



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 19 OF 2009

MARY JOHN KIGETO.....PLAINTIFF

-VERSUS-

NEW KENYA CO-OPERATIVE

CREMARIES LIMITED.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL....2ND DEFENDANT

JUDGEMENT

1) Mary John Kigeto, the plaintiff herein filed this suit against New Kenya Cooperative Creameries Ltd and the Hon. Attorney General, the 1st and 2nd defendants respectively vide the plaint dated 15th January 2009. In the aforesaid plaint the plaintiff sought for judgment as follows:

- a) A declaration that the plaintiff's removal from employment was unlawful, null and void;*
- b) A finding that the police arrests and prosecution made against the plaintiff was illegal, unprocedural and malicious;*
- c) Punitive and general damages for illegal confinement, incarceration, malicious prosecution, injury to reputation and false imprisonment;*
- d) Costs of this suit.*
- e) Any other relief the court deems fit to grant.*

2) The defendants each filed a defence to deny the plaintiff's claim,

3) When this suit came up for hearing, Mary John Kigeto (PW1) was the only witness who testified in support of her case. The 1st defendant summoned Michael Makopi (DW1) to testify in support of its defense while the 2nd defendant closed his case without summoning any witness to testify in support of its case.

4) It is the evidence of Mary John Kigeto (PW1) that she was employed by the 1st defendant in 1990 in the Cheese Factory, Dandora and Kitale factories. PW1 also said that she was posted to work as a Senior Production Supervisor at Sotik factory and later at Kiganjo factory and Kangema plant in the same capacity. PW1 further stated that between 1992 and 2003, he worked in the 1st defendant's Nanyuki Plant as a Senior Production Supervisor and temporary Plant Manager. She stated that in 1998 she was promoted to the position of Plant Manager and that by the year 2003 she doubled as the Plant Manager as well as Sales Manager.

5) The plaintiff further stated that in February 2004, she secured employment with the New Kenya Cooperative Creameries Ltd as a Sales Manager in the Sales Distribution Department at Nanyuki sales Depot and was confirmed to the position on 18.8.2004.

6) PW1 stated that sometimes in the month of September 2006 while she was on maternity leave she received a suspension letter dated 15.9.2006 from the 1st defendant informing her that she had been suspended as a result of audit findings which revealed that the employer had lost ksh.1,641,553/=. It is her submission that the audit was maliciously conducted while she was on maternity leave.

7) PW1 said she responded to the letter of suspension by explaining the sequence of events which took place during that period of the alleged malpractice. On 22.11.2006 PW1 said she received a letter of dismissal from the 1st defendant. PW1 said that the letter of dismissal was

followed by a notice dated 23.11.2006 issued to her to vacate her employer's house.

8) The plaintiff further stated that she was prompted to file Nyeri C.M.C.C no. 893 of 2006 in which she claimed for *inter alia* damages for wrongful dismissal.

9) PW1 further stated that on 16.12.2006 she was arrested by the police on instructions of the 1st defendant in her house and was taken to police custody with her new born baby. She is of the opinion that her arrest was without any probable or reasonable cause. She claimed that an incompetent charge was preferred against her accusing her of using her office improperly to confer a benefit of ksh.1,411,396/= yet the 1st defendant knew she was not a public officer hence the charge was not sustainable. She said she was arraigned before the Nyeri Chief Magistrate's Court vide Nyeri C.M.C.C. no. 5686 of 2006.

10) After attending several mentions which lasted for two years the plaintiff stated that the case was concluded in her favour and she was on 28.1.2008 acquitted under Section 210 of the Criminal Procedure Code.

11) PW1 pointed out that the alleged audit report was prepared by a new employee who had no qualifications of an auditor and which report formed the basis of her suspension and subsequent dismissal for the alleged loss of kshs.1,641,553/=.

12) The plaintiff accused the 1st defendant for failing to hire an external auditor to verify the contents and allegations contained in the report of the 1st defendant before taking the draconian action against her.

13) The plaintiff stated that the alleged audit report covered dates during which she was on leave and therefore she could not be held responsible for the malpractices which may have taken place.

14) PW1 produced the proceedings and the ruling in Nyeri C.M.C.C no. 5686 of 2006 as an exhibit in evidence. The plaintiff pointed out that stated during her prosecution that all the transactions were conducted in cheques as well as cash exchange from the customers to the company to the bank therefore she could not in any way deduct, pocket and or misuse any money from purchases or sales of the company products.

15) She also stated that it was confirmed that she was not in direct transaction of cash exchange from the customers to the company or to the bank but the cashier and the customers would do so.

16) It was also stated that money was banked directly by the customers to the company's collective accounts/ bank accounts.

17) PW1 was further emphatic that the prosecution failed to show how she improperly used a public office to confer on herself or to any one else what benefit under Section 46 of the Anti-corruption and Economic Crimes Act, 2003.

18) The plaintiff alleged that the defendants conspired and colluded to maliciously prefer trumped up charges against her to smoke her out of office and to silence her. She alleged that the defendants hurriedly had her charged when she filed a civil claim for unlawful termination.

19) The plaintiff in her testimony gave the particulars of malice on the part of the defendants to prosecute her. **First**, it is said that the criminal case was instituted to specifically harass and intimidate her to abandon Nyeri C.M.C.C no. 893 of 2006 in which she sued for damages for wrongful dismissal. **Secondly**, that the police preferred a charge against her on the basis of a complaint lodged by the 1st defendant without carry out any investigation. **Thirdly**, that the defendants preferred charges under the Anti-corruption and Economic Crimes Act, 2003 while they were aware that she was not a public officer during and after termination of her services. **Fourthly**, that the 1st defendant's case was found to be bogus and that its witnesses were all dismissed by the court trying the criminal case for lacking credibility.

20) The plaintiff further pointed out the exhibits tendered were found to be improper and the makers of the same were never produced in court making it that look like that the evidence had been maliciously put together so that the plaintiff could be arrested and charged.

21) PW1 said she holds the 2nd defendant vicariously liable for omission and commissions of the prisons and police department which bore direct responsibility and malicious prosecution and in conjunction with the 1st defendant.

22) PW1 stated that as a result of the false imprisonment and prosecution she suffered psychological torture, shock, humiliation and embarrassment. She also said that she was put to great expense defending herself.

23) The 1st defendant summoned Michael K. Mokopi (DW1) to testify in support of its defence. DW1 told this court that he is the Industrial Relations Manager of the 1st defendant and that his evidence are facts within his knowledge and information derived from an examination of documents of the 1st defendant.

24) He confirmed that the plaintiff was the 1st defendant's employee with effect from 1st February 2004 and worked as a Sales Manager in the Sales and Distribution Department, Nanyuki. DW1 stated that one of the plaintiff's duties included ensuring that all products sold were properly accounted for and document movement of stock.

25) It is the evidence of DW1 that the 1st defendant conduct a routine audit in the year 2006 and it was discovered that certain traders who

were not registered with the 1st defendant were enjoying trade prices while they ought to have been receiving products at retail prices.

26) DW1 further stated that the audit report dated 6th September 2006 discovered that there were irregular accounting where traders would buy products at retail prices however accounting would later be done at trade prices and that this made the 1st defendant incur a loss of ksh.1,641,553/=.

27) DW1 stated that following the audit report the plaintiff was suspended from work and eventually dismissed after following due process and fully paid her terminal dues.

28) DW1 further averred that the matter was reported to the police for further investigations and the police decided to charge the plaintiff with the offence of abuse of office under the provisions of the Anti-corruption and Economic Crimes Act.

29) DW1 also averred that the decision to report was based on the discoveries uncovered by the internal audit therefore there was no malice in prosecuting the plaintiff.

30) At the close of evidence, learned counsels were invited to file and exchange written submissions which they did. Having considered the evidence and the rival submissions, two issues commend themselves for determination. First, is whether or not the plaintiff was maliciously prosecuted. Secondly, if the answer to the first issue is yes then this court should determine the question whether or not the plaintiff is entitled to damages and how much.

31) On the first issue, it is the submission of the plaintiff that the 1st and 2nd defendants were actuated by malice in preferring the charges against her yet they knew there was no probable nor reasonable case to prove the charge. The plaintiff enumerated the particulars of malice to include *inter alia* first the failure by the 1st defendant to hire an independent auditor to verify the internal audit report. Secondly, that the 2nd defendant hurriedly arrested and preferred charges against the plaintiff without investigating the complaint. Thirdly, that the plaintiff was charged with an offence in her capacity as a public officer yet she was not a public officer.

32) The defendants on the other hand are of the submission that there was a genuine complaint which arose from the 1st defendant's audit report which gave rise to the criminal case preferred against the plaintiff. The defendants further averred that they were not actuated by malice in having the plaintiff arrested and prosecuted.

33) In the case of **Murunga vs the Attorney General(1979) KLR 138** the court restated the essential ingredients of malicious prosecution as follows:

a) A prosecution instituted by the defendant or by someone for whose acts he is responsible.

b) Termination of the prosecution in the plaintiff's favour.

c) The prosecution is instituted without reasonable or probable cause.

d) The prosecution is actuated by malice.

34) It is clear from the evidence tendered that the plaintiff was prosecuted by the 2nd defendant on the basis of a complaint lodged by the 1st defendant.

35) It is also clear from the ruling Hon. L. W. Gitari, learned Senior Principal Magistrate delivered on 28.1.2008 vide Nyeri C.M.C.C. no. 5686 of 2006 that the case was terminated in favour of the plaintiff. The question is whether the prosecution was instituted without a reasonable or probable cause and whether the same was actuated by malice.

36) It is not in dispute that the plaintiff was arrested and prosecuted on the basis of an internal audit report which was prepared by a person who admitted not be a qualified auditor. It is also noted in the criminal proceedings that the prosecution relied on an audit report which was not produced as an exhibit. What appears to have been produced was a letter. The proceedings conducted before the plaintiff's criminal trial indicated that there were several people who approved the lists of traders registered by the 1st defendant. The plaintiff was the only employee who was targeted leaving out the others.

37) The other aspect which is glaring is the charge which was preferred against the plaintiff. The plaintiff was charged with offence of using her office to improperly confer a benefit of ksh.1,411,396/=. The trial court noted that the prosecution witnesses never adduced evidence to show how the accused(plaintiff) used her office to confer a benefit on herself or to any other person.

38) It is apparent from the evidence tendered before this court and before the court which tried the plaintiff that the 1st defendant had no probable and reasonable case against the plaintiff. The 2nd defendant proceeded to prosecute the plaintiff yet there was no evidence that the case was investigated. Had the 2nd defendant seriously investigated the complaint, it would come out clearly that there was no genuine case which would have been preferred against the plaintiff.

39) The other issue which came out as a glaring gap is the fact that the 'audit report' covered dates when the plaintiff was not in office as she was away on maternity leave.

40) Having considered the above evidence, it is clear to me that the element of malice can be inferred on the part of both defendants. Consequently, I find that the 1st and 2nd defendants maliciously prosecuted the plaintiff.

41) The second issue is whether the plaintiff is entitled to claim damages and if yes how much. Having come to the conclusion that the defendants maliciously prosecuted the plaintiff, I am satisfied that the plaintiff is entitled to claim damages. The plaintiff was able to show that she suffered psychological torture, humiliation, shock and embarrassment. The plaintiff has asked this court to award her a sum of kshs.10 million. She cited the following cases:

- i. **Joseph Mumo =vs= AG & Another (2008) eK.L.R** where this court made an award of 300,000/= in 2008.
- ii. **Jacob Juma & Another =vs= Commissioner of Police & the Ag (2007) eK.L.R** in which this court awarded a sum of kshs.4 million in the year 2013.
- iii. **Michael Maina =vs= The Ag (205) eK.L.R** where this court awarded ksh.500,000/= in the year 2005.

42) The 1st defendant on its part was of the submission that if this court is minded to award damages then it should award kshs.300,000/=.

43) The 1st defendant cited the following cases in which the court awarded ksh.300,000/= to the claimants for malicious prosecutions.

- i. **Thomas Mboya Oluoch & Another =vs= Lucy Muthoni Stephen & Another (2005) eKLR**
- ii. **Johnson Waita =vs= Odillar Mueni Ngui (2018) eKLR**

44) I have considered the proposal made by both sides together with authorities cited. It is clear from the evidence and the submissions that the plaintiff was arrested and taken to custody while breast feeding an infant. She was also kept in police custody with her baby. She was further taken to Embu Law Courts before being taken back to Nyeri Law Courts where she was eventually tried and acquitted.

45) In the unique circumstances of this case, I am convinced that a sum of ksh. 4 million is sufficient compensation as damages for illegal agreement and malicious prosecution.

46) One of the prayers the plaintiff has sought is for a declaration that her removal from employment was unlawful, null and void. The 1st defendant has urged this court to find the issue has been dealt with by the Nyeri Employment and Labour Relations court hence it should be disregarded. It was pointed out that the plaintiff had sought for a similar order in Nyeri C.M.C.C no. 893 of 2009.

47) The plaintiff did not controvert the 1st defendant's assertions. I am satisfied that the 1st defendant successfully challenged prayer 1 of the plaintiff's claim. Consequently, I decline to determine the issue since the same is either *res judicata* or *res-subjudice in view of the pendency or conclusion*.

48) The only issue which should be determined is the question of illegal confinement and malicious prosecution. In the end, judgment is entered in favour of the plaintiff and against the defendants jointly and severally as follows:

- a. **Ksh.4,000,000/= for damages for illegal confinement and malicious prosecution.**
- b. **Costs of the suit.**

Dated, signed and delivered at NAIROBI this 3rd day of May, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

.....**for the Plaintiff/Respondent**

.....**for the Defendant**