritime engineer was falsely imprisoned and maliciously prosecuted. The Plaintiff submitted that the court should award him damages of **Kshs.25,000,000/=**.

38. On the basis of the authority of **Daniel Waweru & 17 Others...Vs... Attorney General [2015] eKLR**, where the Plaintiffs were taken to Mukurweini Police station where they were placed in an overcrowded police cell littered with urine and human waste and poorly ventilated and detained for one night, they were forced to sit on the floor, the court awarded them **Kshs.100,000/=** each as general damages for false imprisonment.

39. In awarding the damages cognizance is taken of the established principles and as reiterated in the case of **Daniel Waweru Njoroge & 17 Others... Vs... Attorney General [2015] eKLR** that:

a) Damages should not be inordinately too high or too low.

b) Should be commensurate to the injury suffered.

c) Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.

d) Awards in past decisions are mere guides and each case depends on its own facts.

40. Applying the above principles to this case, I find an award of a sum of **Kshs.200,000/=** as general damages and **Kshs.400,000/=** as exemplary damages reasonable for the reasons stated by **DW1**, that he arrested the Plaintiff not because he found him with any drugs as described in the charge but because he was instructed to do so.

41. On the claim that the Plaintiff has suffered a lot and lost his job as a result of the prosecution, I find that in the absence of any evidence that it was due to the tainted image created by the criminal charges, the Plaintiff has not proved any such claim. Further, there was no evidence that the Plaintiff lost prospects of getting any other alternative employment or could not be considered for any other position owing to the criminal case. Accordingly, I find that the claims for general damages related to career related defamation are not proved and decline to grant the same.

42. With Regard to special damages, the Plaintiff claimed for **Kshs.150,000/=** as legal fees for defending the criminal proceedings. The law on special damages is that it must be specifically pleaded and strictly proved. In the instant case, although the Plaintiff pleaded for **Kshs.150,000/=** and produced photocopy receipts allegedly prepared by the **Firm of Omwitsa Wasuna Kadima Advocates**, there was no evidence from an advocate or witness from the said Law Firm who testified to the effect that they received such amount as legal fees from the Plaintiff. It has also not been explained why the original receipts were not produced in court. Accordingly, I disallow the prayer for special damages for want of proof.

43. Accordingly, Judgment be and is hereby entered for the Plaintiff on liability against the Defendant, the Attorney General, I proceed to award the Plaintiff as follows:-

a) Kshs.200,000/=General damages for false imprisonment and malicious prosecution

b) Kshs.400,000/= Exemplary damages for false imprisonment

c) All other damages claimed are dismissed for want of proof.

d) Costs of the suit and interest to be calculated at court rates from the date of this Judgment until payment in full.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 9th day of DECEMBER , 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.