



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & KANTAL, JJ.A.)

CIVIL APPEAL NO. 234 OF 2016

BETWEEN

JAMES WILLY MWANZIAAPPELLANT

AND

THE HONOURABLE THE ATTORNEY GENERAL.....RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (Sergon, J.) dated 27th May, 2016

in

Civil Suit No. 24 of 2004)

JUDGMENT OF THE COURT

The appellant, **James Willy Mwanzia**, then a businessman and a budding politician in Kitui, was on 20th August, 1997 arrested by police officers from Kitui Police Station. He was taken to Machakos Police Station where he was detained and between that day and 23rd August, 1997 he was subjected to acts of torture and degrading treatment as is set out in a witness statement he filed at the High Court of Kenya, Nairobi, and in particulars of torture, inhuman and degrading treatment set out in the amended plaint in **H.C.C.C. No. 24 of 2004**. We shall revert to this issue in this judgment.

He was charged with others in **Machakos Criminal Case No. 3539 of 1997** with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, an offence to which there was no bail in those days. The charge was later withdrawn by the prosecution leading to his release on 26th September, 1997. He was re-arrested and arraigned with five others before the Magistrate's court at Kangundo where the same charge was laid against him and those others. A trial was conducted and the magistrate, being satisfied that the charge had been proved as required in law convicted the appellant and sentenced him to suffer death. The appellant appealed that conviction and sentence in High Court Criminal Appeal No. 739 of 1998 and in a judgment delivered on 6th March, 2003 (**Mbogholi Msagha & Oguk, JJ.**) the learned Judges found in favour of the appellant, quashed the conviction and set aside the sentence.

That is a synopsis of the facts that led to the suit filed at the High Court (later amended) where the appellant sued one Muli Mutua (he was the owner of the lorry that had been stolen leading to the charge. He was not served with Summons to Enter Appearance and did not participate in the case) and the Honourable Attorney-General where the appellant prayed for:

“aa. General damages for unlawful arrest and confinement, false imprisonment and malicious prosecution.

bb. General damages for severe physical, psychological and mental torture.

cc. Aggravated and exemplary damages.

dd. A declaration that the defendants are bound to honour and repay the bank loan the plaintiff owes Industrial and Commercial Development Corporation and order compelling the defendants to repay the said loan.

ee. Costs of future medical expenses at the rate of Kshs. 6,400 per month from August 2003.

ff. General damages for sexual dysfunction.

gg. Damages for loss of business @ the rate of Kshs.35,000 per month from 20/8/1997.

b. Costs and interest of this suit.

c. Any other further relief that this Honourable Court deems fit to grant.”

In a defence (as amended) the respondent denied the claim contending amongst other things that a report had been made to police about robbery; that the report was not malicious; and that there was probable cause for the appellant to have been prosecuted. Particulars of torture and malice set out in the plaint were denied, it being stated as defence that a crime had indeed been committed leading to the arrest and prosecution of the appellant.

A hearing took place first before **Onyancha, J.** who took the evidence of a Doctor who had examined the appellant. **Sergon, J.** took over the matter and took the evidence of the appellant and his two witnesses.

The respondent did not call any evidence and in a judgment delivered on 27th May, 2016 the learned Judge found that the prosecution of the appellant was not malicious. Having so found the Judge reached the conclusion that in the absence of malicious prosecution the appellant was not entitled to any damages.

It is those findings that have provoked this appeal where eight grounds of appeal are taken in the Memorandum of Appeal drawn for the appellant by his lawyers, **Njugi B.G. & Company Advocates.** These range from an attack on the Judge for finding that there were only three issues for determination; for finding that there was no proof of malicious prosecution; for relying on prosecution evidence which had been overturned on appeal; for finding that damages were not payable; for not considering every prayer in the amended plaint; for ignoring uncontroverted medical evidence. The Judge is said to have erred in finding for a party who did not attend the hearing, and, in the final ground the Judge is faulted for dismissing the appellant's suit. We are therefore asked to allow the appeal by setting aside the said judgment.

When the appeal came up for hearing before us on 12th November, 2019 both parties had filed written submissions and List and Digest of Authorities and what remained was a highlight of the same.

Mr. Njugi B.G., learned counsel for the appellant, submitted that the appellant had proved malicious prosecution and the Judge was wrong not to have so found. According to counsel, the High Court, sitting on appeal, had found that there was no identification of the appellant as one of the robbers and the prosecution that had taken place was therefore malicious. On the claim for general damages for injuries suffered counsel submitted that the appellant's evidence in that respect supported by medical evidence remained unchallenged and damages should have been awarded.

It was then the turn of **Miss E. Makori,** learned counsel for the respondent to reply. Counsel cited the case of **Kagane & Others v Republic [1969] E.A. 643** where Rudd, J., sitting at the High Court of Kenya at Nairobi, identified the principles that would apply in a suit for malicious prosecution to be:

“(i) whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty;

(ii) the fact the prosecution was instituted on the advice of State Counsel did not in itself constitute reasonable and probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case;

(iii) once the objective test is satisfied, it may be necessary to consider whether the prosecutor did not honestly believe in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case (Glinski v Mclver (3) adopted;

(iv) on the facts, no reasonable person could honestly have believed that the prosecution was at all likely to succeed; and the second defendant was actuated by malice.”

Counsel also cited the case of **Katerregga v Attorney General [1973] E.A. 287** where it was held by the High Court sitting in Kampala, *inter alia*, that in a suit for malicious prosecution the plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill-will or improper motives. It was further held in that case that lack of reasonable and probable cause cannot be relied upon by itself to show malice.

Miss Makori challenged the evidence of witnesses called by the appellant, submitting that they were not present when the appellant was arrested and their evidence was at the very least, in counsel's view, hearsay and inadmissible.

We have considered the whole record and the submissions made and we identify as two central issues for our determination. Firstly, whether there was malicious prosecution and, secondly, whether the appellant was entitled to general and special damages claimed in the suit.

As we have already shown the appellant was charged before the Magistrates' court at Machakos with the offence of robbery with violence, a charge which was later withdrawn. He was re-arrested and charged at the Magistrates' court at Kangundo with the same charge of robbery with violence and was duly convicted. The particulars of the charge and the evidence led by the prosecution were that on 19th of August, 1997 a complainant, Muli Mutua, who was the driver of an Isuzu lorry registration Number KAJ 663M was with his turn boy, James

Musembi Wambua, at a place called Ikiwa River in Machakos. They were loading sand on the said lorry when they were confronted by an armed gang who fired shots at the lorry, shattering the driver's side mirror. They were ordered by the gangsters to lie down but they managed to escape into the surrounding bushes but Muli Mutua was pursued by the gangsters while trying to cross a river. He was beaten up and robbed of cash Kshs.27,000 and the gangsters took away the vehicle keys. He was put in the cabin of the lorry which was driven towards Kitui. While enroute Muli Mutua was blindfolded and then injected with a substance that made him lose consciousness. He was then removed from the lorry and thrown by the way side. Meanwhile, the turnboy James Musembi Wambua had managed to report the incident to Mbooni Police Station.

Muli Mutua was picked by a good samaritan from where he had been dumped and taken to Machakos Police Station. Muli Mutua and his turnboy James Musembi Wambua testified to those facts before the trial magistrate as did other prosecution witnesses. The fact of Muli Mutua and his turnboy being confronted, beaten up and robbed was found to be true by the trial magistrate and that is why the appellant was convicted of the offence of robbery with violence. He was sentenced to death but acquitted on appeal.

In the case of **Kagane & Others v Republic** (supra) which has been followed by various courts, the principles that apply to malicious prosecution were well set out. They include whether there was reasonable and probable cause for the prosecution and this is to be judged on an objective basis. The available material basis for prosecution must be believed by the prosecutor. Once the objective test is satisfied there is a subjective test whether the prosecutor believed in such probable cause. For malicious prosecution to be found the plaintiff must prove that the prosecution acted maliciously in instituting the criminal proceedings.

This Court sitting at Nyeri in Civil Appeal No. 270 of 2003 **David Kirimi Julius v Fredrick Mwenda (ur)** on a second appeal where the facts of the case were that the plaintiff and the defendant were involved in a fight. The respondent was hurt in the fight and reported the matter to Meru Police Station. Following that report the appellant was arrested and charged with the offence of assault contrary to **section 251** of the **Penal Code** but half way through the trial the prosecution withdrew the charge and the appellant was discharged. He was rearrested two years later and charged with the same offence but he was acquitted after a trial. Based on that trial the appellant filed a suit in the subordinate court for unlawful confinement and malicious prosecution. He was awarded damages. The respondent appealed to The High Court which reversed the trial magistrate's findings. On a second appeal to this Court it was found that there was no evidence that the respondent had made a false report or that he was actuated by malice in making the report or that his prosecution was brought without reasonable or probable cause. The appeal was dismissed.

In **Civil Appeal No. 52 Of 2016 Anthony Shiveka Alielo v Kenya Post Office Savings Bank & The Hon The Attorney General (ur)**, again a second appeal, the first respondent as employer of the appellant reported to the police loss of money from its books. The appellant was arrested and charged with the offence of stealing by servant contrary to **section 281** of the **Penal Code** and there were also two other counts. He was acquitted under **section 210** of the **Criminal Procedure Code** on the ground that the prosecution had not established a prima facie case against him. The appellant had meanwhile been dismissed from duty. He filed a civil suit before the magistrate for wrongful confinement and malicious prosecution and he was awarded damages. The 1st respondent filed an appeal at the High Court against award of damages but the appeal was dismissed. This Court found that there was no evidence that the 1st respondent had made a false report or that it was actuated by malice in making that report or that the appellant's prosecution was brought without reasonable or probable cause.

On the facts before us, a report was made to police that a robbery with violence had taken place that led to the arrest of the appellant. The learned magistrate who tried the case found that there was a report to police who investigated the case, arrested the appellant and prosecuted him. The appellant was convicted and sentenced to death, findings which were reversed on appeal. On our consideration of the material before the trial magistrate, which is on record, there is no doubt that a robbery took place when the complainant and his turnboy were confronted by armed gangsters who robbed them of money and the lorry. They were subjected to acts of violence. A report was made to police who believed that report. They investigated the case, arrested and charged the appellant and on the evidence the appellant was convicted. There was a reasonable report which was not false. The report was not actuated by malice and there was reasonable cause to bring the prosecution. We are satisfied, like the trial judge, that the appellant's prosecution was initiated by a police officer and that the evidence presented to the trial court was found to be credible leading to the successful conviction of the appellant by the trial court. There was probable cause for that prosecution and on the facts of the case the prosecution was not malicious. That is the answer we return on the first issue we identified in this judgment for our consideration. This brings us to the second issue - whether the appellant was entitled to an award of damages.

The judge found that having reached the decision that there was no malicious prosecution the appellant was not entitled to damages.

We had stated that we would revert to the issue of how the appellant was treated by police and we do so now by revisiting the pleadings and the proceedings.

The appellant stated in the plaint that between 20th August, 1997 to 23rd August, 1997 he was physically and psychologically tortured and subjected to inhuman and degrading treatment by agents of the respondent. He stated that as a consequence thereof he sustained several injuries and his health drastically deteriorated. He gave various particulars of torture, inhuman and degrading treatment to the effect that on the morning of 21st August, 1997 he was taken by police from the police cells. Those officers included one called Stanley Simiyu Wafula. They bundled him into a waiting police car and he was driven to Kapiti Plains where he was asked to strip naked after which his hands and legs were cuffed. He was questioned about the robbery of a lorry and he was beaten up on his hands and legs using police batons and was whipped using hippo whips (kiboko). The beating only stopped after he lost consciousness. The next day 22nd August, 1997 the same police officers now accompanied Inspector Papa and others collected him from the said cells and he was returned to the said Kapiti plains. The police cuffed his hands and legs, tied up his genitals using rubber bands made from motor vehicle tyre tubes and was made to lie down. The police then pulled at his genitals with the rubber bands at the same time whipping him. He was asked to confess to a robbery so that the beatings could stop.

On the night of 23rd August, 1997 the same police officers now also accompanied by one called Mwangi collected him from the cells and took him to the said Kapiti plains. They again cuffed his hands and legs and made him to lie down after which they poked and pricked his toes using a syringe until one of his toe nails came off. When he maintained his innocence the police tied his legs using a long rope that was then tied to the motor vehicle and he was threatened that the vehicle would be driven off. Still he did not confess.

The appellant further averred that between 20th August, 1997 and 31st September, 1997 (sic) he was kept incommunicado without any access to medical attention and as a result his health deteriorated.

Particulars of injuries were given as blunt injuries on the lower limbs, injuries on the thoracic spine, injuries on the muscles between the scapulae, extensive injuries between the scapulae, injuries on the distal hand dorsally, difficulties in walking, bruised testicles, bruises and swelling of the back, injuries on both knees, loss of sexual dysfunction and loss of eye sight. It was further averred in the plaint that by the said imprisonment the appellant was deprived of his liberty and he was injured in his credit, character and reputation and he suffered considerable mental and bodily pain and anguish and was entitled to damages. Particulars were given that the appellant had been a businessman who had secured a loan of Shs.80,000 from Industrial and Commercial Development Corporation and that because of the arrest he had been unable to service the loan and by the time of the charge and conviction he owed the corporation Kshs.2,179,694. He further stated as particulars of loss that he was impotent as a result of the physical torture carried out to him by the respondents' agents and he had to use viagra drugs for the rest of his life at an estimated cost of Shs.6,400 per month from August, 2003. Further, that he was arrested when he was 42 years old running the business of trading in tryes and earning a profit of Shs.35,000 per month. That business had collapsed when he was arrested. He prayed for damages for loss of liberty for 7 years.

All the prayers in the plaint are summarised earlier in this judgment.

As we have stated the respondent filed a defence where the claim was denied but no evidence was called in support of the defence. The appellant testified before the trial judge how he was tortured when he was arrested, testimony which was supported by his two witnesses. He produced various medical reports in support of his case.

One of the reports was by **Mr. R. Baraza, F.R.C.S., a Consultant Surgeon** who saw the appellant on 3rd September, 2003 with complaints of pain in the thoracic spine and pain in the muscles for six years before he was seen. On examination, Dr. Baraza observed many scars in keeping with the complaints mentioned by the appellant. The area around the scapula was extensively scarred. The toe nails were in order. Dr. Baraza reached the conclusion that although some of the torture evidence had disappeared the appellant had significant scars, in particular the upper back had many residual marks consistent with the complaint of having been tortured. It indicated marked brutality meted out to the appellant at that time.

Dr. Ahmed Khan, MD, Ph.D, FRCS (ECSA), also a **Consultant Surgeon** saw the appellant and also testified before the judge. Dr. Khan on examination saw many scars in keeping with the complaints made by the appellant. The area between the scapulae was extensively scarred. The doctor prescribed analgesics and viagra for impotence after finding that the impotence was disturbing the appellant mentally and he would require drugs for impotence for the rest of his life.

Although we have agreed with the trial judge that the trial of the appellant was not malicious, on the material presented before the judge and the evidence, it is patently clear that the appellant was tortured by the police on three different occasions as his testimony shows, evidence which was not controverted by any other evidence. He was taken to a place called Kapiti plains and subjected to what must be inhuman and degrading treatment which our law does not allow. He was arrested in 1997 when the retired Constitution was in place. **Section 74** of that **Constitution** protected individual's rights and did not allow torture. It provided that:

***“74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment*”**

That protection against torture or other degrading inhumane treatment was and is provided in various international human rights treaties such as **Article 5** of the **United Nations Declaration of Human Rights** and **Article 7** of the **International Covenant on Civil and Political Rights**; and **Article 3** of **The Convention Against Torture**.

Nearer home, **Article 25** of the **Constitution of Kenya, 2010** provides that:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

(a) Freedom from torture and cruel, inhuman and degrading treatment or punishment;

(b)

The police had no authority after arresting the appellant to subject him to the acts of torture which we have described in this judgment. It was found by this Court in a recent judgment in the case of **Lucas Omoto Wamari v Attorney General and Director of Public Prosecutions [2017] eKLR**, that the Attorney General was responsible for the actions of a negligent police officer who had shot the appellant without any reasonable cause. Damages were awarded accordingly.

We have found in the instant appeal that the police were not entitled to subject the appellant to acts of torture and we disagree with the learned judge that in such circumstances the appellant was not entitled to an award of damages. Having found that the torture was unlawful, the appellant was entitled to compensation for injuries suffered during that painful experience he went through for those days that he was tortured by the police. The appellant prayed for damages as follows:

a) For unlawful arrest, confinement, false imprisonment and malicious prosecution

We have found that the prosecution was not malicious and no damages were awardable under this head.

b) For severe physical, psychological and mental torture

We have found that the appellant was subjected to unlawful acts of torture when he was subjected to the matters we have stated and torture not being allowed in law he was entitled to compensation for the injuries he suffered.

Particulars of those injuries were given in evidence and are on record as confirmed by Dr. Khan and Dr. Baraza. Counsel for the appellant has not been of much assistance as regards quantum of damages as no case was cited in that regard either before the trial judge or before us.

c) Aggravated and Exemplary Damages

In the circumstances of the evidence that was placed before the learned judge on the acts of torture that the appellant was subjected to, the appellant was entitled to an award of exemplary damages .

d) A Declaration that the Respondent Repay A Loan on behalf of the Appellant

This was in the nature of a special damage claim and the appellant was in law required to specifically prove the same and having not done so he was not entitled to the claim. In addition, absent malicious prosecution, this claim would be remote and not awardable at all.

e) Costs Of Future Medical Expenses

The appellant testified that as a result of torture his sexual life had been affected and he was forced to buy sex enhancing drugs at Shs.6,400 per month from August, 2003. Dr. Khan in evidence before the judge testified that he had prescribed viagra drugs for the appellant to assist him to deal with impotence and that the drugs cost Shs.6,400 per month. Upon our own consideration this was a specific claim and enough material was placed before the judge that the appellant had bought sex enhancing drugs which he would require for a period which the Doctor did not specify, only stating that the appellant would require the drugs for the rest of his life. It did not however come out of the appellant's evidence or that of Dr. Khan how often the appellant would use or need such drugs. On our consideration we think that the appellant was entitled to a reasonable award under this head.

f) General damages for sexual dysfunction

Having found that the appellant was entitled to general damages for torture and also exemplary damages we do not think that the appellant would be entitled to this claim which is covered by general and exemplary damages.

g) Damages for loss of business

The appellant testified that he lost business when he was arrested. We have found that his arrest was not unreasonable and the prosecution was not malicious. He would therefore not be entitled to this claim.

In conclusion, we have found that the prosecution of the appellant by the police was not malicious. We have however found that the torture he was subjected to was unlawful. We therefore think that the appellant is entitled to the following:

- (a) general damages for physical, psychological and mental torture
- (b) exemplary damages
- (c) a reasonable award to enable the appellant procure sexual enhancing drugs to deal with sexual dysfunction.

In the premises where the parties before us did not make any submissions on quantum of damages, we think that the correct course to take in this appeal is to remit the case to the High Court to assess the damages we have identified in this appeal. The assessment shall be done by any judge in the Civil Division other than Seron, J. We so order. The appellant will have costs here and in the court below.

Dated and delivered at Nairobi this 21st day of February, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR