



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO 6 OF 2015

ZADOCK MAKHANU KHAEMBA

T/A KHAEMBA CONTRACTORS }..... PLAINTIFF

VERSUS

THE ATTORNEY GENERALRESPONDENT

JUDGMENT

1. By his amended plaint dated 10/2/2016 the plaintiff prays for the following orders;

a) General damages at court rates of Kshs 60 million.

b) Costs of this suit with interest at courts rate

c) Any other relief that this court may deem fit .

2. The defendant did file its amended defence denying the plaintiffs averments on 14/3/2016.

3. During trial the plaintiff testified and did not call any witness. His evidence can be summarised as follows;

That he was arrested on 12/10/2011 and arraigned in court on 14/10/2011 over some charges of purporting to act as an advocate contrary to Section 33 and 85 of the Advocates Act Cap 16 laws of Kenya but was however acquitted under the Provisions of Section 202 of the Criminal Procedure Code. The Criminal case in which he produced the proceedings was case no 2423/2011 at Kitale.

4. He further testified that after taking plea he was granted bond of Ksh 40,000/- or cash bail of Kshs 100,000/-. He did spent however a full month in person. He stated that while in person he was tortured and he lost his farm properties his children were chased out of school and his wife died. He therefore lost his reputation as a consequence of the said criminal case.

5. The plaintiff did produce various sets of exhibits to back up his case which included interalia his school testimonials as well as the registration of his business name Khaemba Contractors.

He therefore prayed for damages for unlawful arrest, malicious prosecution and false imprisonment.

6. The defendant did not offer any defence but chose to file written submissions which I have perused together with those of the plaintiff.

Analysis and Determination

7. Basically it is not in dispute that the plaintiff was arrested and charged with the aforesaid criminal offence and that he was acquitted under Section 202 of the Criminal Procedure Code. The question however is whether the said arrest was unlawful, and whether the imprisonment was false and malicious.

8. It is trite law that the following ingredients ought to be satisfied for an action on malicious prosecution to succeed, namely

- i) That the proceedings were instituted or continued by the defendant.**
- ii) That the defendant acted without any reasonable and probable cause;**
- iii) that the defendant acted maliciously and**
- iv) that the proceedings were terminated in favour of the plaintiff.**

(see Salmond on the Law of Torts 16th Edition Pg 423)

The 1st and the (iv) ingredients are in the affirmative namely that it was the defendant who instituted the proceedings against the plaintiff and that those proceedings were terminated in favour of the plaintiff.

9. The question however is whether the defendant acted unreasonably and without any justifiable cause. From the records it appears that all that the plaintiff did was to tell the court that he was arrested, incarcerated and charged. Thereafter he was set free. That of course could be deduced from the lower courts proceedings which he produced. A part from that there was no explanation from him that the action by the police was unreliable and without any cause, he did not explain to the court why he thinks He was suspected of impersonating an advocate.

10. **Rudd J in Kagame Vs Attorney General & Another (1969) E.A. 643** stated as follows;-

“----- to constitute reasonable and probable cause the totality of the material with their knowledge of the prosecution at the time he instituted the prosecution, whether that material constituted facts discovered by the prosecution or information which has come to him or both must be such as to be capable of satisfying an ordinary reasonable prudent and cautious men to the extent of believing that the accused is probably guilty”,

11. Did the defendants have such reasonable and probable cause to institute criminal proceedings against the plaintiff? Though the defendant did not offer any evidence, the proceedings from the lower court seemed to suggest so. He pretended that he could offer legal representation to one Jecinta Kibet in Tribunal case No 54 of 2011. I don't think this was unreasonable.

12. In **Hicks Vs Faulkner (1878) 8 QBD 167** Hawkins J stated that

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

13. Faced with the situation at hand, I do not think that the police acted maliciously or unreasonably in suspecting the plaintiff. In any case the said complainant must have recorded statements to that effect. The defendant consequently acted within the confines of the law which is expected and mandated.

14. The fact that he was acquitted perse does not mean that the defendants action was malicious in any way. This view was expressed by the Court of Appeal in **Nzoia Sugar Company Limited Vs Fungututi**

C.A No 7 of 1987 KLR (2002) as follows;

“Acquittal perse 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.”

15. In this case though the plaintiff was acquitted he did not in his case demonstrate any ill will or bad motive on the part of the defendant. Just that the witnesses failed to turn up did not mean prima facie that the defendants acted maliciously or unreasonably.

Did the plaintiff suffer any harm, prejudice or torture as he prayed?

The plaintiff stated that he was incarcerated for more than 24 hours and that he spent a whole month in jail. He also as a result lost his contracts, business and that his wife died and the children chased out of school.

16. There is no evidence however that he was tortured while under the custody of the defendant. Neither is there any evidence that he lost the business contracts. Infact the business contract he exhibited dates back to 21/11/2001 prior to the institution of the suit. Neither is there evidence that he lost his wife or that the same has any nexus to the defendants action. No evidence that his children were sent away from school. In essence there is nothing to prove that the plaintiff suffered any damage except by mere statements.

17. The granting of bond by the trial court was within the mandate and the plaintiff had the liberty of remaining in prison or getting the desired freedom which he eventually did albeit after about one month.

18. All that the plaintiff has done in his submissions is to merely quote figures for general damages for loss of reputation, loss of business and property among others but not backed by any substantive evidence.

19. In the premises I do not think that the plaintiff has established a case capable of being awarded the damages he prays for. There was no malice on the part of the defendant and even the preferred charges against the plaintiff were within the confines of the law. The plaintiff failed to prove any malice and merely relying on acquittal under the provisions of Section 202 of the Criminal Procedure Code was not sufficient.

20. In *Selle Vs Associated Motor Boat Co. Ltd & Another (1968) EA 123 at 131* the court stated as follows:-

“It is always desirable, in a suit for damages, for the trial judge to make a judgment as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgement for the defendant. Much time and expense can be avoided if this course is followed.”

21. In the instant case the only available evidence presented by the plaintiff in respect to his credentials background is a school leaving certificate from A.C. Butonge Secondary School which showed that he was a student there for 2 years between January 1979 and December 1980. Nothing else was shown by the plaintiff suggesting that he furthered his education or career.

22. In terms of business he exhibited a certificate of Business name of Khaemba Contractors dated 2/4/1998 as well as a contract agreement dated 21/11/2011 to carry out some construction of some classroom at Tangasia Primary school. This was, as earlier indicated before the criminal case.

23. In my view the above does not speak much of the plaintiffs character and standing in the society. Neither did he raise his profile in his evidence. But for the trouble and time he has taken and considering the volumes correspondences to various government organisations and NGO's I would have granted him

a global sum of Kshs 50,000/- as general damages. The plaintiff did not present any item on special damages.

24. In conclusion despite the spirited efforts by the plaintiff I do not find that he has succeeded in persuading this court that the charges preferred against him as well as the arrest by the defendant were unreasonable and actuated with malice or at all. The defendant through its agents had reasonable belief that there was a case against the plaintiff for breaching the Advocates Act Cap 16 Laws of Kenya. This case is therefore dismissed with costs to the defendant.

Delivered this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Odenyo holding brief for Kuria for the defendant

Plaintiff – present

Kirong – Court Assistant