



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 166 OF 2013**

**BRUTUS NANDWA WA AMBUNYA.....PLAINTIFF**

**VERSUS**

**THE INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff vide a plaint dated 9<sup>th</sup> May, 2013 sued the Defendants claiming damages for alleged arbitrary arrest and malicious prosecution.
2. The claim was denied as per the statement of defence filed. In the alternative, it was pleaded that there was reasonable and probable cause for the arrest and prosecution.
3. The Plaintiff filed a reply to the defence. He denied the allegations made in the defence and joined issues with the Defendants.
4. The Plaintiff gave evidence and adopted his witness statement. He narrated to the court how on 21<sup>st</sup> December, 2010 he was going on with his duties as Kenya Wine Agencies Ltd (KWAL) when he was summoned to the criminal investigations headquarters, Nairobi and questioned about alleged loss of property at his employers premises. That he was then placed under arrest and escorted to Muthaiga Police station where he was detained the whole day until evening. That without any investigations being carried out he was given a police bond requiring him to appear in court the following day to answer to the charge of theft by servant.
5. The Plaintiff contended that he was on his annual leave when the theft occurred. That he pleaded not guilty and was eventually acquitted after 1 ½ years of trial. That he paid Ksh.300,000/= as legal fees to his advocate and a further Ksh.2,880/= to obtain certified copies of the proceedings and judgment.
6. During the hearing of the case, there was no attendance by the Defendants. The case proceeded ex parte. However, at the close of the Plaintiff's case both sides filed written submission which I have considered.
7. The ingredients of the tort of malicious prosecution have been long settled. In the case of **Murunga v Attorney General [1979] eKLR**, this court, Cotran J, held the ingredients to be four as follows:

**“(1) That the prosecution was instituted by the defendant; (2) that the prosecution terminated in the plaintiff's favour; (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.”**

8. The Plaintiff produced the criminal case proceedings as an exhibit. The said proceedings reflect that the prosecution was instigated by the agents of the 1<sup>st</sup> Defendant. There is no doubt that the prosecution ended in favour of the Plaintiff who was acquitted under Section 215 of the Criminal Procedure Code.
9. With regard to whether the prosecution was instituted without reasonable and probable cause, there was no evidence adduced by the Defendants to controvert the Plaintiff's case that he was rushed to court the same day without any investigations having been carried out. The Plaintiff's evidence that he was on leave at the time of theft is one of the grounds upon which the Plaintiff was acquitted in the criminal case.
10. The trial magistrate in his judgment observed that there was no evidence to show how the 37 cases of **Amarula cream** and 85 cases of

**Johnie Walker** disappeared from the godowns of KWAL. The trial magistrate further held that there was no basis at all for the Plaintiff to have been singled out and charged. That comprehensive investigations were not carried out and that the investigating officer conceded that the goods disappeared in mysterious circumstances. That having been the opinion of the investigating officer, there were no reasonable and probable grounds to warrant the criminal prosecution. Thus there was malice as the legal process was not applied for the appropriate purpose.

11. As stated in the case of **Thomas Mutsotso Bisembe v The Commissioner of Police & another [2013] eKLR**.

**“[11] ....The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect...Where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purpose of malicious prosecution...But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice.”**

12. The Plaintiff suffered damages due to the prosecution. His evidence was that he lost his employment. He produced receipts for the payment of Ksh.300,000/= to his defence counsel and Ksh.2,880/= for obtaining the court proceedings and judgment in the criminal case.

13. The Plaintiff's counsel in his submissions proposed an award of Ksh.4,500,000/= as general damages to vindicate the Plaintiff for the violation of his constitutional rights and compensate him for the malicious prosecution. The court was referred to the following cases:

- **Emmanuel Kuria Wa Gathoni v Commissioner of Police & another [2017] eKLR** where the award of general damages made was Ksh.5,000,000/=. The Plaintiff was in prison remand for three (3) years.
- **Jaston Ongule Onyango v Attorney General & another [2015] eKLR** where an award of general damages made was Ksh.4,000,000/= in year 2015. The Petitioner had been in police custody for 13 days and 127 days in prison remand.

14. The Plaintiff's counsel submitted for an award of Ksh.2,000,000/= as exemplary, aggravated and punitive damages. He relied on the case of **Emmanuel Kuria Wa Gathoni (supra)** where an award of Ksh. 2,000,000/= was made as aggravated damages.

15. The Defendants counsel did not quantify the damages awardable.

16. Punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant's action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. (See the Court of appeal exposition in **Obongo & another v Municipal Council of Kisumu [1971] EA 91**)

17. with regard to aggravated damages, as encapsulated in **Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR)** where it was stated:

**“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive.”**

18. In the case at hand, the Plaintiff was employed at the material time as an Assistant Manager, KWAL. His uncontroverted evidence was that he lost his employment following his arrest and prosecution. The Plaintiff's trial took about 1 ½ years. However, unlike in the cases relied upon, the Plaintiff herein was not placed in police custody nor remanded in prison.

19. I have considered the following other cases:

- **HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another**, where the Court made an award of Ksh.500,000/= to each of the petitioners as general damages for malicious prosecution.
- **Crispus Karanja Njogu v the Attorney General [2008] KLR** where the court made an award of Ksh.800,000/= as general damages.
- **Thomas Mutsotso Bisembe v Commissioner of Police & another [2013] eKLR**, the court awarded the plaintiff Ksh.800,000/= for general damages for malicious prosecution.
- **Christpine Otieno Caleb v the Attorney General High Court Civil suit No. 782 of 2007**, the court awarded the plaintiff the sum of Ksh.2,000,000/= general damages for malicious prosecution.

20. In the case at hand, I am of the view that an award of Ksh.1,500,000/= general damages and a composite figure Ksh.500,000/= as exemplary, aggravated and punitive damages is reasonable. Special damages claimed and proved is Ksh.302,880/=. The total comes to Ksh.2,302,880/=.

21. Consequently, I enter judgment for the Plaintiff against the Defendants jointly and severally for the sum of Ksh.2,302,880/=, interest and

COSTS.

**Date, signed and delivered at Nairobi this 19<sup>th</sup> day of July, 2018**

**B. THURANIRA JADEN**

**JUDGE**