



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 367 OF 2017**

**(Before Hon. Justice Mathews N. Nduma)**

**STEPHEN AYUGI .....CLAIMANT**

**VERSUS**

**NATIONAL HOUSING CORPORATION.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR AGGREY AMONDI.....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF POLICE.....3<sup>RD</sup> RESPONDENT**

**THE PERMANENT SECRETARY.....4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

1. The claimant was employed by the respondent as a Clerical Officer on a 3 years contract on 11<sup>th</sup> December 1989.
2. In 1996, the claimant was transferred to Kisumu office as a Chief Cashier and on 22<sup>nd</sup> August 2000, the claimant was promoted to the position of Officer in Charge of Kisumu office overseeing National Housing Corporations interests in the entire Western Kenya Region.
3. Due to good work, the claimant was promoted vide a letter dated 24<sup>th</sup> August 2000, and in 2002 by confidential assessment letters dated 30<sup>th</sup> January 2002 and 16<sup>th</sup> September 2002, the work of the claimant was rated 'good'
4. During this time, the respondent held a cash office at the Provincial Commissioner's Office (Nyanza) and there were two cashiers manning the cash office namely Mr. Bernard Adala Nalwenje and M/S Betty Atieno Okeyo.
5. The said cashiers collected cash payments of rent from the corporation's tenants, issued receipts to them and at the end of each working day deposited the total amount collected with the Provincial Commissioner's cashier who would in turn issue them an official miscellaneous receipt from the Government indicating the amount received. The Corporation cashiers would then fill a daily collection certificate in duplicate indicating the N.H.C receipts they had issued for the day, the total amount which would tally with the miscellaneous receipts issued.
6. The daily collection form and duplicate N.H.C receipts would then be taken to the office of the claimant which was about half a kilometer away at the Reinsurance Plaza 4<sup>th</sup> floor in Kisumu.
7. It was the responsibility of the claimant to then check those documents, to see if they tallied. The claimant would keep the miscellaneous receipt for the P.C's office and after a week, would surrender them back to the P.C's office for a single cheque to be issued in favour of N.H.C reflecting the total collection for the week. The claimant would then bank the cheque in N.H.C National Bank of Kenya account in Kisumu and do returns to N.H.C headquarters in Nairobi containing the banking slips, the daily collection certificates for the period in question and the duplicate National Housing Corporation receipts issued on the same period.
8. This is the system the claimant found in place and had been introduced by N.H.C Senior Managers.
9. The claimant testified that around October 2002, he started to note delays in reimbursements from the P.C's office without satisfactory explanations after surrendering the official miscellaneous receipts for cheques to be written to N.H.C.

10. The claimant further testified that he wrote three letters dated 25<sup>th</sup> October 2002, 15<sup>th</sup> May 2003, and 9<sup>th</sup> June 2003 to the Managing Director N.H.C advising of the need for the corporation to stop depositing its money at the P.C's office and instead to direct banking to its account because of the unnecessary delay in getting the same money from P.C's office.
11. In June 2003, the claimant wrote to the P.C Nyanza complaining about the delays. This was after the delays became too much.
12. On 12<sup>th</sup> June 2003, the P.C's office responded to the claimant stating that investigations were done and there was a problem at the P.C's cash office which had been reported to the police for further investigations. The P.C also advised the claimant to report the matter to the police. The claimant reported the matter to his superiors at the Head office Nairobi and an Auditor Mr. Patrick Wanjala of N.H.C was sent to Kisumu to carryout investigations and to meet P.C Nyanza Mr. Wilson Ndolo then, for way forward.
13. A report was made by Mr. Patrick Wanjala on 24<sup>th</sup> June 2003 to the Managing Director. The P.C confirmed the certificate of the audit report as it tallied with preliminary findings to the Managing Director.
14. On 24<sup>th</sup> July 2003, the P.C wrote to the Managing Director on the missing cash at P.C's office.
15. On 22<sup>nd</sup> July 2003, the claimant received a letter of suspension from Headquarters. On 12<sup>th</sup> February 2004, due to the delay in resolving claimant's case, he tendered his resignation. N.H.C rejected the letter of resignation and on 16<sup>th</sup> September 2004, the claimant received a letter of summary dismissal which was not preceded by a disciplinary hearing.
16. The claimant had been arrested on 4<sup>th</sup> June 2004, by police officers. On 7<sup>th</sup> June 2004, the claimant and the two cashiers, were charged with theft of Kshs 1,695,079/90 the property of N.H.C in KS CRC NO. 421 of 2004.
17. The claimant testified that he learnt that his arrest was prompted by a complaint made by an ex-employee of the claimant. The claimant had sacked the said employee by the name Erick Ouma Okeyo. That aggrieved by the sacking, Mr. Okeyo had made the false complaint to the N.H.C and Anti Banking fraud unit in Nairobi claiming to be a whistle blower and that his life was in danger because of the information he had about N.H.C lost cash at P.C's office Nyanza. Mr. Okeyo had implicated the complainant and the co-accused in the theft of cash at the P.C's office, leading to the arrest.
18. The claimant and Bernard Adala Nalwenje who worked for the N.H.C were both charged. The other co-accused did not work for the N.H.C but was a partner of the claimant in a private business.
19. Mr. Adala and M/S Beth Atieno were the cashiers at the P.C's office. M/S Atieno was not charged but her employment was terminated and she had successfully sued N.H.C for wrongful termination.
20. Claimant testified that the three accused persons were acquitted under *Section 210 of the Criminal Procedure Code* on 10<sup>th</sup> January 2006.
21. The claimant concludes that the investigations by the P.C's office and the Audit by N.H.C had not implicated the claimant in anyway in the loss of money at P.C's office. That the arrest and prosecution was actuated by malice. That this defamed the character of the claimant. The Claimant lost his half salary wrongfully during the period of suspension. The claimant suffered loss and damage for wrongful and unfair summary dismissal.
22. The claimant prays to be granted the reliefs set out in the statement of Claim with interest and costs. The claimant relied fully on the witness statement dated 25<sup>th</sup> May 2011; statement of claim, list of documents and written submissions.

### **Defence**

23. The 1<sup>st</sup> defendant N.H.C filed amended statement of defence on 13<sup>th</sup> July 2012 in which it disassociates itself wholly from the arrest and prosecution of the claimant.
24. The 1<sup>st</sup> respondent denies that it suspended the claimant from work in August 2003; the 1<sup>st</sup> respondent denies that the claimant was arrested, charged and acquitted as alleged or at all. The 1<sup>st</sup> respondent denies not having paid the claimant salary during the period of suspension.
25. The 1<sup>st</sup> defendant further denies that it rejected the resignation of the claimant made on 12<sup>th</sup> February 2004.
26. The 1<sup>st</sup> respondent denies that the claimant was it's employee between 5<sup>th</sup> March 2004 to July 2005 and entitled to be paid monthly salary at Kshs 34,500 in the sum of Kshs 552,000.
27. The claim of anticipated salary in the sum of Kshs 1,032,000 is equally denied at the rate of Kshs 61,000 per month. The claim for damages for defamation and wrongful summary dismissal are denied.
28. It was however pleaded in the amended statement of defence in paragraph 12A in the alternative that the arrest and prosecution of the claimant was a culmination of investigations carried out by Kenya police force following the 1<sup>st</sup> defendant's honest report to it of a theft of funds and therefore the claimant has no claim against the defendant for wrongful arrest and malicious prosecution.

29. The 1<sup>st</sup> defendant prays that suit by the claimant against it be dismissed with costs.

30. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants being Inspector Aggrey Amondi, Commissioner of Police, PS Office of the President and Honourable Attorney General filed statement of defence on 7<sup>th</sup> July 2010 in which they admit the arrest charge and prosecution of the plaintiff and others.

31. The defendants state that the arrest, charge and prosecution followed a genuine report made to the Police Station. That investigations established a reasonable and probable cause that the claimant had committed the alleged offence. The police officers acted in good faith and in due course of their lawful duty of maintenance of law and order.

32. The particulars of loss and damage allegedly suffered by the claimant are equally denied and claimant put to strict proof thereof.

33. The particulars of defamation and claim in respect thereof is equally denied. The notice of intention to sue in terms of *Government Proceedings Act – Cap 40 laws of Kenya* was denied. The respondent further alleged that the suit is time barred under its *Public Authorities Limitations Act Cap 39 Laws of Kenya*.

34. The respondents pray the suit be dismissed with costs.

### **Determinations**

35. The issues for determinations are as follows:

- a. Whether the claimant's suspension and subsequent rejection of the claimant's resignation was null and void and a declaration that such rejection amount to the claimant retaining his employment.
- b. Whether the claimant is entitled to special damages set out under paragraphs 7,8,10 and 11 of the plaint.
- c. Whether the claimant is entitled to General damages for false imprisonment, malicious prosecution and defamation of character against – 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

### **Issue a.**

36. The claimant's contract was for a period of three years ending on the 31<sup>st</sup> December 2004. RW1 Mr. Antony Thiong'o who testified for the 1<sup>st</sup> respondent testified that the claimant was entitled upon suspension to half salary from 22<sup>nd</sup> July 2003 until 12<sup>th</sup> February 2004. RW1 testified further that upon acquittal and in terms of N.H.C staff regulations an employee is entitled to payment of the half salary not paid during the period of suspension. The claimant was not paid at all during suspension. Accordingly, the claimant was entitled to the unpaid ½ salary during the period 5<sup>th</sup> April 2003 to 2004 in the sum of Kshs 120,750 and same is awarded accordingly.

37. The claimant tendered his resignation on 12<sup>th</sup> February 2004. N.H.C rejected the resignation and purported to proceed with disciplinary action against the claimant. The claimant was arrested by police on 4<sup>th</sup> June 2004 and was charged for theft by servant on 7<sup>th</sup> June 2004.

38. The 1<sup>st</sup> respondent purported to summarily dismiss the claimant from employment on 16<sup>th</sup> September 2004.

39. It is in the court's well considered view and finding that the employment contract ceased upon the tender of resignation by the claimant on 12<sup>th</sup> February 2004. The only obligation left for the 1<sup>st</sup> respondent was to consider whether there were terminal benefits due and owing to the claimant from the date of termination. Any further disciplinary action taken by the 1<sup>st</sup> respondent on the mistaken belief that the employment contract was in place was null and void.

40. All terminal benefits due to the claimant in terms of his contract of employment upon lawful resignation are due and payable to him and any penalty visited on him on the mistaken belief, summary dismissal was lawful is void.

41. The claimant cannot be heard to claim any further salary anticipated for the remainder of the contract nor is any salary payable from the date of resignation to January 2005. These claims are accordingly dismissed. Therefore no further special damages is payable under paragraphs 7 to 14 of the statement of claim except as already awarded. Advocate's fees are recoverable as costs in the suit and may not be claimed as special damages.

42. The other two questions remaining are whether the claimant is entitled to General damages for arrest, false imprisonment, malicious prosecution and defamation of character against all respondents.

43. It is pertinent to note that even though the 1<sup>st</sup> to 5<sup>th</sup> defendants filed their defences to the suit, only the 1<sup>st</sup> defendant adduced evidence in rebuttal to the claims made by the claimant.

44. Therefore, there is no rebuttal of the evidence adduced by the claimant against the 2<sup>nd</sup> to 5<sup>th</sup> defendants except in as far as the defence proffered by RW1, for the 1<sup>st</sup> defendant controverted the claimant's case regarding the claims for damages for false imprisonment and malicious prosecution.

45. The claimant testified that he was completely cleared of any blame by the investigations conducted by the PC's office and the Audit by N.H.C. The claimant testified that he was however implicated in theft of 1<sup>st</sup> respondent's money by his own ex-employee who recorded statements with the police implicating the claimant in the theft of cash paid and kept at the P.C's office in Kisumu. It is important to note that a business partner of the claimant was also implicated in the theft of N.H.C's money by the said disgruntled ex-employee. The court notes that the co-accused persons engaged in private business independent of the public duty conducted by the claimant and the co-accused. RW1 testified that he was one of the prosecution witnesses during the trial of the claimant. That he testified and produced documents to show that N.H.C lost huge sums of money under the watch of the claimant. RW1 stated that his testimony was honest and was not actuated by malice. RW1 further stated that N.H.C did not cause publication of claimant's photograph and the story published by others in the local daily newspapers.

46. RW1 stated that the police conducted independent investigations leading to the arrest and prosecution of the claimant. RW1 stated that mere acquittal of the claimant does not prove malice on the part of the complainants.

47. The claimant was not placed on his defence. He was acquitted under *Section 210*.

48. From the investigation report by the P.C's office to the Audit report by the Auditor of N.H.C, the claimant was not placed in any close proximity with the stolen funds. To the contrary, the claimant had blown the whistle against the office of the PC to his Managing Director on three previous occasions but his plea to have the N.H.C money banked directly to the corporation account instead of first storing it at the P.C's office was ignored. This compelling evidence was not controverted by RW1 for the 1<sup>st</sup> Respondent.

49. The 2<sup>nd</sup> to 5<sup>th</sup> respondents did not see it fit to call any witness to rebut the testimony by the claimant that there was no evidence whatsoever upon which a reasonable police officer investigating a case of theft could have come to the conclusion that the claimant was in any way whatever connected to the theft of Kshs 1,695,079/90 stolen at the PC's office Kisumu from the N.H.C.

50. The claimant further testified that Inspector Aggrey Amondi, the 2<sup>nd</sup> defendant was biased in causing his arrest and was connected to the so called whistle blower who was an ex-employee of the claimant and therefore had a grievance against the claimant that made him to make false and malicious allegations against the claimant.

**51. In Kiiru vs Joseph Mwamburi and 3 others CA Nairobi 171 of 2000 the court stated:**

**“The mere fact that a complainant is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any prosecution arm of the government is not a mere conduit of complaints....”**

52. In the present case, the court is satisfied that no proper investigations were conducted before the 2<sup>nd</sup> to 4<sup>th</sup> respondents instituted criminal prosecution of the claimant. **In Nelles vs Ontario [1989] 2 SCR 170 the Alberta Court of Appeal in Radford vs Stewart said:**

**“There are four elements to the tort of malicious prosecution. The prosecution must have been initiated by the defendant. The proceedings must have been terminated in favour of the plaintiff, there must be an absence of reasonable and probable cause and there must be malice or a primary purpose other than that of carrying the law into effect”.**

53. All the aforesaid elements concede in the present case. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents initiated prosecution. The prosecution was terminated under *Section 210 of PC* without the trial court placing the claimant on his defence. There is no evidence whatsoever before court to show that the 2<sup>nd</sup> to 4<sup>th</sup> respondent's had any reasonable and probable cause to cause the arrest, charge, and prosecution of the claimant. Furthermore, the claimant had clearly illustrated the malice on the part of the ex-employee who had falsely and maliciously complained to the police. The police had the explanation from the claimant prior to instituting the prosecution but recklessly and maliciously chose to proceed with it.

54. Accordingly, the claimant has proved the case of malicious arrest, charge and prosecution by the 2<sup>nd</sup> to 5<sup>th</sup> respondents and the claimant is entitled to damages. No case of defamation of character by the defendants has been proved to the standard required.

55. The claimant was released on bail upon arrest and therefore the claim of false imprisonment has not been proved. It is a different claim from that of malicious prosecution. **See Egbema vs West Nile Administration [1972] EA 60 Simba vs Wambari [1987] KLR.**

**56. In Dr. Willy Kaberuka vs Attorney General Kampala HCCS No. 160 of 1993, it was held that:**

**“The plaintiff suffered injury to his reputation.....He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence. There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”**

57. In awarding the damages, I take into consideration the principle also enunciated in the case of **Daniel Njuguna Muchiri vs Barclays Bank of Kenya Ltd and another [2016] eKLR Justice Aburili cites Daniel Waweru Njoroge and 17 others vs Attorney General – that:**

- a. Damages should not be inordinately too high or too low.
- b. Should be commensurate to the injury suffered.
- c. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.
- d. Awards in past decisions are mere guides and each case depends on its own facts.

58. The court applying these principles and following the case of *Nagvi Sayed Omar vs Paramount Bank Ltd and another [2015] eKLR* in which the plaintiff was awarded Kshs 2,000,000 for malicious prosecution.

59. In the present case, the court awards the claimant who suffered malicious prosecution at the hands of the 2<sup>nd</sup> to 5<sup>th</sup> respondents Kshs three Million five hundred thousand (3,500,000) in general damages.

60. In the final analysis judgment is entered in favour of the claimant as follows:

- a. As against the 1<sup>st</sup> respondent, special damages in the sum of Kshs 120,750 being half (1/2) salary during the period of suspension.
- b. As against the 3<sup>rd</sup> to 5<sup>th</sup> Defendants Kshs 3.5 Million General damages for malicious prosecution. Total award: Kshs 3,627,500.
- c. Interest at court rates from date of judgment till payment in full.
- d. 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to pay costs of the suit.

**Judgment Dated, Signed and delivered this 21st day of February, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Mwamu for Plaintiffs

Mr. Mwesigwa for 1<sup>st</sup> Respondents

Mr. Que for 2<sup>nd</sup> to 5<sup>th</sup> Respondents

Chrispo – Court Clerk