



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CONSTITUTIONAL PETITION NO 503 OF 2016

BETHWEL OMONDI OKAL.....PETITIONER

VS

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA POWER AND LIGHTING COMPANY....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

JUDGMENT

1. On the night of 1st July 2015, *Jane Atieno Obila*, wife to *Bethwel Omondi Okal*, the Petitioner, was arrested at their home in Rongo, Migori County and was arraigned before the Magistrate's Court at Rongo the following day, charged with the offence of fraudulent consumption of Electrical Energy contrary to Section 64 (i) (h) of the Energy Act in criminal case no. 220 of 2015. After a full trial, she was acquitted on 27th July, 2016, after the trial Court made a determination that the charge the accused faced was based on non-existent section of Statute.

2. Following that acquittal, the accused's husband, the Petitioner herein, filed the present petition against the *Attorney General*, the 1st Respondent, *Kenya Power and Lighting Company Limited*, the 2nd Respondent, and *The Director of Public Prosecutions*, the 3rd Respondent, claiming that his wife had been falsely arrested and maliciously prosecuted, that there was abuse of the legal process, and that the Prosecution was frivolous, malicious and lacked probable cause. The Petitioner further averred that the prosecutor was negligent of the rule of law and relied on fabricated evidence without carrying out reasonable investigations. He contended that the 2nd Respondent acted arbitrarily when its officers carried a search at night, arrested and falsely imprisoned his wife, after which they preferred frivolous, baseless and defamatory charges, causing anxiety, mental suffering, humiliation and loss of reputation and credit to the entire family.

3. The Petitioner further contended that the 2nd Respondent initiated a wrongful arrest, false imprisonment resulting to malicious prosecution in Criminal Case No. 270 of 2015. He averred that under **Article 232** of the constitution, the Respondents have a duty to act efficiently, with high degree of professionalism and impartiality. He accused the 2nd Respondent of trespass and invasion of his home in violation of his family's privacy contrary to **Article 31** of the Constitution.

4. The petitioner sought the following reliefs:

I. Compensation for damages for malicious prosecution, false imprisonment and trespass and breach of Article 28, 31, 47, 49, 50 of the constitution.

II. Compensation for damages for defamation and false night (sic) due to injured reputation or disparagement of character.

III. Apology and costs of the suit.

1st respondent's response

5. The 1st Respondent filed a replying affidavit by **Leonard Olaka**, sworn on 6th June, 2017 and filed in Court on 14th June, 2017. He deposed that on 1st July, 2015, **PC Edwin Mahera**, while on routine patrol in the company of the 2nd Respondent's enforcement officers, encountered the accused who was using electric power without permission and after investigations, they formed an honest opinion that the power consumption was illegal because there was no meter from the 2nd respondent. They arrested the accused and took her to Kamagambo Police Station from where she was charged with fraudulent consumption of electric energy; that the accused was found with a case to answer but was later acquitted on technicality. The deponent denied that the Petitioner's contention in the petition that the case against the accused was malicious and an abuse of the court process.

2nd Respondent's response

6. The 2nd Respondent also filed a replying affidavit by **Emily Kirui**, sworn on 20th June, 2017 and filed in Court on 21st June, 2017. She deposed that the petition is bad in law; that the Petitioner has no locus to file and prosecute this petition, that the Petitioner is a stranger to the petition, that the 2nd Respondent was merely carrying out its public duty by reporting a crime to the Police and that the 2nd Respondent's complaint was neither made in bad faith, nor was it malicious; and that it was up to the Police to carry out investigations and mount prosecution.

7. It was also deposed that the 2nd Respondent was erroneously enjoined in the proceedings, that neither the 1st nor the Director of Public Prosecutions nor Inspector of Police are agents of the 2nd Respondent hence their decisions were not influenced by the 2nd Respondent.

8. Miss Kirui further deposed that the Petitioner's wife was arrested for illegal power connection and was charged in Court in Criminal Case No. 270 of 2015 where the 2nd Respondent was the complainant. It was deposed that the process was lawful and that there was no malice in initiating the prosecution since the accused was using power without a meter which was illegal because they had not paid for power supply. She denied that there was any violation of rights and or fundamental freedom.

Petitioner's Submissions

9. The Petitioner submitted both orally and through written submissions that his wife was unlawfully arrested and maliciously prosecuted, that the 2nd Respondent was dishonest when it tried to change the records of the trial court's proceedings and that the 2nd respondent could only have been a witness but not an investigator. He contended that he brought the present petition under **Articles 22, 45 and 53** of the Constitution. In the Petitioner's view, Article 53 protects the rights of children and contended that when his wife was arrested, the children were left helpless hence he was it was in order for him to institute the petition.

10. The petitioner further submitted that Article 45 (1) gives protection to the family and that the State has an obligation to protect the enjoyment of other people's rights. He contended that family rights are protected by the Constitution and that when his wife was taken from home, she was detained without procedural fairness. He went on to contend that searches can only be conducted during the day but that

the arrest in the case of his wife the arrest was done at night. He prayed for grant of the relief in the petition arguing that **Section 52** of the **Energy Act** allows payment of damages where there is trespass.

1st Respondent's Submissions

11. Mr. Makori, learned counsel for the 1st Respondent submitted that the Petitioner's wife was lawfully arrested and charged with fraudulent connection of electricity under **Section 64 (4)** of the **Energy Act**, but was later acquitted on a technicality. On malicious prosecution, learned counsel submitted that the Petitioner did not prove the elements of malice that must be proved and relied on the case of **Music Copyright Society of Kenya v Tom Odhiambo Ogunyi** [2014] eKLR for the proposition that for one to succeed in a case for malicious prosecution the four elements must unite. He submitted that the Petitioner had not established his case to the required standards, that he had not shown that there was malice in the prosecution and that there was no proof of violation of human rights and fundamental freedoms

2nd Respondent's Submissions

12. Miss Muyaka, learned counsel for the 2nd Respondent, submitted that there was no dishonesty on the part of the 2nd Respondent, and that the 2nd Respondent did not try to interfere with the trial court's record of proceedings since those proceedings were obtained from the magistrate's court at Rongo, but that a page was missing and that was no dishonesty.

13. Regarding trespass, counsel submitted that **Section 51** of the **Energy Act** allows the 2nd Respondent's officers to enter premises and inspect meters and power supply lines a position that is confirmed by **Section 58 (12)** of the Act. According to counsel it is unlawful for one to deny the 2nd Respondent's employees access and that **Section 65** does not state time hence there is no provision prescribing time for entry and investigations, or arrest.

14. For purposes of this judgment section 51 (1) of the Act provides that after electric supply lines have been laid in accordance with this Act, the licensee or any person authorized by the licensee may, from time to time as it becomes necessary, enter the land on which the electric supply lines are laid, with such assistance as may be necessary, for the purpose of inspecting or repairing the lines, or removing such lines in case where the electric supply lines are no longer required. Under section 57(1), a person requiring supply of electrical energy should apply to the 2nd respondent specifying the premises in respect of which the supply is required and the maximum power required to be supplied, and when the supply is required to commence. Thereafter upon meeting the conditions for supply, he may have electric energy supplied to him. Under section 58, the amount of electric energy supplied is to be measured by meters installed by the 2nd respondent.

15. On the reasonableness of the arrest, learned counsel submitted that **Jane Atieno Obila** is not a party to these proceedings and there was no authority for the Petitioner to institute the petition of her behalf, hence, the Petitioner has no **locus standi** in the proceedings. Learned counsel contended that **Jane Obila** was arrested for unlawful consumption of electric energy; that the arrest was not malicious and that it was well founded despite her acquittal on a technicality. Counsel contended that there were reasonable grounds to make a complaint and that even under the **Criminal Procedure Code**; Police are obliged to take action upon a complaint being made.

16. Learned counsel argued that the 2nd Respondent does not have power to direct the 1st respondent or the Police on what to do, that the **Inspector General of Police** can second Police officers to private persons and properties and that arrest by officers seconded to the 2nd respondent was sanctioned by the Office of Inspector General.

Determination

17. I have considered this petition, responses thereto; submissions by both sides and the authorities relied

on. This petition, however packaged, is a challenge to the arrest and prosecution of **Jane Atieno Obila**, the Petitioner's wife. In essence, it alleges false arrest and malicious prosecution of the said **Jane Atieno Obila** by the respondents. The Petitioner contended that his wife's arrest and prosecution was malicious and violated her rights and fundamental freedoms. He has also alleged that there was trespass and violation of his family's rights.

18. The respondents on their part contended that there were reasonable grounds to arrest **Jane Otieno Obila** and arraign her in court because she was found using electric energy without authority. They contended that there was no trespass since the Energy Act allows the 2nd Respondents' officers to enter premises and inspect meters and power lines. They denied that there was any violation of the petitioner's rights, that the arrest and prosecution was false and malicious or that there was any loss or damage suffered by the petitioner.

19. From the material before Court both in terms of the petition, responses and submissions, the only question that arises for determination is whether the arrest and prosecution of the Petitioner's wife was unlawful and malicious.

20. Although the Petitioner pleaded many other aspects of violation of rights, these were in my view, generally to cloud the petition otherwise; the facts which emerge from the petition are that the 2nd Respondents' officers were on routine patrol in the company of the Police. They found power in the accused's home, entered the home, found no meter and after interrogation, arrested her and took her to a police station. She was processed and was charged in court the following day with the offence of fraudulent use of electric energy contrary to the **Energy Act**. After full trial, the accused was acquitted because the section under which she was charge was non-existent. It was after her acquittal, that the Petitioner filed the present petition. It is also clear from the reliefs sought that false arrest and malicious prosecution are the principle reliefs.

21. The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff's favour having been acquitted of the charge laid against him. (See Egbema v West Nile District Administration [1972] EA 60)

22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. In the present case, the 2nd respondent's duty was to report that the accused was illegally connected to electric energy. The responsibility of investigating, charging and conducting prosecution was that of the police and the 1st respondent.

23. In this petition, it is true that the petitioner's wife was arrested, charged in Court and prosecuted. It is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited v Fungutuli [1988] eKLR, the Court of Appeal observed;

“It is strite learning that acquittal, per se, on a criminal case 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 appelliant. But there must be evidence of spite in one of its servants that can be attributed to the company.”

24. In the case of Jediel Nyaga v. Silas Muckeke 1987 (CA NO 59 of 1987) the Court of Appeal again stated;

“The appellant having reported to the police about the respondent’s action of damaging his crops, the police took over the matter to investigate the respondent for a possible offence... Once the appellant gave the report, he ceased to have anything to do with the matter.”

25. And In the case of Robert Okeri Ombaka v Central Bank of Kenya [2015] eKLR the Court of Appeal observed;

“In this appeal there is no evidence that the respondent made a “false” report or that the it was actuated by “malice”, or that his prosecution was brought “without reasonable or probable cause”.. That a suspect was acquitted of a criminal case is not a ground for filling a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”

26. A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above are clear that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the complaint was false and that it was full of spite or malice.

27. The petitioner also alleged that there was trespass on his privacy and that his wife’s arrest was effected at night. The law that allows the 2nd Respondent to inspect meters and power lines does not state what time this should be done. However, in the case of meter reading or inspection, one would expect that it be done during the day. The fact that officers visited the Petitioner’s premises at night and discovered suspected unlawful use of power could not amount to trespass.

28. Taking the petitioners interpretation of trespass and his contention that no arrest or investigation should take place at night, is adopting a narrow interpretation that would defeat the work of the 2nd Respondent, given that many people who illegally use power are likely to do so at night. I do not therefore see any trespass or violation of the law for arresting *Jane Atieno Obila* in the evening or even at night.

29. The Petitioner further contended that his family suffered after the arrest of his wife because children were left alone and helpless. The Constitution grants family protection (Article 45) and that of children (Article 53). However, where a party pleads that his family’s rights were violated, s/he is under obligation to prove how those rights were violated. The Petitioner did not do so in this petition. He made general submissions without actual proof by way of evidence. Furthermore, in the case of children he did not adduce any evidence to show that there were children at home at that time, their ages and how they suffered. It is not enough for one to merely state that rights were violated without showing how and to what extent. The petitioner failed in this respect and left no doubt that there was no precision in the pleadings as required by the principle laid down in Anita Karimi Njiru V Republic (No 2) [1979] eKLR 154, or in the evidence adduced in Court.

30. I must also say something about this petition. The person who was arrested, charged and prosecuted was the Petitioner’s wife. *Jane Atieno Obila*. She is an adult and there was no allegation that she could not file this petition on her own. Although the Constitution did away with the requirement of *locus standi*, it is not an opening for people to file cases on behalf of others without justification. A proper reading of **Article 22 (2)** cannot allow the Petitioner to present this petition of behalf of his wife without showing that she could not act on her own. He did not file this case as a public interest litigation but because *Jane Atieno* is his wife. That is not what Article 22 of the Constitution intended.

31. In conclusion, having considered the petition, the evidence submissions and the law, I am not satisfied that the petitioner has made a case. The petition is dismissed with costs.

Dated Signed and Delivered at Nairobi this 6th Day of April 2018

E C MWITA

JUDGE