



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 336 OF 2009**

**DAVID IRUNGU MUKONYA.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

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

**JUDGMENT**

The plaintiff herein filed this suit against the two defendants claiming damages for unlawful arrest, false imprisonment, defamation and financial and personal credibility suffered as a result of the defendants actions alongside special damages. He also claimed costs of the suit and interests at court rates.

The facts as set out are brief and straight forward. The plaintiff opened an account with the 1<sup>st</sup> defendant. He presented a cheque for USD 150,717.15 drawn by IETNA LIFE INSURANCE Company.

Upon presentation of the said cheque to the 1<sup>st</sup> defendant at Moi Avenue Branch, one Mr. Nicholas Kyau who was an agent and or servant of the 1<sup>st</sup> defendant is said have alleged that the plaintiff had stolen the said cheque as a result of which he lodged a complaint with the police.

Acting on the said complaint the Central Bank Anti Banking Fraud Police Unit, arrested and charged the plaintiff with the offence of stealing contrary to Section 275 of the Penal Code. He cited Chief Magistrate's Court, Criminal case no. 2039 of 2008 Republic vs. David Irungu Mokonya. It is his pleadings that after the said arrest he was unlawfully detained for 4 days and later arraigned in court where he was maliciously prosecuted but later acquitted for lack of evidence.

He has set out particulars of malice and ill will in his plaint paragraph 8, and that the 2<sup>nd</sup> defendant is vicariously liable for the acts of the Kenya Police with regards to this matter. He pleaded that he incurred costs in defending himself in the criminal case and undertook to furnish particulars at the hearing of this case.

It was his case in the pleadings that, as a direct consequence of the false arraignment in court initiated and or actively supported by the defendants, his name and reputation were defamed among right thinking members of society, and that he suffered mental anguish and his general standing in society. He suffered financial and credibility loss for which he now claimed damages.

The defendants denied the plaintiffs claim. In particular the 1<sup>st</sup> defendant admitted that one David Irungu Mokonya held an account whose number is different from what the plaintiff pleaded in its Moi Avenue Branch. Sometime in December, 2008 the plaintiff presented a cheque in the name of David Irungu Wamukonya which was not drawn in favour of the plaintiff, David Irungu Mokonya.

In normal banking procedure, the plaintiff was asked to explain the difference in the two names. It is pleaded that the plaintiff was rude and refused to comply, as a result of which the 1<sup>st</sup> defendant was forced to verify the said cheque using security mechanism. The allegations of malice, careless or reckless conduct was denied and that security officers were called after the plaintiff became rude, and failed to give a proper explanation as to the difference in the names on the cheque and his identification.

The complaint to the police was based on reasonable belief and or suspicion on the plaintiff. Further, the 1<sup>st</sup> defendant stated that, other than making a complaint to the police for investigation it did not play any role in the arrest or detention of the plaintiff as this was purely the mandate of the Kenya Police.

It is also denied by the 1<sup>st</sup> defendant that the plaintiff was labelled a thief, and it was only incumbent upon security forces to investigate the complaint. The 1<sup>st</sup> defendant did not use the amount on the face of the cheque as a basis for raising any suspicion, but only sought explanation from the plaintiff on identification which he declined. Particular of any injury to the plaintiff's credit, character or reputation

were denied.

The 2<sup>nd</sup> defendant equally denied the plaintiff's claim reiterating part of the 1<sup>st</sup> defendant's defence and added that the plaintiff was arrested by the police after what appeared to be a credible complaint received from the 1<sup>st</sup> defendant's bank. He was prosecuted on reasonable suspicion of having committed an offence. The arrest and prosecution were lawful and carried out by the police in the discharge of a statutory duty. Particulars were listed as protection of property, prevention and detection of crime, the apprehension of offenders and enforcement of laws.

Particulars of loss were denied, and so was any claim for defamation. It is also pleaded that a claim for defamation cannot be brought jointly with a claim for wrongful arrest, unlawful detention and malicious prosecution as this would amount to claiming double damages.

The parties herein gave evidence in support of their respective pleadings; because the evidence adduced in court tallied with the pleadings herein, it is not necessary to recast the same here. The plaintiff had the duty to connect the defendants to the pleadings and establish that they were actuated by malice and that the subsequent arrest and charging was also malicious.

My first observation is in respect of the claim for special damages. It is a cardinal principle that special damages shall not only be specifically pleaded, but strictly proved. This plaintiff has failed to do. - see **Equity Bank Ltd vs. Gerald Wang'ombe Thuni (2015) e KLR.**

The plaintiff opened an account with the 1<sup>st</sup> defendant. The proceeded to deposit a cheque in the name of David Irungu Wamukonya while his account was in the name of David Irungu Mukonya. He did not deem it necessary to engage the officers of the 1<sup>st</sup> defendant to either explain or consult the drawer in that regard.

On failing to do so, the 1<sup>st</sup> defendant had a duty to conduct due diligence to clear the position before the cheque was paid. It is common knowledge that this is elementary banking procedure. Having failed to explain the anomaly, the plaintiff cannot blame the 1<sup>st</sup> defendant in initiating that inquiry. The 1<sup>st</sup> defendant'S witness denied that they called the plaintiff a thief, and the allegation that the plaintiff became rude on being asked to explain the anomaly has not been dislodged.

There was a probable and reasonable cause to initiate the inquiry and the subsequent steps taken by the 2<sup>nd</sup> defendant can only be a reflection of the sequence of events triggered by the plaintiff himself. Can the defendants be held liable for the actions they took?

I have already observed the duty and concern of the 1<sup>st</sup> defendant. On the issue of prosecution, one has to interrogate what prosecution means and then assess, based on evidence, whether or not it was malicious. Black's Law Dictionary defines prosecution as **"The commencement and carrying out of any action or scheme."** What this means in criminal proceedings is that, there must be a charge filed to initiate commencement and witnesses availed to complete the carrying out of such an action. It is my finding that where a charge is filed and proceedings terminated before any witnesses are called, this cannot be said to be prosecution because a trial has not taken place.

For the defendants to be blamed the plaintiff had a duty to prove malice. In the case of **Samuel Kiprono Chepkonga Vs. Kenya Anti-Corruption Commission & Another (2014) e KLR,** the court set out the ingredients of malicious prosecution. These included; the criminal proceedings must have been instituted by the defendants, that is to say, he was instrumental in setting the law into motion against the plaintiff leading to his arrest. It is not complete until a charge is registered before a judicial authority, that is to say a court of law. The defendant must have acted without reasonable or probable cause which means, there were no facts which the defendant based his action believing the criminal proceedings were justified. The plaintiff also must establish that the intention of the defendants was to use the legal process in question for some other reason other than what they are legally authorised or appointed to do. The plaintiff must also establish that such proceedings were terminated in his favour.

Reasonable and probable cause was defined in the case of **Kagane vs. Attorney General (1969) EA 643** as follows,

**"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of existence of a state of circumstances, which assuming them to be true, would reasonably lead a ordinarily, prudent and conscious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."** See also James Karuga Kilovu Kiiru vs. Joseph Mwamburi & 2 others (2001) e KLR.

The 2<sup>nd</sup> defendant pleaded statutory duties. This is what prompted the officers in the banking fraud unit to take action against the plaintiff. Bad faith has not been established on their part. It is known that suspicion is not sufficient to sustain a criminal charge against any suspect. However in the present case there was more to it that mere suspicion because of lack of cooperation on the part of the plaintiff.

After assessing the evidence presented, I am not persuaded that the plaintiff has established his case against the two defendants to warrant the orders sought. This suit is therefore dismissed with costs to the defendants.

***Dated, signed and delivered at Nairobi this 6<sup>th</sup> day of November, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**