



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1414 OF 1980

JUMA KHAMISI KARIUKIPLAINTIFF

versus

EAST AFRICA INDUSTRIES LIMITED AND GEORGE OKOKODEFENDANTS

JUDGMENT

In this action, the plaintiff, Juma Khamisi Kariuki is represented by Mr Gaturu; the defendant, East African Industries Ltd and George Okoko are represented by Mr Ojiambo.

The action was begun by plaint filed in court on May 23, 1980. A defence was filed on June 24, 1980, and a reply to the defence was filed on August 5, 1980. The hearing of the action was begun on December , 1985 when the plaintiff gave evidence, and the case for the plaintiff was closed. The hearing was resumed on Tuesday October 28, 1986 when the defendant called one witness and the case for the defendant was closed. At initial hearing it had been agreed that notes of evidence would have to be obtained of Criminal Case No 999 of 1979 which had been tried in the resident magistrate's court at Makadara. At the adjourned hearing it was accepted that such notes of evidence could not now be obtained, and it was agreed that this trial should proceed on the basis that only the judgment delivered in that case would be available.

In paragraph 4 of his plaint, the plaintiff alleged wrongful arrest, false imprisonment and malicious prosecution; in paragraph 7 he alleged defamation.

For these torts he claimed both special and general damages.

In paragraph 3 of the defence the first defendant admitted that the second defendant was the agent of the first defendant but denied the alleged torts.

It was not disputed that, at all material times, the plaintiff had been employed by the first defendant. On January 11, 1979 the defendant's witness, Francis Kimani Ngugi, who was employed by the first defendant as an internal auditor, happened to visit a butchery situated near to the first defendant's premises. He had gone there simply for the purpose of buying meat suitable for roasting. He was surprised to find at the butchery that old print out papers from his employer's computers were being used in the butchery for wrapping up meat. It was the practice of his employers to destroy, by burning, disused print out material. The witness reported what he had seen and recommended that the security manager should investigate and, if possible, discover how the first defendant's print out paper found its way to the nearby butcher. The matter was investigated by the defendants and, as Mr Ojiambo concedes, the investigations carried out by the defendants led to the plaintiff and another man being arrested by the police. The plaintiff and the other man were subsequently charged with the offence of stealing by a servant, contrary to section 281 of the Penal Code. The particulars of offence were that between the 1st

day of July, 1978 and the December 31, 1978, at the Industrial Area, within the Nairobi Area, the plaintiff and the other man, with another not before the court, being servants to East African Industries Limited stole 5 cartons of computer papers valued at Kshs 5,000 the property of the said East African Industries Limited. To this charge the plaintiff and the other accused pleaded not guilty. On October 19, 1979 L M Ombete Esq R M acquitted the plaintiff and convicted the other accused. When the other accused had been convicted, an inspector of police drew the court's attention to the fact that the accused was a first offender Mr Njugi also said that the accused was a first offender and that he had worked for 15 years. He said the accused had a clean record and was married with nine children all in school. The accused was 48 years of age, and he stood to lose his employment and terminal benefits. Mr Njugi said, and this is of particular significance to the present action, that what was stolen had been discarded. The magistrate accepted that the paper was worthless and that the company, meaning the first defendant in that action, lost nothing. In view of that, the magistrate said that he agreed with Mr Njugi that the accused deserved some lenient treatment and he made an order for the accused to be conditionally discharged for six months under the provisions of section 35(1) of the Penal Code.

In dealing with the case against the plaintiff, the magistrate, at page 2 line 18 of his judgment, said:-

“It is not quite clear why the second accused was arrested but I think it is because he was the archives supervisor and these papers were from the archives.”

Again at page 3 line 8, the magistrate said:

“As I have already remarked it is not easy to know the reason why he was arrested in the first place. It is true that he was the archives supervisor and these computer print out papers must have come from those archives.

But that is no evidence either that he is the one who stole them alone or with anyone else.

The magistrate then went on to consider how the case might have been proved against the plaintiff but at page 3 line 23 he said:-

“I have consequently no option but to acquit the second accused
(ie the plaintiff) of the charge laid against him.”

In the course of this hearing, the defendants, as I have said, called only the one witness, Francis Kimani Ngugi. He was unable to give any evidence that could justify the prosecution of the plaintiff and I have come to the conclusion that the prosecution of the plaintiff was unreasonable and unjustifiable.

Mr Ojiambo, in his address to the court at the conclusion of the case for the defence, has referred to the cases of Katerregga v Attorney-General, [1973] EALR page 287 and Mbowa v East Mango Administration, [1972] EALR page 352. He has also referred to Halsbury's Laws of England Third Edition volume 25 at page 347. Mr Gaturu has referred to Kagane and Others v Attorney-General and Another [1969] EALR..

In the Katerregga case, at page 289 per Mead J at paragraph B it is said that for the plaintiff to succeed on the grounds of malicious prosecution five basic essentials have to be satisfied.

The first one is that the police officer as agent for the defendant must have instituted the criminal proceedings against the plaintiff. Mr Ojiambo says that a police officer does not or can not act as agent. I do not accept this contention or agree that there is such a universal rule. In my judgment, the question of whether or not a police officer prosecutes as agent for a complainant is a question of fact and degree. There will be cases where a prosecution can be seen to be conducted on the initiative of a police officer and upon the responsibility of a police officer. There will be other cases where a prosecution is clearly launched on the instigation of a complainant who has persuaded a police officer to conduct the prosecution on his behalf. In each case the court must look to the reality that lies behind the formality.

In the present case, Mr Ojiambo concludes that the investigations carried out by the defendants led to the plaintiff being arrested. The plaintiff's uncontradicted evidence was that the second defendant arrested him and handed him over to the police. I am satisfied that the second defendant was the moving spirit behind this prosecution, and that the police officer who prosecuted acted at the instigation of the second defendant and on behalf of the defendants and as their agent.

For the reasons I have already given, I am also satisfied that the prosecution of the plaintiff was instituted without reasonable or probable grounds.

In the Katerregga case, at page 289 paragraph H, it is said that the lack of reasonable and probable cause may be taken as some evidence of malice although the plaintiff cannot rely solely on the defendant's failure to show reasonable and probable cause. In the Kagare case, at page 646 paragraph B it is said that a person who is actuated by malice may for that reason be likely to institute a prosecution without reasonable and probable cause. Rudd J goes on to say:

“This possibility is provided for in law to some extent in a rattle
backhanded way by allowing want of reasonable and probable
cause to be taken into consideration as being some evidence
of malice, but the converse does not apply.”

In the present case, I do take into consideration, as some evidence of malice, the want of reasonable and probable cause. The property allegedly stolen was worthless and discarded papers. If the defendants, for some reason of business policy, wanted to ensure that the paper was destroyed they could have done so by regulation and by inspection. It was in my judgment, malicious to institute this criminal prosecution, merely for the indirect purpose of ensuring that the discarded papers were burnt. I also find, upon the evidence of the plaintiff, that the second defendant conducted his investigations unfairly and even oppressively as far as the plaintiff was concerned. I find in the second defendant's lack of conduct and frankness, and in the atmosphere of mystery which he deliberately created, further evidence that this prosecution was conducted with malice towards the plaintiff. I am satisfied that the plaintiff has established that essential element in his claim.

That the proceedings terminated in the plaintiff's favour is acknowledged by the defendants.

The plaintiff having established liability in the defendants, I turn to the question of damages.

In paragraph 5 of his plaint, the plaintiff alleges that while he was in custody his house was burgled and his property stolen. He puts the value of these at Kshs 9,670. This burglary, however, was the act of one or more unidentified persons. It has not been shown, or even suggested, that they were persons for whom the defendants have any responsibility. There is no link of causation between the arrest of the plaintiff and the burglary of his house; the one did not cause the other. Even if it could be argued that, upon arresting the plaintiff, the defendants became liable for the protection of the plaintiff's property, and no such suggestion has been put forward, it would still be open to the defendants to invoke, by way of defence, the argument that the plaintiff's loss was due to a novus actus interveniens. This part of the plaintiff's claim must therefore fail.

Paragraph 7, 8 and 9 of the plaint are couched in the language of a claim for defamation but no defamatory statement is pleaded. Indeed, no tort is alleged that has not been alleged in paragraph 6 of the plaint, and the attempt to present a claim for wrongful arrest, false imprisonment and malicious prosecution as also a claim for defamation must be condemned as an attempt to claim double damages. Consequently there can be no separate award of damages to the plaintiff under paragraph 7, 8 and 9, and no award of general damages for defamation.

The plaintiff alleges false imprisonment and says that he was remanded in prison for three months and

four days. This however, was the result of an order made in Makadara court. Mr Ojiambo has referred me to a passage in the Katerregga case, at page 288 paragraph 8, Mead J, in commenting on a case where the imprisonment of the plaintiff was the result of magisterial remand orders, says this:

“The defendant is not liable for these magisterial acts, the magistrate not being a person for whose acts the defendant in the present instant is liable. The proposition that a person instituting legal proceedings before a court is not liable in respect of imprisonment where the imprisonment is the result of a court order has long been established in English law; *Lock v Ashton* [1848] 12 QBD 871 and the more recent case of *Diamond v Mintel* [1941] 1 KB 656 at page 674.

Following this ruling, I hold that the plaintiff's claims for wrongful arrest and false imprisonment must be confined to the period at or about February 1, 1979 when the plaintiff was arrested and handed over to the police who held him overnight until he could be brought before the magistrate at Makadara. The defendants are not liable for the plaintiff's subsequent imprisonment by the magistrate.

In paragraph 6 of the plaint, under the heading, Particulars of Special Damages, there is a claim for loss of earnings amounting to Kshs 5,400. Apart from saying that he had been promoted to supervisor the plaintiff gave no evidence to support this claim or to show how it arose. It is said by Mr Gaturu that the claim was not challenged but it does not follow from that that the claim was admitted. In the absence of any admission by the defendants, I am forced to the conclusion that this claim remains unsubstantiated and I am unable to accept or allow it. The same also must be said of the claim for travelling expenses for the plaintiff, his wife and witness. There is simply no evidence at all to support such a claim as a claim to special damages. There is an item No III which is for KShs. 24 for the cost of the proceedings and judgment in Makadara court but it appears that only the judgment, and not the proceedings, was obtained. There is no evidence as to the cost of the judgment.

It follows that the plaintiff's claims for special damages fail entirely either because, in the case of items (i), (ii) and (iv) quantum has not been proved or, in the case of item (ii) liability has not been proved.

The result is that the plaintiff is entitled to general damages only for wrongful arrest, false imprisonment and malicious prosecution.

For wrongful arrest I award the plaintiff damages of Kshs 1,000.

For false imprisonment I award the plaintiff damages of Kshs 1,000.

For malicious prosecution I award the plaintiff damages of Kshs 18,000.

There will therefore be judgment for the plaintiff against the defendants in the sum of Kshs 20,000 general damages together with interest thereon calculated at court rates from the date hereof viz 3rd day of November, 1986 until the same are paid by the defendants to the plaintiff and I order that the defendants do pay to the plaintiff the costs of this suit such costs to be taxed if not agreed and to bear interest thereon at court rates from the date of such taxation or agreement until the same are paid by the defendants to the plaintiff.

Delivered at Nairobi this 3rd day of November, 1986.

JOSEPH BUTLER-SLOSS

JUDGE