



**Major (Rtd) Julius Kiptesot v Attorney General (Cause 501 of 2016)
[2022] KEELRC 3802 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3802 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 501 OF 2016
SC RUTTO, J
JULY 15, 2022**

BETWEEN

MAJOR (RTD) JULIUS KIPTESOT SOI CLAIMANT

AND

HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The suit herein was initially commenced at the High Court vide a plaint filed on January 11, 2010. In this regard, the claimant's testimony in chief was taken at the High Court and thereafter the matter was transferred for further hearing and determination before the Employment and Labour Relations Court vide the Court's (Aburili J) Ruling on March 23, 2016.
2. Major Julius Kiptesot Soi, the claimant herein, avers through the plaint that he was a Major with the Kenya Army, attached to the Defence Headquarters and that on or about December 1, 2004, the Commander Kenya Army instituted court martial Proceedings against him. That due to the malicious prosecution, his services were unlawfully terminated. It is on this account that he claims the sum of Kshs 12,303,662.00 being salary arrears, Court Martial Legal Defence, Appeal to High Court, terminal benefits and monthly pension. He also seeks an award of exemplary damages.
3. The respondent filed a defence on June 14, 2010 through which it averred that investigations had established a reasonable and probable cause that the claimant had committed an offence cognisable in law. The respondent further denied that the investigations and prosecution of the claimant was malicious and that his services were prematurely terminated.
4. As stated herein the matter initially proceeded at the High Court on July 28, 2014 when the claimant's testimony in chief was taken. Upon transfer to this Court, the matter proceeded for further hearing on October 12, 2021 and December 14, 2021.



Claimant's case

5. The claimant adopted his witness statement at the commencement of the hearing, to constitute his evidence in chief. It is the claimant's case that he joined the Kenya Army as a recruit on March 25, 1975. That he rose through the ranks due to his hard work and dedication in his military duties. That he served as a commissioned officer from November 30, 1993 until December 1, 2004 when he was convicted wrongly by a court martial and jailed.
6. That he served his sentence until June 14, 2005 when he was released on bail pending appeal. That his appeal which was before the High Court, was allowed in its entirety upon hearing and determination. That as such, the conviction and sentence was set aside. That it was on that account that he filed the instant suit. In summing up his testimony, the claimant asked the Court to allow his claim.

Respondent's Case

7. The respondent presented evidence through Mr Jackson Kimathi Muthee who testified as RW1. Mr Kimathi introduced himself as a Staff Officer II in charge of records of both serving and retired officer at the Ministry of Defence. It was his testimony before Court that the claimant was the paymaster Kenbatt 10 and doubled up as an accountant and cashier. That between February 26 and 28, 2003, the claimant while in the discharge of his duties, violated the department of defence regulations on expenditure of public funds leading to misappropriation of funds totalling Kshs 29,124,150.00 or thereabout.
8. That investigations revealed that the claimant had committed service offences hence he was charged before the court martial where he was found guilty. That he was sentenced to three years imprisonment and was dismissed from service.
9. He further stated that investigations were undertaken by an independent unit upon request by the commanding officer. That the court martial proceedings are judicial proceedings and are presided over by a Judge Advocate. That the investigator and the court martial are independent of each other hence cannot connive. Consequently, Mr Kimathi termed the process before the court martial as fair.
10. It was Mr Kimathi's further testimony that a dismissed officer as the claimant herein, is not entitled to service benefits. He further testified that the claimant did not report to any Kenya Defence Forces (KDF) facility as required, upon his acquittal by the High Court. That further, the claimant never served the decision of the High Court upon the Ministry of Defence.

Submissions

11. It was submitted on behalf of the claimant that the court martial proceedings were malicious. That there was no investigation report tendered in the court martial or before this Court, to support the criminal charges. On this account, reliance was placed on several cases including, *Mbowa vs East Mengo District Administration* [1972] EA 352, *National Bank of Kenya v Alfred Owino Balla Kisii* [2017] eKLR and *Republic v Attorney General ex parte Kipngeno arap Ngeny*.
12. It was further submitted that the claimant proved that he is entitled to both special and general damages. That he suffered loss and damages as a result of the malicious prosecution as a career he had built for over 20 years was ruined leading to his dismissal from service. In support of this position, the case of *Stephen Gachau Gitbaiga & another v Attorney General* [2015] eKLR, was cited.
13. The respondent submitted that the claimant's prosecution was not actuated by malice but purely by a desire to bring him to justice and military discipline. That his acquittal is not proof of malice on the



part of the respondent. The respondent cited the case of *Douglas Odhiambo Apel & another v Telkom Kenya Limited & 2 others* [2006] eKLR and *Music Copyright Society of Kenya v Tom Odhiambo Ogowl* [2014] eKLR.

14. That the claimant is not entitled to salary arrears as he never extracted an order to serve upon any military establishment.

Analysis and Determination

15. Flowing from the pleadings, the evidence on record and the rival submissions, it is evident that this Court is being called to resolve the following questions: -
 - i. Whether prosecution of the Claimant before the court martial was malicious?
 - ii. What was the effect of the High Court order quashing and setting aside the Claimant's conviction and sentence by the court martial?
 - iii. Is the claimant entitled to the reliefs sought?

Whether prosecution of the Claimant was malicious?

16. The claimant has alleged that his prosecution before the court martial was actuated by malice. The question is what constitutes malicious prosecution and whether the facts and evidence before me can sustain such a claim?
17. The elements which must be proved in a claim of malicious prosecution were stipulated as follows in the case of *George Masinde Murunga vs Attorney General* [1979] eKLR: -

“As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.”

18. In a nutshell, the claimant must prove that: -
 - a there was a prosecution by the respondent;
 - b the proceedings complained of were terminated in his favour;
 - c the prosecution was instituted without reasonable and probable cause that it was actuated by malice; and
 - d the prosecution was instituted or carried on maliciously.
19. There is no dispute as regards the 1st and 2nd element.
20. What is in contention is whether the claimant's prosecution at the court martial was instituted without reasonable and probable cause and whether it was actuated by malice.
21. It is notable from the Judgment of the High Court that Counsel on record for the respondent conceded the appeal. The relevant excerpt of the Judgement reads as follows:-

“Learned respondent's counsel Mr Makura conceded to this appeal-on the ground that the charges before the court martial were not proved beyond any reasonable doubts (sic). Counsel urged that since court martial proceedings are in the nature of criminal proceedings,



proof of charges should have been strictly conducted and for the charge of stealing, there was no proper proof as long as the taking of another's property with *animus furandi* (the intention to steal) had not been proved. On the stealing charge, moreover, even the amounts said to have been stolen were not proved.

As for the desertion charge, this term, desertion, is defined in s 31 of the *Armed Forces Act*; it is realized when an officer is not at his work station and is not, at the same time, on leave. But from the documentation on file, the appellant had been on leave for 42 days; so, he could not have deserted.

As regards the charge of making a false document, Mr Makura urged that this subject was covered by s 61 of the *Armed Forces Act*; and an independent document examiner should have been called as a witness.”

22. Following remarks by the respondent's counsel in conceding to the appeal, the learned Judges made the following remarks: -

“The process of the criminal law as regulated by strict procedures, necessary for the protection of the accused trial rights. Proof in the circumstances, must be conducted on a beyond reasonable doubt basis.

This kind of proof, it is clear to us was not achieved in respect of any of the several charges; and we are in agreement with counsel on both sides that the conviction handed down in respect of the several charges, was not safe.”

23. In *Kagane & Others vs The Attorney General & Another* (1969) E A, the Court reckoned as follows: -

“The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious (sic) man that the Plaintiff was probably guilty of the offence.”

24. From what is apparent in the determination by the High Court, there was no evidence to support the charges against the claimant at the court martial. As such, the material known to the prosecution at the time would not have satisfied a prudent and cautious man that the claimant was probably guilty of the offence.

25. As a matter of fact, the respondent through its counsel before the High Court conceded that they had no evidence against the claimant, hence his acquittal.

26. In view of the above reasons, I am satisfied that the claimant has proved that his prosecution was instituted without reasonable and probable cause.

27. As regards the element of malice, the claimant is required to prove that the prosecution was motivated by something more than a sincere desire to vindicate justice. This is as per the determination in the case of *Kagane & Others v The Attorney General & Another* (*supra*).

28. I am also mindful that an acquittal does not automatically translate to malice as was held in *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399, thus: -

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”



29. The claimant submitted that the fact that counsel for the respondent conceded that the charges against him were not proved before sentencing, show that the case against him was a sham, unjustified and malicious.
30. The respondent on the other hand, submitted that the claimant's prosecution was not actuated by malice but purely by the desire to bring him to justice and military discipline. That his mere acquittal is not proof of malice on the respondent's part.
31. It is notable that the claimant was acquitted upon the respondent's counsel conceding to the appeal on grounds that the allegations against him had not been proved.
32. Indeed, and judging by the remarks made by counsel for the respondent while conceding to the appeal at the High Court, leads me to conclude that there were no proper investigations undertaken by the relevant authority prior to the claimant being court martialled.
33. As counsel for the respondent conceded, the charge of stealing by the claimant had not been proved, and the amounts said to be stolen were not proved. That further, the claimant was on leave hence could not have deserted duty and as regards the charge of making a false document, an independent document examiner should have been called as a witness.
34. One wonders then what informed the charges against the claimant in the first place before the court martial? I have painstakingly gone through the court martial proceedings and the summary of the decision by the Judge Advocate but the same do not reveal much. The substance of the charge against the claimant is not apparent. In a nut shell, the circumstances from which the Court can deduce that the conviction of the claimant before the court martial was probably justified have not been disclosed to the court.
35. Having been presented with no evidence to support the charges against the claimant before the court martial and the respondent having conceded the appeal at the High Court as it did, I am led to conclude that the proceedings against the claimant were actuated by malice. This can be inferred from the circumstances surrounding the prosecution of the claimant, which evidently, was not backed by evidence.
36. Besides, it is worth noting that the claimant had served in the armed forces for about 29 years and there was no evidence that similar allegations had been levelled against him during his period of service which spanned close to three decades.
37. To this end, I find that the claimant has established all the ingredients of malicious prosecution.
What was the effect of the High Court order quashing and setting aside the Claimant's conviction and sentence by the court martial?
38. It is not in doubt that the claimant's conviction before the court martial led to his eventual dismissal from the armed forces. The Armed Forces Act (repealed) which was in force at the time, provides under section 102 (6) that: -

“Where an officer is sentenced by a court martial to imprisonment, he shall also be sentenced to dismissal from the armed forces; and, if the court martial fails to sentence him to such dismissal, the sentence of imprisonment shall not be invalid but shall be deemed to include a sentence of such dismissal.”
39. Seemingly, the decision of the court martial is akin to a disciplinary tribunal in an ordinary employment setting.



40. The High Court having set aside the conviction and sentence of the claimant in its entirety, resulted in a domino effect on his dismissal from the armed forces, thus rendering it a nullity.
41. The net effect is that the dismissal of the claimant from the armed forces cannot stand in the face of the decision of the High Court. Therefore, every action is set in a reverse motion and it is as if the claimant was never dismissed from the armed forces.
42. Having so found, what reliefs avail the claimant?

Reliefs

43. As I have found that the claimant was maliciously prosecuted before the court martial, he is entitled to damages. This is noting that his prosecution and conviction had far reaching consequences on the claimant. His service with the armed forces came to an abrupt halt. Further, it is notable that the claimant had been in military service for close to 29 years before he was dismissed. The dismissal was with loss of benefits for the 29 years he had served.
44. Aside from the foregoing, and judging by the nature of the charges levelled against him, it is not hard to guess that he suffered reputation damage as a result of the conviction. Bearing in mind the foregoing circumstances and taking into account the inflationary trends, the Court awards the claimant Kshs 1,000,000.00 as damages for malicious prosecution.
45. The Court further finds that since the claimant's acquittal at the High Court had the effect of annulling his dismissal from the armed forces, the said dismissal is converted to an honourable discharge with full pension benefits.
46. The claim for salary arrears is denied since the claimant did not counter the respondent's assertions that following his acquittal by the High Court, he did not present himself before any KDF facility nor serve the acquittal order on any military establishment. Moreso, the claim for the salary arrears has not been justified and the period for which the claimant is claiming the salary arrears has not been stated in the claim. Therefore, the claim is neither specifically pleaded nor proved.
47. Similarly, the claim for the costs in respect of the martial legal defence and appeal to the High Court, cannot be sustained as the same have not been proved despite being specific claims. The claimant ought to have proved the same by way of evidence but he failed to do so, hence the Court declines to award the same.

Orders

48. In the end, the claimant is awarded damages against the respondent, for malicious prosecution in the sum of Kshs 1,000,000.00. Interest shall apply on this amount at court rates from the date of Judgement until payment in full.
49. The claimant's dismissal is converted into an honourable discharge with full pension benefits as from December 1, 2004.
50. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY 2022.

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STELLA RUTTO

JUDGE



Appearance:

For the Claimant Mr Ongegu

For the Respondent Mr Kabi

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

