



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 312 OF 2013**

**FRANCIS KARIUKI KAMINJU .....APPELLANT**

**VERSUS**

**THE COMMISSIONER OF POLICE & THE HON. ATTORNEY  
GENERAL.....RESPONDENTS**

**JUDGEMENT**

1. Francis Kariuki Kaminju, the Appellant sued the Commissioner of Police and the Attorney General, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively before the Chief Magistrate's court, Nairobi at Milimani vide the plaint dated 3<sup>rd</sup> July 2007 and amended on 18<sup>th</sup> February 2009 in which he sought for judgement as follows:
  - a. *General damages*
  - b. *Special damages for hiring legal services, travelling and accommodation during the trial period (details to be supplied).*
  - c. *Exemplary damages for malicious prosecution confinement and injury to his character and reputation.*
  - d. *Interest on (a), (b) and (c) herein above.*
  - e. *Cost of this suit.*
  - f. *Any other or further relief that this Honourable court may deem just to award to the Plaintiff.*
2. The Respondents filed a defence to deny the Appellant's claim.

The suit was heard by Hon T.W.C Wamae(Mrs), who in turn dismissed the Appellant's case on the basis that the Appellant had not proved his case to the required standard in civil cases. Being aggrieved, the Appellant preferred this appeal.

3. On appeal, the Appellant put forward the following grounds:
  1. *The Learned Magistrate erred in law and in fact in dismissing the Appellant case in entering judgment in favour of the Respondent and against the Appellant without having due regard to the pleading sand evidence before the court.*
  2. *The Learned Magistrate erred in law and in fact in dismissing the Appellant's despite failure on the part of the Respondent to defend the suit.*
  3. *The Learned Magistrate erred in law and in fact in dismissing the Appellant's case despite there being over whelming evidence of the culpability of the Respondents.*

4. ***The Learned Magistrate failed and/or refused to find in favour of the Appellant despite there being a judgement acquitting the Appellant and dismissing all the charges against him.***
4. When the appeal came up for hearing, this court was prompted by the Appellant's advocate to issue an order directing the Appeal to be disposed of by written submissions. At the time of writing this judgement, the Appellant was the only party who had filed submission hence this appeal is determined without the input of the respondent.
5. Before considering the substance of the Appeal, let me first set out the case that was before the trial court. When the suit came up for hearing, the Appellant testified alone without summoning independent witnesses. It is the Appellant's evidence that on 31.03.2004 he went to Nyahururu Police Station to visit his sister-in-law's husband. Upon reaching the police station, the Appellant claimed he was arrested and locked up for 10 days and was later arraigned before court vide Nyahururu C.M.C CR.C. No. 809 of 2004 for the offence of stealing a motor vehicle contrary to section 278 (a) of the Penal Code. After undergoing a trial, the Appellant was acquitted under section 210 of the Criminal Procedure Code on 8/11/2005.
6. Upon acquittal, the Appellant filed the suit before the trial court. The Appellant tendered in evidence certified copies of the proceedings and judgement in the criminal case. The Appellant claimed that he was held in custody for 72 days before he was admitted to bail and that he spent ksh.175,000/= as legal fees, kshs.35,000/= of fuel and kshs.45,900/= on accommodation while undergoing the criminal trial. The respondent did not tender any evidence in support of their defence. The learned Chief Magistrate stated that she considered the evidence and came to the conclusion that the Appellant had not proved his case to the required standard i.e on a balance of probabilities. She also came to the conclusion that the Appellant did not issue the statutory notice to the Attorney General to inform the 2<sup>nd</sup> Respondent of the institution of the suit.
7. The Appellant is now before this court to challenge the learned Chief Magistrate's decision. Though the Appellant listed four grounds of appeal, it would appear the Appellant argued all the grounds together. This being the first appellate court, I am enjoined by law to re-evaluate the case that was before the trial court. It is the submission of the Appellant that the learned Chief Magistrate erred when she failed to find that the Appellant's arrest was unlawful and without reasonable or probable cause. The trial magistrate was accused of failing to take into account the evidence of PW-1 and PW-2 tendered before the Nyahururu court which tried the criminal case. The submission should not have been made before this court because at page 2 of her judgement, the learned Chief Magistrate was categorical as follows:

***“The proceedings in the criminal case shows that the Plaintiff was arrested at Nyahururu police. No reason for his arrest was given as a result of which he was acquitted under section 210 of the Criminal Procedure Code. Clearly from the onset it is apparent that the prosecution was therefore malicious.”***

8. It is clear from the above excerpt that the trial Chief Magistrate found that the appellant had shown that his arrest was unlawful and without probable cause. I do not therefore need to disturb the finding of the learned Chief Magistrate.
9. The Appellant urged this court to find that the learned Chief Magistrate erred when she dismissed the Appellant's case on the basis that the Appellant had failed to issue a notice upon the Attorney General as required under section 13A(i) of the Government Proceedings Act (Cap 40 L.O.K) The Appellant argued that there was evidence showing that he had actually served the 2<sup>nd</sup> Respondent with the notice hence she should not have dismissed the Appellant's case. I have re-evaluated the evidence tendered before the trial court and it is clear to me that the learned Chief Magistrate appreciated the fact that the Appellant issued a notice to the 2<sup>nd</sup> Respondent but her contention is that there was no evidence of receipt of the letter by the Attorney General. This finding flies on the face of record. The evidence tendered clearly shows that the Appellant presented evidence showing that he issued a notice of intention to sue upon the 2<sup>nd</sup> Respondent

and that the 2<sup>nd</sup> Respondent vide its letter of 1<sup>st</sup> March 2006, acknowledged receipt of the Appellant's notice. The order dismissing the Appellant's case must be set aside.

10. The other ground which the learned Chief Magistrate relied to dismiss the Appellant's case is the fact that the appellant submitted receipts to support the claim for payment of expenses incurred while undergoing trial before the magistrate's court at Nyahururu had no revenue stamp. I think the learned Chief Magistrate misapprehended the import of section 19 of the Stamp Duty Act. It is not in dispute that the documents had not been stamped. In such a case, the law mandated the court under section 19(3) (b) of the same act to give the party relying on the document reasonable time to have the document stamped. The learned Chief Magistrate instead rejected the admissibility of the documents and proceeded to dismiss the suit. I am convinced that this order must too be set aside to open the way for the Appellant to be given reasonable time to comply with the law.

11. In the end I find the appeal to be with merit. I allow the appeal by setting aside the order dismissing the suit. For the avoidance of doubt I make the following orders:

- i. The Defendants(Respondents) are found liable for unlawfully arresting and maliciously by prosecuting the Plaintiff(Appellant)
- ii. The assessment of quantum is set aside. A fresh assessment to be done by another magistrate of competent jurisdiction other than Hon. T.W. C. Wamae (Mrs) on priority basis.
- iii. Costs of the appeal is awarded to the Appellant.

**Dated and delivered in open court this 2<sup>nd</sup> day of July 2015**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent