



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 225 OF 2009**

**PHILIP ODARI.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**ROSE WETAOBANDA.....2<sup>ND</sup> DEFENDANT**

**RUTH KHASAI.....3<sup>RD</sup> DEFENDANT**

*(From the judgment of A Abdul, Senior Resident Magistrate*

*in*

*Makadara CMCC No. 12779 of 1995)*

**J U D G M E N T**

The Plaintiff, Philip Odari was convicted by the Senior Resident Magistrate, Makadara on 27<sup>th</sup> November 1996 on the counts of robbery with violence contrary to section 296(2) of the Penal Code, on one count of rape contrary to section 140 of the penal code, and one count of indecent assault contrary to section 141(1) of the Penal code. He was sentenced to death on the conviction for the robbery charges and was sentenced to ten years and seven years imprisonment, respectively, for the sexual offence. He appealed to the High court at Nairobi unsuccessful hence the second appeal at the court of Appeal. The court of appeal allowed the appeal quashing the conviction and set aside the sentence imposed on him.

By way of a plaint dated 21<sup>st</sup> April 2009, the Plaintiff is seeking judgment against the Defendants jointly and severally for special damages and general damages for malicious prosecution. The Plaintiff's case is that his arrest by the 1<sup>st</sup> Defendant's police officer was wrongful, unlawful and without any reasonable or probable cause. He also maintains that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant made false allegations against him and upon the same, the Plaintiff was arrested, confined and maliciously prosecuted. He cited the following particulars of malice.

- 1. The 1<sup>st</sup> Defendant's aforesaid agents ignored the pleas by the Plaintiff for further investigations into the charges falsely leveled against him as he was being framed.*
- 2. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant ought to have known that the Plaintiff had not committed any crime*

*but wanted to please their husband to whom they had reported the robbery and rape allegation.*

3. *1<sup>st</sup> Defendant's agents were under legal duty to investigate and establish the truthfulness or otherwise of allegations leveled against him instead of rushing the Plaintiff to court on trumped up charges.*

4. *The OCS acted maliciously and unprofessionally.*

The Plaintiff also complains that he stayed in custody and prison from the date of arrest of 22<sup>nd</sup> June, 1995 to 20<sup>th</sup> day of February 2009 a period of 14 years. He claims special damages for loss of employment and salary for 14 years.

The 1<sup>st</sup> Defendant entered defence on 25<sup>th</sup> November 2008, denying the claim of wrongful arrest and malicious prosecution. It states that the said acquittal does not entitle the Plaintiff a cause for malicious prosecution. The 1<sup>st</sup> Defendant maintains the arrest was lawfully done by the police in execution of their statutory duty. The 1<sup>st</sup> Defendant pleads the particulars of 1<sup>st</sup> Defendant's statutory duty as; (one) to receive and act upon information that an offence cognizable in law has been or is likely to be committed, (two) to cause investigation to be undertaken and pursue every credible evidence upon a reasonable and a probable cause; (three) to apprehend and detain in custody suspected offenders.

During the hearing of the case the Plaintiff, testified as PW1. He told the court that he filed the suit against the 1<sup>st</sup> Defendant because the police did not carry out sufficient or proper investigations. He lost his job when he was in prison. He was also badly treated and tortured while in prison, lost his freedom, his name and reputation. The society saw him as a criminal. He claims that his life could have been better if he had not gone to prison. He intended to further his education and fulfill his dreams of becoming a hotel manager. During cross examination he stated that his name was *Odari* not *Odali* as misspelt in his training letter produced as **P2**. Miss Rashid counsel for the Plaintiff submitted that misspelling should not worry the court as the Plaintiff proved he was the same person who was working for *Bon Appetit* restaurant and arrested and charged. He said he sued three Defendants and served them with the plaint but he did not know who among the three made a complaint to the police.

The Plaintiff submitted that he had proved on balance of probability that he was arrested on or about the 22<sup>nd</sup> June 1995 on charges of robbery with violence and rape and he stayed in custody until 20<sup>th</sup> February 2009 when he was acquitted. He further stated that failure by the police to carry out investigations resulted in the unlawful incarceration of the Plaintiff who has been greatly prejudiced and occasioned injustice.

He proved by production of documents to show that he worked at Bon Appetite Restaurant before his arrest. That he used to earn a salary of Kshs.4,500/- per month in 1995. Ms Rashid proposed an award of Kshs.20,000,000/- as damages for unlawful detention. The Plaintiff relied on the High court decision in **Michael Kagoma Maina Vs Attorney General (2012) eKLR**

The 1<sup>st</sup> Defendant however, submitted that the Plaintiff had not demonstrated any cause of action to warrant the orders sought. That he failed to present any evidence to show that his rights were infringed by the 1<sup>st</sup> Defendant or evidence to show that he suffered damages. That the fact that the Plaintiff was acquitted by the Court of Appeal is not a yardstick to confirm that the 1<sup>st</sup> Defendant acts were malicious.

The 1<sup>st</sup> Defendant on the other hand contended that the Plaintiff had not proved his case. He submitted that the training letter produced to prove his case reflected different names as Philip Asiema Odali instead of Philip Odari as stated in the pleading. The 1<sup>st</sup> Defendant argued that those were two different documents representing two different individuals in law. The 1<sup>st</sup> Defendant further submitted that the Plaintiff failed to prove/produce a letter of employment, pay slip, NSSF deduction sheet, or even call a witness from the hotel to confirm the documents produced.

On whether the prosecution acted maliciously, the 1<sup>st</sup> Defendant submitted that the police did not act with malice and without probable cause. That the Plaintiff failed to show that there existed a grudge with the arresting police and that therefore the claim of malice should fail. The Defendant relied on the case of **Katerrega Vs Attorney General (1973) E.A 289** where the court observed that in a claim of damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or by indirect or improper motives. The Defendant stated that in this case the police were performing their duty when they arrested the Plaintiff as they had reasons to believe that an offence which could be tried in court of law had been committed.

On whether the prosecution acted without reasonable or probable cause, the Defendant submitted that the police acted with reasonable cause. That the police have a statutory duty to receive and act upon information that an offence cognizable in law has been or is likely to be committed and to take appropriate action on such information. The Defendant relied on the case of **Kagane Vs Attorney General (1969) EA 643**. The Defendant further submitted that from the information and investigations which the police undertook there was enough evidence to satisfy a prudent and cautious man that the Plaintiff was guilty of the offence, hence the arrest and charging of the Plaintiff was justified in the circumstances.

On whether the Plaintiff is entitled to general and exemplary damages, the Defendant submitted that the Plaintiff did not prove the basic ingredients of a case of malicious prosecution hence the suit should be dismissed with costs.

Having read the pleadings filed by all the parties in support of their respective position and having considered the evidence that was adduced by the parties during the trial, including the written submissions by the Plaintiff, the issue for determination by the court is ***Whether the Plaintiff was maliciously arrested and detained and If the answer is in the affirmative, what damages the court will award.***

The Burden of Proof in cases of Malicious Prosecution is now settled in this country. In a claim for damages for malicious prosecution such as this, it is incumbent upon the Plaintiff to prove on a balance of probabilities that the prosecution was instituted by the Defendant; that the prosecution terminated in the Plaintiff's favour; that the prosecution was instituted without reasonable and probable cause and that in instituting the prosecution, the Defendant was actuated by malice. The test was set down in the case of **Murunga Vs. The Attorney General {1979} KLR 138** Cotran J. had this to say: .....

I will apply the above test in this matter. It is not disputed that the Defendant initiated the arrest and the prosecution of the Plaintiff and that the case was determined in the Plaintiff's favour. What is in dispute is whether the prosecution lacked reasonable or probable cause and that the prosecution was actuated by malice. I will consider each essential separately.

The Defendant submitted that the police did not act without probable cause. The police had good intentions and performing their duties when they arrested and charged the Plaintiff as they had reasons to believe he committed the offences. In **Kagane & Others Vs The Attorney General & Another (Supra)** RUDD J. had this to say:

***“The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence.”***

In this case the Complainants, who are the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein, testified in the lower court that they had been raped. There is evidence that they reported to a private medical clinic where they were examined immediately after the alleged rape. The Clinical Officer who carried out the tests testified to that end and produced his medical report. Although no report was made to the Police Immediately, the same was made several days later when the Plaintiff herein, who was one of the suspect was seen, arrested by the husband of one of the Complaints and taken to the Police Station (Post) at Dandora.

There is evidence on the record that No. 68080 PC Mwangi, re-arrested the Plaintiff on the alleged allegations of robbery and rape and later charged him with the offenses of rape and robbery with violence, clearly relying on the evidence recorded by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the Clinical Officer, PW 3 and the Police Officer who made arrest, PW 4.

The evidence that came from the above witnesses individually may have or could have contained contradictions and/or conflicts when compared one from another. Indeed, that was the case, and the Court of declared so. The same court also found the charges of rape and probably robbery, were defective. It also found that the charges had variances in relation to sums robbed, the place where robbery took pace and the weapons used in the robbery. The law required that all these are to be clearly stated in the charges raised against an accused and failure to do so created the substantive errors in the charges which led the Court of appeal to dismiss the charges and allow the Plaintiff's appeal.

Clearly, however, the Police relied upon the report made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's to arrest, charge and prosecute the Plaintiff. May be the police should have done more investigations to gather more evidence to successfully prosecute the appellant. There, is no doubt in this court's mind that the police felt they had adequate evidence to prosecute the Plaintiff herein from the two complainants and one husband plus the Clinical Officer and the Police Officer who rearrested the Plaintiff.

To answer the issue as to whether the prosecution of the Plaintiff was instituted without reasonable and/or probable cause, this court is not limited to the fact that the prosecution ended in favour of the Plaintiff, alone. Other factors also matter and must be taken into account. They include (a) that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who the victims of the alleged rape reported to and examined by a Clinical Officer who testified, (b) that the medical evidence was produced in the lower court and was not contradicted; (c) that the plaintiff was arrested within a short period and sufficiently identified before being taken to the Police who re-arrested, charged and prosecuted him; (d) that the trial court found the evidence of the Respondents credible and reliable and convicted on the reliance, and that the first Appellate court also found the evidence credible and reliable and confirmed the conviction.

This court finds accordingly, that the 1<sup>st</sup> Respondent's prosecution of the Appellant on the alleged charges of rape and robbery was not malicious and was not without probable and reasonable cause. The material evidence known by the Respondent which led to the Plaintiff's arrest and re-arrest, charge and prosecution was adequate to satisfy a prudent and cautious man that the Plaintiff was probably guilty of the alleged offences. Indeed this court is of the view that the acquittal by the Court of Appeal was based on purely technical reason which would not undermine the substantive evidence upon which the Plaintiff had been convicted.

As stated in Nzoia Sugar Company Ltd. -Vs- Collinsus Faugututi Civil Appeal No. 7 of 1987: -

***"A suspect who is acquitted of a Criminal Case is not sufficient 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".***

The result is that the Plaintiff has not persuaded this court that he has established his claim for general and special damages on the balance of probabilities. The claim s is accordingly hereby dismissed with costs to the Respondents.

Orders are made accordingly.

Dated and delivered at Nairobi this 5<sup>th</sup> day of March, 2015.

.....

**D A ONYANCHA**

**JUDGE**