



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 3486 OF 1987

JOSEPH KAMUNGE KAMAUPLAINTIFF

VERSUS

EDMOND KWENA NDUZI.....DEFENDANT

JUDGMENT

The plaintiff in this case filed a plaint on 3/9/87 dated 25/8/87. This plaint was later amended. In the amended plaint the plaintiff averred that on or about the 13th day of July 1986 the defendant maliciously and without reasonable and or probable cause laid an information to the Muthaiga Police Station against the plaintiff of assaulting the defendant and caused the plaintiff to be arrested on the 27th day of July 1986.

He averred further that in consequence of the matter aforesaid the plaintiff was arrested and was imprisoned until the 28th of July 1986 and was subsequently brought before the Resident Magistrate Court at Makadara where the defendant maliciously and without reasonable and or probable cause continued to prosecute the plaintiff for the offence of assault contrary to section 251 of the Penal Code.

That on various dates the defendant caused the plaintiff to appear before the aforesaid Court in further continuance of the said prosecution and the said Court heard the case on the 13th April 1987 the charge against the plaintiff was dismissed and the plaintiff acquitted of the charge and he was immediately released whereupon the said prosecution determined.

By reason of the matters aforesaid the plaintiff was wrongfully imprisoned, greatly injured in his credit character and reputation and he suffered considerable mental pain and anguish and he was put to considerable triable inconveniences anxiety and expenses and has suffered loss and damage.

In the alternative the plaintiff averred that the defendant unlawfully and wrongfully assaulted the plaintiff occasioning upon his person severe bodily injuries and was put to considerable expenses as a result thereof.

He gave particulars of injuries as bruising and laceration to the chin, bruising to the face and head injury. The plaintiff claimed special damages being medical report fees 550/=, travelling expenses 1,800/=, legal fees Kshs 10,000/= totalling Kshs 12,350/=

In addition he prayed for general damages for false imprisonment, general damages for malicious prosecution, costs, interest and any other relief as the Court may deem fit to grant.

The defendant on the other hand filed a defence in person on 1/3/88. This was later amended. The amended defence was filed on 14/11/88. In it the defendant denied that he laid information to the

Muthaiga Police Station against the plaintiff without reasonable and probable cause as alleged at para 3 of the plaint and put the plaintiff to strict proof thereof. He further denied that the plaintiff was prosecuted maliciously and without reasonable and probable cause and puts the plaintiff to the strict proof thereof. He stated further that he would contend that he honestly laid information to the Muthaiga Police Station about his having been assaulted by the plaintiff and the decision to arrest and prosecute the plaintiff and the prosecution was a matter of discretion in the police which discretion the police exercised properly after diligent investigation. He added that the mere acquittal of the plaintiff in the criminal case does not automatically impute or prove malice as against the defendant. That he had reasonable and probable cause to lay information against the plaintiff to the Muthaiga Police Station and he acted with no malice whatsoever.

The evidence in brief is as follows:-

The plaintiff testified that on 13/7/86 his two children were brought to Umoja Estate where he resides to visit him. They came from Kahawa West where they were residing with their mother. He took them home and found their mother out. The defendant was seated at his door reading a newspaper. He left the children at a neighbour's place and went to a nearby bar. He came back at 7.00 pm and found the lady in. Shortly the defendant came in asked for oil and then told the plaintiff that he too will leave that house.

The plaintiff told the defendant that that was his house as well as his wife and children. The defendant left and then came back with his houseboy who threw a stone at the plaintiff. The defendant hit him on the left shoulder with a metal. He fell down and he was hit on the mouth with a stone and he had 5 stitches. He went to the house and slept. The next day he went to Aga Khan Hospital where he was treated and discharged and he reported to Muthaiga Police Station where he was issued with a P3. He took the P3 to the doctor but he was told it would not be filled before the stitches were removed.

Shortly thereafter police arrested him for an alleged assault. He tried to explain to police that he had made a report and he had a P3 but he was still arrested and charged and the P3 snatched from him. The plaintiff stated that he was locked up for 40 minutes and then signed a bond and he was released. He went to Court on 28th and he was released on bond.

He produced proceedings in the lower court to show that he was prosecuted for assault as Exh 1.

The plaintiff added that he married his wife in church but disagreed with her as she used to spend nights out. He used to meet her in town with the defendant and he warned the defendant against moving about with his wife. He was firm that he reported the incident to Muthaiga Police Station and it was booked in the O/B. He was issued with a P3, which he produced in Makadara Court. He also produced a receipt for treatment in the Makadara Court. He later on saw a doctor who filed the medical report for him Exh 2 in 1989. The plaintiff showed the injuries to Court, which were still visible. He added that the case at Makadara was occasioned by the defendant's report. He added that he did not assault the defendant but he only defended himself.

He was firm he did not hit him as some were holding his hands when he was hit with a metal. That the report that he assaulted the defendant was false and malicious. He added that his wife resided in K9 while the defendant resided in K10. That he used to meet the defendant's houseboy cooking food in his wife's house. He paid 10,000/= for the criminal offence. He spent 1,800/= on transport but he has no receipts. He prayed for judgment as prayed for in the amended plaint.

When cross-examined, the plaintiff stated that he learned in 1982 that the defendant was moving with his wife. He took him to police and they were told to settle the matter before the chief. He also confirmed that he has never found his wife in his house nor found them sleeping together. He conceded he suspected them as he found the two walking together. He agreed he was not happy at her absence and that is why he waited at the local bar.

He conceded that in the proceedings in the lower court he said the 3 beat him up. That he said the houseboy hit him with a stone. That when he fell on the stones and injured his chin. He confirmed he said

the 4 of them beat him up. He added that the judgment was that both of them had been assaulted as they both presented P3s.

He was firm he had taken 4 bottles but he was not drunk when the incident took place.

The plaintiff was called at a later stage and produced the medical report as Exh 2 and the certificates of marriage as Exh 4.

The defendant on the other hand gave sworn evidence to the effect that on 13/7/86 at 9.13 pm he was working at a French News Agency as he is a journalist by profession. He was in a shift from 8.00 pm to 9.15 pm. He left the office and drove to his house in Kahawa West arriving there at 9.15 pm. As he pulled into the parking he noticed the plaintiff standing right in the middle of the parking. The defendant stopped and he immediately rushed to the driver's side forced the door open, pulled him out and pushed him to the ground. His houseboy was attracted by the commotion and came to restrain the man who had pushed him to the ground. He pulled him off him. The defendant asked what was wrong but the man uttered something the defendant did not hear, as the plaintiff was incoherent. The plaintiff started jumping saying on that day he was going to kill. Him and the houseboy reported the matter to Muthaiga Police Station and showed the police the injuries he had sustained on the right leg, and at the back of his right arm. He was issued with a P3. He later led police to where the plaintiff was working at Hotel Intercontinental and he was arrested.

He was firm he never went to the woman's house who is his neighbour. He was met and attacked in the car park. He recalled on one occasion the plaintiff came to his place of work and assaulted him there on the allegation that he was moving with his wife. He denied the allegation. On this occasion they went to the police but they were referred to the chief.

When cross-examined he stated that he reported the incident the same day. He confirmed that the plaintiff had assaulted him on an earlier occasion and when they went to the police station they were referred to the chief.

He added that he was anxious to have the plaintiff prosecuted as he had formed the habit of assaulting him whenever he wanted. That police arrested him after confirming that he had done wrong on completion of investigations. He maintained that Florence Wambui is a single woman. He has never known her to be married. He was firm he sustained injuries and he had a P3 but it was not produced, as the doctor did not come to testify.

At the close of the whole case both counsels put in written submissions. The plaintiff's counsel submitted that the plaintiff has proved his case on a balance of probability on the following grounds.

1. That the trial magistrate in the criminal case made a finding that the plaintiff was assaulted although she did not expound on the assailant but the plaintiff has explained the person who assaulted him as the defendant.
2. That the defendant has not counter claimed against the plaintiff and has shown no justification for arrest of the plaintiff and his subsequent prosecution. The onus is on the defendant to prove justification.

The counsel for the defendant also put in written submissions to the effect that the plaintiff has not proved his claim on a balance of probability as he has not proved all the ingredients necessary in such a claim.

1. That the plaintiff has based his claim on the Madaraka Criminal Case No 11365 of 1986 in which the trial magistrate made a finding that the complainant was assaulted although there was no finding of who the aggressor was. As such it cannot be said that the prosecution against the plaintiff was malicious as there was probable and justifiable cause.
2. That in the lower court the plaintiff alleged to have been hit by some other people.

3. That the claim for special damages has not been specifically proved as receipts produced were marked for identification only.

Having assessed the evidence adduced by both parties and also having perused the submissions of both parties it is clear that the case is based on the Makadara Criminal Case No 11365/86. First of all I will go back to the amended plaint and revisit the claim put forward by the plaintiff which are damages for;

1. False imprisonment.
2. Malicious prosecution. These were in addition to a claim for special damages.

The ingredients of the above 2 claims were set out by the defence lawyer and they are as follows;

1. That the plaintiff was prosecuted by the defendant.
2. That the proceedings were resolved in the plaintiff's favour.
3. That the proceedings were instituted without reasonable and probable cause.
4. That the defendant instituted proceeding maliciously.
5. That the plaintiff suffered loss and damage.

On the question of false imprisonment the time factor is also important. The plaintiff says he was arrested from his place of work on 27/7/86 in the afternoon hours. He was taken to Muthaiga Police Station where he stayed for 40 minutes and then he was released on bond. He reported to Court on 28/7/86 where he was again released on bond. So from the above evidence the false imprisonment lasted for only 40 minutes and the plaintiff agreed to accompany the police to Muthaiga Police Station when requested to do so.

I refer to the case of *Edgar Benard Cufforn v Arthek John Hawley* [1966] EA 44. In this case the defendant *bonafide* purported to execute a duly endorsed warrant of arrest for Edward Benard Cuffon by apprehending the plaintiff and bringing him before a magistrate in Nairobi to answer charges laid under the East African Customs Act. Consequently the plaintiff was acquitted of the charges and he sued the defendant for damages for false imprisonment, it was argued for the defendant that the plaintiff consented to the arrest. The plaintiff argued that consent is no defence in an action for false imprisonment.

It was held *inter alia* that the plaintiff's conduct amounted to a representation that the warrant entitled the defendant to arrest and detain him.

The above case referred to Customs Act provisions while our case refers to arrest in exercise of the powers under the Criminal Procedure Act following a complaint having been made by the defendant.

I also refer to the case of *Fernandes v Commercial Bank of Africa Ltd and another* [1969] EA 482. The first defendant through its manager the second defendant acting on legal advice applied for the arrest of the plaintiff before judgment on the ground that he was leaving Kenya. He was taken before a Judge and then released. The plaintiff then sued for damages for wrongful arrest.

It was held *inter alia* that on the facts the second defendant had reasonable and probable cause for the action he took.

The foregoing authorities show that an action for false imprisonment can only lie where the action taken was taken without a reasonable or probable cause.

The stand of the plaintiff is that the arrest and imprisonment was false and it was without reasonable and probable cause. That the prosecution was malicious.

The stand of the defence is that the defendant did not commit the assault neither was the arrest unlawful nor was the prosecution malicious.

In resolving the above, we have to go back to the root of the present action, which is the Makadara Criminal Case No 11365 of 1986. In his evidence in the criminal case the defendant who was the complainant stated that the defendant attacked him in the parking yard for nothing. He shouted and his houseboy came to restrain the man who is now the plaintiff. He added he was injured on the right knee and left hand.

When cross-examined he stated that he never struck back and that the accused who is now the plaintiff had assaulted him in 1983.

PW3 in that case confirmed that the defendant made a report there and that the accused who is now the plaintiff had a P3 which was withdrawn from him upon arrest.

The plaintiff in his evidence in the lower court stated that the houseboy had a metal rod and he hit me on the shoulder. The other one hit me on the chin with a stone. When I fell they went back to the house. He brought drugs dressed the wounds and slept and then reported to Muthaiga Police Station the next morning. He went to hospital and he was treated.

He conceded he had a conflict with the defendant in 1984 as he was moving with his wife. He reported to police and they were referred to the chief.

In the judgment of the lower court it was ruled that the issue of who was the aggressor cannot be determined. In the evidence in the lower court the plaintiff who was the then accused stated that he was hit by the houseboy and another after the defendant had shouted. But in his evidence in this case he changed and said that he was assaulted by the defendant.

The defence counsel submitted that the earlier version of evidence should be taken as it was made when memories were still fresh. This aspect of evidence was put to the plaintiff but he maintained it is the defendant who assaulted him. The plaintiff's counsel submitted that the plaintiff has proved and shown who the assailant was.

It is also observed that the trial Court made the finding that there were two assaults although it was not determined who was the aggressor. In the absence of determining who the aggressor was it is not possible to pin point the blame on to either party. If the defendant was attacked first then he had a right to defend himself, if the plaintiff was attacked first then he also had the right to defend himself.

However, this Court will put much attention to the lower court's record which shows clearly that the plaintiff herein was actually assaulted by persons other than the defendant although it is the defendant who shouted for them to come. These were members of the defendant's household including a houseboy for whose actions the defendant would be liable. This finding is at variance with the pleadings as para 7 of the amended plaint states emphatically that it is the defendant who assaulted him. It is a general rule that a party is bound by his pleadings and there is no way he can go round it. In order for the defendant to be bound he had to plead vicarious liability, which is not the case here.

As regards the wrongful arrest and the malicious prosecution the trial court made a finding that there were 2 assaults. As such the defendant was also aggrieved and he had a right to seek police help to vindicate his rights.

The fact that he did not succeed in getting a conviction does not in any way mean that he had no reasonable and justifiable cause.

In the final analysis I find that the defendant had justifiable cause in laying the report to Muthaiga Police Station.

Before I wind up on this matter it is clear that the plaintiff was married to the lady living next to the defendant. It came out in the lower court as well as in this Court that the plaintiff had warned the defendant to stop moving around with his wife with whom they were separated. If there was anybody who would be aggressive it would be the plaintiff.

I now consider the issue of special damages, photocopies of receipts were produced but not originals. They were marked for identification only (MFI). Without the originals being produced the photocopies cannot be produced to form part of the evidence.

I refer to the case of *Ouma v Nairobi City Council* [1976] KLR 297 who assaulted him. The plaintiff's counsel submitted that the plaintiff has proved and shown who the assailant was.

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I refer to the case of *Ouma v Nairobi City Council* [1976] KLR 297 in which it was held *inter alia* that although special damage had been specifically pleaded by listing in the plaint the items alleged to have been stolen or damaged, the plaintiff's failure to prove such damage at the trial with certainty and particularity precluded the Court from making any award of special damages.

In the final analysis and for reasons given I find that the plaintiff has not proved his claim against the defendant on a balance of probability. The suit is dismissed with costs to the defendant.

Dated and at Nairobi this 18th day of March , 1992.

WALEKHWA

JUDGE