



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 205 of 2008

MARGARET WAMBUI MWANGI PLAINTIFF

VERSUS

LUCY NJOKI NYAGA.....1ST DEFENDANT

THE HON ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

By a plaint dated 21st May 2008 filed in court on 23rd March 2008 the plaintiff seeks from the Defendants general damages and exemplary damages for unlawful arrest, detention and false prosecution; aggravated and a declaration that the Town Clerk to a Municipal Council is not a senior to a Councillor therein. She also seeks costs of the suit and any other relief the court may deem fit to grant.

According to the plaintiff the 1st defendant, a Town Clerk to the Municipal Council of Limuru on or about 12th September 2006, made a malicious complaint to the police to the effect that the plaintiff, a nominated Councillor in the same Local Authority, had used abusive language in a manner likely to cause a breach of the peace. The 2nd defendant, through officers at Tigoni Police Station, is accused of having maliciously caused the plaintiff to be arrested, detained and charged with the said offence before the Limuru Senior Resident Magistrate in Criminal Case No. 1433 of 2006. It is the plaintiff's case that under the provisions of section 72(6) of the Constitution a person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person hence the institution of the present case.

I have gone through the court file but I have been unable to find any evidence of service of summons to enter appearance and the plaint on the 2nd defendant, the Attorney General. There is likewise no judgement entered against the 2nd defendant in default of appearance or defence.

The 1st Defendant, on the other hand filed a defence dated 13th June 2008 on 20th June 2008. According to that defendant, the plaintiff's claim that she made malicious complaint as alleged in the plaint is untrue as well as the particulars of malice contained therein. The 1st defendant further denies the allegation that the plaintiff was arrested detained and charged as alleged in the plaint. She however, avers, of course without prejudice, that in or about 2006 the plaintiff unlawfully without justification and upon pretended/imagined authority/powers set out to frustrate and interfere with the 1st Defendant's discharge of her duties as the said Town Clerk and physically assaulted the 1st defendant as a result of which the latter reported the matter to the said Council as well as the police after which the plaintiff was charged in Limuru Criminal Case No. 1433 of 2006 by the said police. The 1st defendant, however, maintains that

the said action by the police was as a result of the latter's independent investigations. According to the 1st defendant the fact that the plaintiff was acquitted does not form a basis for laying a claim against the 1st defendant and hence the suit is frivolous, vexatious, scandalous and is otherwise an abuse of the process of the court and ought to be struck out. The 1st defendant's further contend that the suit is improperly filed before the court.

In her evidence, the plaintiff **Margaret Wambui Mwangi**, as PW-1, testified that she comes from Kiambu County in Tigoni. According to her evidence, she is a business lady being the proprietor cum manager of a school in Limuru, Tigoni Location. She has also been involved in politics as a result of which in 2008 she was nominated as a councillor with the Municipal Council of Limuru (hereinafter referred to as the Council) and was the Chairman of the Finance Committee of the Council charged with the duties of Chairing the meetings of the said committee, and coordinating with the Council officials including the mayor on the same. One of her duties was to supervise the staff. According to her statement dated 30th December 2011 and filed on 17th January 2012 which was adopted as part of the Examination in Chief, on 12th September 2006 or thereabouts, the 1st defendant made a malicious complaint to Tigoni Police Station officers to the effect that the plaintiff was her junior and had used abusive language to her in a manner likely to cause a breach of peace. According to the plaintiff the reason for making the said statement was to ensure that the plaintiff was arrested and charged in order for the 1st defendant to get a chance to misappropriate the Council funds which according to the plaintiff she managed to the tune of Kshs. 4,000,000.00 while the plaintiff was out of the office as a result of the said charges. On 12th September 2006, the plaintiff was arrested by the police acting as the 2nd defendant's agents in conspiracy with the 1st defendant, detained at Tigoni Police Station and charged in the said criminal case. According to the plaintiff all these actions were malicious and without reasonable or probable cause. She was subsequently acquitted on 8th August 2007 after spending a lot of money to defend herself. As a result of the foregoing she suffered mental anguish, torture and was defamed in the eyes of her colleagues, members of the public and voters and her moral integrity undermined amongst her family and friends. Since the defendants have failed to compensate her she prays for damages as stated in the plaint as well as a declaration that a Town Clerk to a Municipal Council is not Senior to a Councillor as well as the costs of the suit. In her evidence in court she also produced a copy of the said criminal proceedings in which according to her the complainant was the 1st defendant and reiterated that the bone of contention was her questioning of the misuse of public funds through the Clerk's office in her capacity as the chairman of the said committee. According to her a total of six witnesses testified including the 1st defendant. Despite this the prosecution failed to prove the case against her leading to her acquittal under section 215 of the Criminal Procedure Code.

After she closed her case the plaintiff was recalled and gave further evidence to the effect that on 7th September 2006 there was a committee meeting of the said council convened by the Town Clerk, the 1st defendant herein chaired by the Mayor, Councillor **James N. Kuria** whose agenda was the unbecoming behaviour of the plaintiff due to an allegation of harassment of the 1st defendant to convene a meeting to discuss the issue of per diem payment made to the 1st defendant and some of the councillors some of whom did not go for the meeting while the Town Clerk only travelled overnight. According to her as the Chairman of the Finance Committee the issue fell within her docket. Referring to the Minutes of the meeting the plaintiff said that the Mayor asked the 1st defendant not to take any action against the plaintiff and there was no resolution that an action be taken against the plaintiff. However, it was after this meeting that she was charged. Pursuant to the said meeting three resolutions were passed one of which was the suspension of the plaintiff which according to the plaintiff the council was not authorised to do. Referred to the minutes of the meeting of 15th September 2006, the plaintiff said she was not present in the same having been suspended and that the allegation against her was that she was inciting market vendors not to pay fees and charges to the Council. At the said meeting, one of the resolutions was the withdrawal of her allowances which according to her the council had no powers to do. At the conclusion of her evidence the plaintiff produced the judgement, charge sheet and a demand letter as exhibits.

In cross-examination, the plaintiff admitted that the person who prefers criminal charges is the Officer in

Charge of Police Station. Whereas she admitted that the 1st defendant was not the said officer she maintained that the 1st defendant was the complainant and did participate in the prosecution by acting as the investigation officer and employed an advocate to sit holding a watching brief. While admitting that she did not know whether the advocate was involved in the investigations, she said that she deduced so because the 1st defendant was practically present. As the Chairman of the Finance Committee, the plaintiff said she did not require any authority to enter the Town Clerk's office which is a public office. In further cross-examination she admitted that there was an incident on 31st August 2006 which incident which was the agenda for the meeting. He conceded that the person entrusted with convening meetings is the Town Clerk who convene the same. She confirmed that the Mayor gave an opinion that no legal action be taken against her and that there was no resolution that she should not be charged.

In her evidence, the 1st defendant **Lucy Njoki Nyaga**, who gave evidence as DW-1, testified that she is a former Town Clerk of Limuru Municipal Town Council though she is now Assistant Town Clerk with Nairobi City Council. She then proceeded to adopt the contents of her statement dated 2nd September 2011 and filed in court on 2nd September 2011. In the said statement, she stated that on 12th September 2008 while in the course of her duties, the plaintiff, then a Councillor of the said Council, stormed her office and maintained that she was supervising her after which the 1st defendant was abused and physically assaulted by the plaintiff. Pursuant to the foregoing the 1st defendant lodged a complaint with Tigoni Police Station and the plaintiff was charged in the aforesaid case. The 1st defendant, however, contends that the complaint was not actuated by any malice whatsoever and that the action taken by the police against the plaintiff was upon the independent investigations done by the said police. In her evidence in court the 1st defendant testified that on the day of the incident, the plaintiff went to her office and raised certain financial matters which ought to have been raised at the meeting. However, the plaintiff got worked up and started shouting and abusing and punched her prompting the Mayor whose office is nearby to intervene and told the plaintiff to leave. Thereafter a meeting of the council was called and the council tried to resolve the dispute amicably with one of the resolution being the suspension of the plaintiff from conducting her duties as the Chairman of the Finance Committee until she reformed.

According to the 1st defendant under section 86 of the Local Government Act Cap 265 members of local authorities (councillors) are restrained by the Act from supervising, instructing or ordering local authority officers in their duties and it was this provision that the council resolved the plaintiff had contravened. However, the council noted that the plaintiff did not reform prompting the convention of the meeting on 16th September 2006 due to a problem with market vendors in which it was alleged that the plaintiff was inciting the vendors not to pay to the Council the approved fees and charges and the plaintiff was replaced by Councillor **Simon K. Njenga** and she was barred from visiting the Council offices after which the matter was reported to the Minister who de-gazetted the plaintiff. The said minutes were also produced as exhibits. While admitting that it was agreed that the matter be resolved amicably, she personally decided to report the matter to the police for her own security and the plaintiff was charged. According to her she did not participate in the prosecution of the plaintiff but was only called as a witness. Neither did her advocate who was holding watching brief participate in the said prosecution. The charge sheet, as well as the proceedings, were produced as exhibits. She clarified that she did not have the power to influence the investigations and her role was limited to the complaint. Whatever the police did thereafter was their own decision. She confirmed that the plaintiff was acquitted for lack of proof beyond reasonable doubt not due to the falsity of the complaint. She denied participating in the arrest of the plaintiff as well as her detention and prosecution. Apart from the complaint which was not maliciously made but only for her safety and security she played no other role.

In cross examination the 1st defendant stated that on the day of the incident she was with the Treasurer, **Emilio N. Wanjohi** and the administrative officer **Alexander Maina Mwangi** before the plaintiff joined. The two also gave evidence in the criminal case. She however, admitted that the plaintiff was not charged with assault. She however stated that at the time of the assault they were only two of them. She said the Mayor was in his office and did not testify. While admitting that she was a signatory to the minutes of 15th September 2006 and that she called the same meeting, the 1st defendant said that the agenda is drawn by the Mayor and the councillors and hers is to put down the agenda as given to her. While admitting that there was no resolution to prosecute the plaintiff, she complained to the police due to her safety. She

confirmed that for the meeting of 15th September 2006, the plaintiff was not invited since she was on suspension. She maintained that the council has powers to suspend a councillor's allowance while admitting that the plaintiff was discharged.

In re-examination the 1st defendant stated that when she complained she did not know the offence with which the plaintiff was to be charged. She stated that the agenda was not her own and that she does not require a council resolution to complain to the police.

At the close of the case, both parties filed written submissions.

According to the plaintiff, it is clear from the evidence that it is the 1st defendant who reported the matter to the police without being authorised by the Council. The police never carried out any investigation leading to acquittal of the plaintiff for lack of evidence after one year. Accordingly, based on **Simba vs. Wambari Nairobi HCCC No. 1967 of 1982**, it is submitted that the plaintiff is entitled to damages since the arrest and detention of the plaintiff was unlawful and the prosecution that followed malicious. Further reliance is placed on **Samuel Muchiri W'Njuguna vs. Attorney General & 6 Others**. On quantum it is submitted that the plaintiff who is a politician and a businesswoman was a nominated Councillor from 2003 till 2007 and was elected as the Chairperson of the General Purposes Committee and Finance. She operated a school in Tigoni area was a family lady married with children. On her social standing and business dealings, it is submitted that the plaintiff's responsibilities as a councillor and a proprietor of a private school was enormous and was a respected member of the society. According to the plaintiff she is entitled to an award of Kshs. 2,000,000.00 in general damages and a similar sum as exemplary/punitive and aggravated damages as well as costs and interest from the date of judgement.

On behalf of the 1st defendant it is submitted that she exercised her right in lodging the complaint in the face of the harassment and threats by the plaintiff and had no reason to act with malice and none was proved. It is further submitted that the 1st defendant did not arrest, investigate, charge or prosecute the plaintiff in the said criminal case as that was the duty of the police undertaken on their own without direction from and with no control of the 1st defendant. The failure by the police to secure a conviction, it is submitted cannot be blamed on the 1st defendant and the mere fact of the acquittal does not entitle the plaintiff to damages as not every acquittal does not entitle an accused to damages for malicious prosecution unless the prosecution actuated by malice and reliance is placed on **Jane Wanjiru Mugunyi vs. Pan African Organisation HCCS No. 2880 of 1990**. Since the 1st defendant's role was limited to lodging the complaint with the police on the authority of **Douglas Odhiambo Apel & Another vs. Telcom Kenya Ltd & 2 Others [2006] eKLR**. Accordingly, submitted that the suit ought to be dismissed with costs.

Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, the issues that fall for determination in this suit:

- 1. Whether the 1st defendant had reasonable cause and/or justification to make the complaint to the police.**
- 2. Whether the making of the said report was malicious.**
- 3. Whether the 1st defendant participated in the arrest, detention and prosecution of the plaintiff.**
- 4. Whether the said prosecution was actuated by malice.**
- 5. Whether the defendants are liable to compensate the plaintiff and if so what should be the award of damages.**
- 6. Who between a councillor and a Town Clerk to a Local Authority is senior?**

7. Who should bear the costs of the suit?

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, 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. If the plaintiff does not prove them he would fail in his action”.

In **Egbema vs. West Nile Administration [1972] EA 60**, the same Court held:

“There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice”.

In **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. The Court does not consider that the plaintiff has established *animus malus*, improper and indirect motives, against the witness”.

The foregoing, in my considered view set out the law and the conditions to be satisfied in order for a plaintiff to succeed in the tort of malicious prosecution.

On the first issue whether the making of the said report was malicious, the plaintiff has admitted that there was an incident that took place on 31st August 2006. She has neither denied that she actually went to the 1st defendant's office nor explained what exactly transpired when she was there. She has admitted that she was concerned about the misappropriation of funds by among others the 1st defendant. Obviously from her statement filed in court she was unhappy about the said events. Taking into account the minutes of the Council of the meeting held on 7th September 2006 as well as the proceedings in the said criminal case more so as the court found that a *prima facie* case had been established and placed the plaintiff on her defence, I am not satisfied that there was no reasonable or justifiable cause for making the complaint. The fact that the plaintiff was acquitted does not necessarily mean that the complaint was unjustified. If that were the position it would open floodgates for those acquitted to file civil cases for compensation. The law as I understand it is that in order to succeed on the ground that the prosecution of the plaintiff was malicious, the plaintiff must show that the defendant or his servants were actuated by ill will or spite against him or an improper motive. The plaintiff has to show that the defendant had no reasonable or probable cause to prosecute him. The question of reasonable and probable cause depends in all cases not upon the actual existence but upon reasonable *bona fide* belief in the existence of such state of things as would amount to a justification of the course pursued in making the accusation complained of no matter whether the belief arises not on the recollection and memory of the accuser or out of the information furnished to him by others. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down and where a person is satisfied or has apparently sufficient evidence that he has in fact been cheated, there is no obligation to call upon the cheat and ask for an explanation in as much as to ask for this may only have the effect of causing material evidence to disappear or be manifested. In other words the person preferring the charge or laying a complaint before the court should have an honest belief in the guilt of the person charged based upon reasonable grounds depending on the state of circumstances which if they are true would lead any prudent and cautious man placed in the position of the prosecutor to the conclusion that the person he is charging is probably guilty of the crime imputed. The question as whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based upon information, the information must be reasonably credible such that an ordinary prudent and cautious man could honestly believe it to be substantially true and to afford a reasonably strong basis for the prosecution. Malice means a wrongful act done intentionally without a just cause or excuse. So to prosecute anyone for an improper motive can be evidence of malice.

The second issue for determination is whether the making of the said report was malicious. There is no evidence that before the said incident there was bad blood between the plaintiff and the defendant. In fact the existence of prior bad blood between the two was expressly denied by the plaintiff in the said criminal proceedings. On the evidence on record, I am not satisfied that the said report was maliciously made by the 1st defendant to the police.

The third issue is whether the 1st defendant participated in the arrest, detention and prosecution of the plaintiff. It is clear on the evidence on record that the plaintiff was arrested by the police and was detained by the police who also prosecuted her. The fact that the 1st defendant secured the services of a lawyer to hold watching brief in the said matter does not necessarily mean that the 1st defendant was the prime mover in the said process. In a criminal trial the complainant is technically the state while the victim may just be one of the witnesses. However, the law recognises the role of the victim in such trials with Article 50(9) of the Constitution enjoining Parliament to enact legislation providing for the protection, rights and welfare of victims of offences. It must always be remembered that the proceedings in criminal cases more often than not form evidence in civil cases hence the interest attached to the former by the victims. Therefore for the victim to be interested in the criminal proceedings cannot be taken to amount to prosecution thereof unless the role played by the victim goes farther than that of securing his interest.

The next issue is whether the said prosecution was actuated by malice. Since I have already found that the 1st defendant did not conduct the prosecution of the plaintiff, the issue of malicious prosecution by the 1st defendant does not arise. A prosecution exists where a criminal charge is made before a judicial officer or tribunal and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it and is called the prosecutor. See ***Words and Phrases Legally Defined Vol. 4 Page 206***. However, it is my view that in cases where the role played by the victim is such that it transcends that of a complainant in that the role is so active as to render the actual prosecutor a mere pawn or agent in the whole game, the victim may be deemed to be the actual prosecutor and may be held responsible for the prosecution carried out by his agents. In the present case I am not satisfied that apart from lodging the complaint with the police the 1st defendant played in any other role in the matter. The prosecution was solely handled by the police for whom the 2nd defendant would have been responsible. However, no evidence at all was led to prove malice on the part of the police. Without proof of malice, prosecution *per se* does not render the prosecution malicious in order to justify an award of damages in the tort of malicious prosecution.

Having found that the tort of malicious prosecution has not been proved against any of the defendants it follows that the defendants are not liable to compensate the plaintiff.

The next issue seeks a declaration as to who between a councillor and a Town Clerk to a Local Authority is senior. In ***Matalinga and Others vs. Attorney General [1972] EA 518, Simpson, J*** (as he then was) held that the power to grant declaratory orders is a very wide power and it is obvious that it is one that should be exercised with utmost caution. It should be exercised “sparingly”, “with great care and jealousy”, “with extreme caution”. The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought; it is essential that a person who seeks to take advantage of the rule must be claiming relief. The learned Judge went on to hold that the wide language of the rule is not free of all limitations and is subject to the limitation that the declaration claimed must not be contrary to the accepted principles on which the court exercises jurisdiction, and one of those principles is that the court will not make declarations in a dispute which is not a justiciable dispute. In this case the declaration which the plaintiff seeks is a general declaration which really has no bearing to the cause of action herein. The determination of that issue must await another day.

I have therefore found no merit in this suit.

However as the law requires me to assess damages despite the foregoing finding, I will proceed to do so. In this case although the plaintiff said she was acquitted after one year, there was no evidence relating to the period for which she was incarcerated. Therefore following in the footsteps of ***Onyancha, J's*** decision in ***Bernard Kyeli Mutula vs. Anthony Kitonga Kamundi & Another Machakos HCCC No. 26 of 2004***, I would have awarded the plaintiff Kshs. 500,000.00 in general damages. The sum spent in defending the said criminal case defence was neither expressly pleaded nor strictly proved and I would have awarded none in respect thereof.

In the result this suit fails and is dismissed with costs to the defendant.

Dated at Nairobi this 4th day of October 2012

G V ODUNGA

JUDGE

Delivered in the presence of

.....for the Plaintiff

.....for the Defendant