REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 469 of 2011

MICHAEL MUTINDA MUTEMI. .... APPEALLANT

VERSUS

PAUL KINYANJUI NGOIMA. .... 1ST RESPONDENT

THE ATTORNEY GENERAL. .... 2ND RESPONDENT

(From the Judgment and Decree of A O Muchelule, Chief Magistrate in Milimani, CMCC No. 12519 of 2005)

J U D G M E N T

The Appellant herein was the Plaintiff in this suit at the lower court. The Appellant/Plaintiff, in a plaint dated 15th November, 2005 sought general and special damages arising from an arrest and criminal prosecution on the charge of Robbery with Violence Contrary to Section 296(2) of the Penal Code in respect of which he was eventually acquitted. The Appellant thereafter being aggrieved, filed this civil suit basing it on malicious prosecution and false imprisonment on the part of the Attorney General who represented the police. The Respondent had averred in his plaint that the 2nd Respondent, acting on a complaint by the 1st Respondent, had maliciously and without reasonable or probable cause, arrested and prosecuted him of a criminal charge. That the said preferred charge was unsuccessful and was eventually dismissed and the Appellant, acquitted.

The Respondents who had been sued, had filed their defences in which they vehemently denied generally, all the Appellant's pleading in all paragraphs of the plaint. They also had, in the alternative stated that if the Appellant had indeed been arrested, charged and criminally prosecuted, the Police had arrested him in accordance with the statutory powers vested in them and had done so without malice and on bonafide belief after thorough investigations that the Appellant may have committed a criminal offence.

The Respondents had not however, specifically or directly denied the contents of paragraph nine (9) of the plaint which had alleged service on them of Notice of Intention to sue, but that they had generally stated that, save for what had been expressly admitted in the defence statement, the Defendants had denied each and every allegation of fact contained in the plaint as if the same were set out in the defence and had in full, been specifically traversed seriatim.

During the hearing of the suit, the Appellant testified in support of his claim and called one witness to testify in his favour.

In his evidence, he stated that the 1st Respondent was his business partner when he, in the year 2004,

filed a criminal complaint against the Appellant. As a result, the police had arrested him, charged, and prosecuted him with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. That he was several months down the line, found with no case to answer and acquitted under section 210 of the Criminal Procedure Code. He produced a certified copy of proceedings and ruling.

The Appellant, as well produced receipt for Ksh.10,000/- being a down payment to his advocate who defended him in the case. He also testified that he suffered financially, physically and psychologically. He testified that the police did not properly investigate the case before preferring the criminal charge against him. He also said that the evidence produced against him in the criminal case, confirmed that no proper investigation had been conducted against him.

The Appellant further testified that the 1st Respondent had pointed him out to the police who arrested him but on booking him in the Occurrence Book, the police did not indicate any reason for arrest. He accordingly, concluded that failure to properly investigate the criminal complaint and the eventual acquittal confirmed, that the arrest had no reasonable cause and was deliberate and malicious.

In respect to the issue of whether the Plaintiff served notice of intention to sue upon the Attorney-General, the Appellant testified and that asserted that he had served the same on the Attorney General, although he failed to produce copy of the served notice or evidence of the alleged service.

The Appellant concluded his case by calling a Kamiti Prison Warder who produced the Appellants warrant in Criminal Case No. 2317 of 2004 in which Appellant had been detained in remand for robbery with violence. It showed that he had been in remand from 22nd March, 2004 to 3rd December, 2004.

Although the Attorney-General cross-examined the Appellant at the lower court, the state called no evidence to specifically controvert the Appellant's evidence.

In his judgment, the honourable trial magistrate relied on Section 13A (1) of the Governments Proceedings Act, Cap 40 of the Laws of Kenya to dismiss the Appellant's claim. The Section provides thus: -

"S.13A (1) No proceedings against the Government shall be or be instituted until the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings ..."

The honourable trial magistrate in respect of the above provision stated as follows: -

"The Plaintiff says he served notice. He did not produce it. The court cannot know if it existed or if it was served as required by law. The burden to prove these on the balance rested with the plaintiff. I find he has not discharged that burden. I find the suit cannot lie against 2nd defendant."

In the alternative the honourable trial magistrate went ahead and also ruled that the plaintiff (Appellant), his evidence had admitted that the police arrested and later charged and prosecuted him with robbery because the 1st Defendant (Respondent) had pointed him out to them. He, therefore, concluded that the police were entitled to independently investigate and charge him as they did. The court noted that the police did not know the Appellant before and therefore, had no grudge or ill-will from which malice could be imputed on their part in their act of arresting, detaining and prosecuting the Appellant. The court found that the police did not act without reasonable or probable cause. The honourable trial magistrate accordingly, concluded that even on the merit of the facts the claim was proved on the balance of probabilities. He went ahead to dismiss it with costs. That triggered this appeal.

The grounds of complaint can be summarized as follows, although they are 12 in number: -

a) That the trial magistrate erred in law and fact by failing to hold that the Police's arrest detention and prosecution was not based on reasonable or probable cause but was based on a grudge and ill-will

and was accordingly malicious and unlawful.

b)That the trial magistrate erred in law and fact in failing to accept that the proof of acquittal of the (plaintiff) Appellant through the production of the certified copy of proceedings and judgment, was itself sufficient proof of malice and ill-will and lack of reasonable and probable cause of their part.

c) That lack of proof of service of notice of intention to sue the Government, was not an issue before the court and the trial court erred in law to make it an issue.

d)That matters and facts pleaded in the plaintiff's plaint were deemed admitted by the Respondents since they were not denied in the Defence.

e) That the trial magistrate acted against the weight of evidence.

f) That the trial magistrate was unfair and was biased against the Appellant/Plaintiff.

g)That the trial magistrate erred in failing to admit into evidence, Appellant's evidentiary documents.

h)That the trial magistrate erred in law in failing to find that Appellant had proved his claims on the balance of probabilities.

I have carefully perused the lower court record and the written submissions in this appeal which were filed by both sides. I first wish to deal with the technical issue concerning the notice of intention to file the suit against the Government as required under Section 13A (i) of the Government Proceedings Act, Cap 40, earlier herein cited.

In my view, any person who wishes to sue the Government of Kenya, must serve a notice of intention to do so, at least thirty (30) days before the institution of the suit. That being a statutory requirement, the person so suing has the burden of proving that such notice of intention to sue was indeed served as required, especially where the issue of such notice arises during the proceedings. Except where the state concedes to service of the notice therefore, it appears to me of necessity that the plaintiff must prove on the balance of probability, that the notice was indeed served.

In this case, the 2nd defendant's counsel raised the issue of the service of the notice, in cross-examination, especially because the Plaintiff/Appellant had raised little or no evidence of proof of the same in his evidence in chief. The Appellant had not even produced copy of the notice in his evidence but insisted in his testimony that he had served the same. He did not testify on whom he had done the service and when, to enable the defendant to be in a position to suitably deny or admit.

I have considered this tricky situation. I have come to the conclusion that the assertion by the Appellant/Plaintiff that he had served the notice, was not sufficient to prove that he had indeed done so. It was necessary to show evidence of service. For example, he could show a copy of the notice duly stamped at the Attorney-General's or Police Headquarters offices as a sign of service. Or the Appellant could produce a note book in his custody duly stamped by someone from the relevant offices, showing the date or time of service. None of the above was part of the Appellant's evidence.

For the above reasons, this court finds no fault with the conclusions arrived at by the honourable trial magistrate, that the Appellant/Plaintiff had not discharged the burden of proof on his part, of proof of service of the said notice.

In the case of **Lereya & 800 others Vs Attorney General & 2 Others [2006] 2KLR, 345 at page 350**, the issue of the issuance and service of the Notice of Intention to sue was fully discussed by a bench of three judges.

They stated as follows: -

“***It is clear to us from the above provisions that the issuance of a statutory notice and its service upon the government through its duly authorized agent is a condition precedent to the validity of a suit against the government. By virtue of Section 12(1) of the Government Proceedings Act, the Attorney General is the authorized agent.”***

In the case above, the bench proceeded to find the notice asserted as served, was not properly served and ruled that the suit was incompetent.

This court is also persuaded to find that there was insufficient evidence to prove that the Plaintiff/Appellant had served the relevant notice of intention to sue the Government as required under Section 13A (1) of the relevant Act. For that reason the Appellant’s suit was nothing else other than incompetent and only suitable for striking out. That is exactly what the honourable trial magistrate’s finding was and this court would on that ground alone, dismiss this appeal.

The honourable trial magistrate however, went further and considered the evidence that the Appellant had produced. He found that although the Appellant had indeed been acquitted of the criminal offence with which he had been charged, he had nevertheless failed to prove that the 2nd Appellant had acted with malice or ill-will in prosecuting the Appellant.

I have carefully considered the Appellant’s evidence in the lower court. I am as well, satisfied that all he did, was to show that he was arrested by the police at the instigation of the 1st Respondent who was his business partner. That thereafter, the police detained him and later charged and prosecuted him, although he was easily acquitted. In my view he failed to prove that the police did not carry out an independent investigation. He failed to show that the police simply acted at the direction and control of the 1st Respondent. In conclusion, he failed to prove that the arrest, detention and prosecution was malicious and/or was without reasonable or probable cause.

As confirmed in various cases however, the mere fact that a criminal charge against a plaintiff ended up with an acquittal, is alone not enough. In that respect I refer to the case of **Simba Vs Wamberi Nairobi Civil Case No. 1967 of 1982.**

In order to succeed, the plaintiff also must prove that the arrest, detention and prosecution were maliciously carried out without reasonable and probable cause.

For the above reasons, the court would and does also, on merit, dismiss this appeal with no order as to costs. Orders accordingly.

Dated and delivered at Nairobi this 5th day of November 2012.

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D A ONYANCHA

JUDGE