



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 449 OF 2009

PATRICIA NJITHI WANYEKI.PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL..... 1ST DEFENDANT

HON. ATTORNEY GENERAL. 2ND DEFENDANT

J U D G M E N T

1. This is a claim for malicious prosecution. The Plaintiff herein Patricia Njithi Wanyeki has filed a claim against Kenyatta National Hospital and the Hon. Attorney General claiming damages for malicious prosecution.

2. In her amended plead, she pleads that on or about the 10th day of May, 2006, the 1st Defendant filed or made a complaint against her alleging that whilst in her lawful employment with the 1st Defendant she proceeded and made fictitious payments to the Hospitals supplies whereby Police Officers charged her with several counts inter alia stealing by person employed in the public service Contrary to Section 280 of the Penal Code, Cap 63 Laws of Kenya.

3. She further pleads that on or about the 23rd May, 2006, a horde of Police Officers from Nairobi subsequently following the 1st Defendant's complaint against the Plaintiff herein wrongfully and forcibly arrested, confined and detained the Plaintiff at Muthaiga Police Station, held her at the said Police Station before arraigning her in the Chief Magistrate's Court at Kibera on the 26th day of May, 2006 on alleged charges with seven counts of stealing by person employed in the Public Service Contrary to Section 280 of the Penal Code Cap 63 Laws of Kenya.

4. The Plaintiff further pleads that the Police proceeded to maliciously and without any reasonable or probable cause to prosecute and maintain the said charges against her at the Senior Principal Magistrate's court Kibera in Criminal Case Number 2920/2006 before she was eventually acquitted on the 17th day of February, 2007.

5. The Plaintiff has set out the particulars of malice by the Defendants in paragraph 6 of the Plaintiff as follows: -

- a. Causing unjustifiable and unlawful complaint against the Plaintiff without any reasonable cause.
- b. Intentionally and vigorously refusing and/or failing to release the accused on bail before arraignment.

c. Continuously maintaining and prosecuting charges against the Plaintiff at the Chief Magistrate's Court at Kibera despite their knowledge that the same could not be sustained.

d. Vigorously resisting the Plaintiff's Application for bail even though the offences she had been charged with were bailable.

6. She pleads that as a result of the said arrest, confinement and prosecution with the offences hereinabove cited, she suffered great loss and her character and reputation have been greatly injured and she also lost her lawful employment at Kenyatta National Hospital. She prays for judgment against the Defendants, jointly and severally for general, special and exemplarily damages plus the costs of the suit.

7. In response to the Plaintiff's claim the Defendants filed separate statements of defence in which they denied the Plaintiff's claim. The Plaintiff filed reply to the defences by the Defendants.

8. The matter came up for hearing on the 15th October, 2015 and on the material day all the parties were represented by their respective advocates. The Plaintiff who testified as PW 1 reiterated the contents of her plaint and claimed that as a result of the arrest and prosecution, she lost her job with the 1st Defendant, suffered loss and damage.

9. In her evidence on oath she testified that she is an accountant by profession with a CPA. She was employed by the 1st Defendant as such where she had worked for 15 years before she lost her employment. She was an Accountant two which is classified as middle management level. She started as an Account's Assistant and rose through the ranks to the level of Accountant two. She rose the levels because she furthered her education and with time, she was promoted but with the loss of employment she has not been able to study any further.

10. She further told the court that in the year 2006, a complaint was made against her after which she was charged with the criminal case as hereinabove. She was arrested at Kenyatta National Hospital after she was called by her boss one Mr. Mugo because she was on leave at the material time. She was taken to a room with three police officers who did not identify themselves. They interrogated her and recorded her statement after which she was taken to Muthaiga Police Station the same day where she was put in for four nights.

11. She was eventually charged in Criminal Case Number 2920/2006 and after the trial, she was acquitted for all the charges under Section 215 of the Criminal Procedure Code. There has been no appeal against the said judgment. While the case was going on she was sacked for gross misconduct and since then, she has not been able to get gainful employment. According to her there was malice by the two Defendants because she was not told why she was arrested and that she was not shown any documents, she was just arrested and charged.

12. It was her further evidence that she has not been able to further her education after she lost her employment because she cannot afford the fees. If she had continued with her employment today she would be a Chief Accountant or a finance Manager and it would have taken her only five (5) years to rise to that position, all factors remaining constant at which point she would be earning a salary of Ksh.300,000/- to Ksh.500,000/- in public sector or more than one Million in the Private Sector. She reiterated the particulars of malice set out in her plaint.

13. In her witness statement filed in court on the 14th October, 2011 which was adopted as evidence, she states that it has been extremely difficult living with the issue hovering over her head yet she was acquitted of the charges. That her son underwent ridicule in school as the matter was reported in local dailies and she was forced to take him to another school and he had to undergo counseling. The prosecution took away her livelihood and all prospects of future employment and with a criminal record, she is unlikely to get employment elsewhere. Being an Accountant by profession and with a Criminal record, no one would trust her with their money.

14. On being cross-examined by the Defendants' counsels, she told the court that she did not have evidence by way of a job application to show that she has been applying for jobs and further than she does not know for sure if she could have been promoted to the level of Chief Accountant. In further cross-examination, she told the court that it was the 1st Defendant who made a complaint to the police and it was the duty of the police to investigate the Complaint. She admitted that she did not have any report from a professional to show projection of what grade she could be today had she not been dismissed from employment.

15. After the close of the Plaintiff's case, the Defendants did not call any witnesses and apart from their statements of defence, they did not file any witness statements. The two defence counsels closed their cases without calling any witnesses.

16. I have considered the evidence of the Plaintiff vis-à-vis Criminal Proceedings in Criminal Case No. 2920 of 2006. It was her testimony that she was in charge of all cheque writing in the entire hospital. She used to draw the cheques and she was the custodian of all the cheque books though she never used to sign the cheques. She would write all cheques against payment vouchers. The cheques used to be accompanied by vouchers and there were about 6-7 registers that brought the vouchers. She told the court that the Police Officers who investigated her did not allow her to check with the registers and according to her, the vouchers could have been entered in other registers. She could draw cheques against the information in the payment vouchers. The Finance Manager, Mr. Mugo and the Deputy Director Administration used to sign the cheques. No other person was arrested and only a Mr. Mungai Saibu was disciplined.

17. The Investigating Officer (Lawrence Mumima) testified as PW 12. In his evidence he told the court how he was requested to take up investigations in the case which involved fraud to Kenyatta National Hospital. The Finance Manager gave him the payment vouchers said to have been paid to various suppliers who did not exist. The said payment vouchers were not recorded in the payment register which the hospital used. According to his investigations, he found out that every payment voucher should be recorded in the payment register and that the paying cashier before he or she prepares the cheques ought to confirm the payment voucher against the register and it was the Plaintiff's duty to confirm as aforesaid. The Plaintiff was arrested and charged with stealing and abuse of office. It is worth noting that the Plaintiff was charged jointly with others not before the court.

18. The Investigating Officer further told the court that a payment voucher goes through a series of signatures before it's paid. He got the specimen signatures of all the officers who ought to have signed and the document examiner confirmed that the said officers did not sign the vouchers.

19. I have carefully considered the evidence tendered by the Plaintiff in the case before the court together with the submissions by the learned counsels. With respect to the tort of malicious prosecution, the law surrounding the tort of malicious prosecution is well settled in this country. In **Mbowa Vs East Mengo District Administration (1972) EA 352** the East African Court of Appeal expressed itself as follows: -

"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:

(1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

(2) the defendant must have acted without reasonable or probable cause i.e. there must

have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;

(3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and

(4) the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action."

20. In the case of **Gitau Vs Attorney General (1990) KLR 13**, Trainor J had this to say: -

"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.

Secondly he who sets the law in motion must have done so without reasonable and probable cause... The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not."

What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained by Rudd J in **Kagame & Others Vs Attorney General (1969) EA 643** citing **Hicks Vs Faulkner [1878] 8 QBD 167 at 171 of 2000**, **Herniman Vs Smith [1938] AC 305** and **Glinski Vs McIver [1962] AC 726** the learned Judge stated: -

"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 lead to an ordinary, prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

21. What constitutes a reasonable and probable cause was also defined in the case of **Simba Vs Wambari (1987) KLR 601** as: -

"The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not"

22. In my view, the issues for determination by the court are as follows: -

1. Whether the criminal proceedings were initiated by the defendants?
2. Whether the said prosecution was actuated by malice.

3. Whether there was reasonable cause and/or justification to make the complaint to the police.

4. Whether the criminal proceedings terminated in favour of the plaintiff.

5. Whether the defendants are liable to compensate the Plaintiff and if so what should be the quantum of damages.

6. Who should bear the costs of the suit?

23. On the first issue, there is no dispute that the criminal proceedings were initiated by the Defendants. The 1st Defendant made a complaint while the 2nd Defendant investigated and prosecuted the same. A Prosecution can either be mounted based on an offence committed in the presence of the law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies as in this case. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. 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 government is not a mere conduit for complaints. 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.

24. A perusal of the criminal proceedings shows that the Plaintiff was interrogated and she gave her side of the story to the police. Though she told the court that she could not remember if the payment vouchers were entered in the register, the prosecution witnesses who testified including Matunda Makere (PW 2), Joseph Ndambiri (PW 3) and Rose Vate Mutura (PW 11) all told the court that the payment vouchers were not entered in the register before the cheques were written by the Plaintiff.

The Plaintiff wrote the cheques before she could verify whether the vouchers were genuine and in fact as it turned out to be, the same were fake as confirmed by the evidence of John Ochieng (PW 4) and Samuel Mburu Gitau (PW 8). The document examiner also confirmed that the vouchers were fake as the signatures on the same were not genuine. It was the Plaintiff's duty to verify the genuineness of the payment vouchers and also enter them in the various registers before she could write the cheques. In my humble view and in the face of the evidence by the aforesaid witnesses, there was no malice on the part of the 1st Defendant in lodging a complaint with the police or on the 2nd Defendant in investigating and preferring charges against the Plaintiff.

25. As to whether there was a reasonable and probable cause and going by the test of reasonable and probable cause in the case of **Kagame Vs Attorney General** (supra); in the criminal proceedings the investigating officer on being asked by the counsel for the Plaintiff why he charged her responded: -

“The accused was brought because of not verifying with the register, stealing and abuse of office.”

There is overwhelming evidence by the prosecution witnesses that she failed to verify and record the vouchers before writing the cheques. Had she done so, she would have discovered that the vouchers were not genuine.

26. On the third issue, there is no doubt that the prosecution ended in favour of the Plaintiff. She was acquitted under Section 215 of the Criminal Procedure Code, but though she was acquitted the law is clear that the mere fact a person has been acquitted of the criminal Charge does not necessarily connote malice on the part of the Prosecutor. In the case of **James Karuga Kiiru Vs Joseph Mwamburi & 3 Others, Nrb C.A. No. 171 of 2000** to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of privacy that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution.

27. After evaluating all the evidence before me, I find that the Plaintiff was unable to prove her claim. She did not prove that there was malice on the part of the Defendants. It is trite law that whoever alleges must prove, the fact that the Defendants did not call any witnesses, did not lessen the Plaintiff's burden of prove which was on a balance of probability.

In the premises aforesaid, I dismiss the Plaintiff's claim with no orders as to costs.

Dated, signed and delivered at Nairobi this 10th day of March, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff.***

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