



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 54 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

GEORGE JAMES SIRO.....PLAINTIFF

VERSUS

CREDIT BANK LIMITED.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

This matter was originally filed on 24th June 2008 as High Court of Kenya at Kisii Civil Suit No. 56 of 2008 vide the plaintiff's plaint dated 20th June 2008. It was amended on 1st August 2008 and further amended on 13th February 2013.

The case was transferred to this court by letter dated 15th February 2016 following an order by Okwany J. sitting at the High Court, Kisii on 8th February 2016.

In the Further Amended Plaint, the plaintiff George James Siro seeks the following remedies –

- a) General Damages for.
 - i) Malicious prosecution in Kisii CMCC CRI NO. 1343 of 2006.
 - ii) Defamation.
 - iii) Illegal, unlawful or wrongful arrest.
 - iv) Illegal, wrongful, unlawful detention and/ or confinement.
 - v) Loss of pension up to the age of retirement.
 - vi) Punitive or exemplary damages.
- b) Special damages as pleaded above of Kshs.38,510,182.70/=.
- c) Costs of the suit.
- d) Interest on (b) above at court rates from 29.06.
- e) Interest on (a) above at court from date of judgment till payment in full and any other or such relief the court may deem fit and just to grant.

The 1st defendant Credit Bank Limited filed a defence which was amended and further amended by the Further Amended Written Statement of Defence dated 13th June 2015 denying the averments in the Further Amended Plaint and put the plaintiff to strict proof.

The 2nd defendant, The Hon. Attorney General filed a statement of defence dated 8th September 2008 and filed on 9th September 2008. In the defence the 2nd defendant denied that the plaintiff's arrest and prosecution was malicious.

At the hearing the plaintiff testified on his behalf. The 1st defendant called its Legal Manager Francis Wainaina. The 2nd defendant did not call any witness and relied on its defence and written submission.

Facts

The plaintiff was employed by 1st defendant on 10th January 1995 as a Head of Section. He rose through the ranks to the position of Branch Manager. His last position was Branch Manager, Credit Bank Limited, Kisii Branch.

According to the plaintiff two officers working under his supervision as cash officers Mr. Philip Maritim and Mr. Tom Okeyo reported to him on 10th July 2006 that they were not able to balance the books as there was a shortage between the cash and the books. He asked them for an explanation which they did, but he found to be unsatisfactory. He therefore called the General Manager in Nairobi and reported the cash shortage which he stated was normal in banking practice.

Upon reporting the loss to the General Manager, the Assistant General Manager, Mr. N. V. Patel and the Auditor Mr. Ruto were tasked to investigate the loss and travelled to the Branch on 11th July 2006 and commenced investigations.

On 12th July 2006, the General Manager wrote to him a letter referring to the report of the shortage that he made on 10th July 2006 late evening. The letter stated that the plaintiff had not submitted a detailed report on the loss and directed that the report be handed over to Mr. N. V. Patel, Assistant General Manager who at the time was at the Kisii Branch, without any further delay and a copy thereof be fixed to the General Manager.

The investigations established a loss of Kshs.3,086,000 from the branch strong room which was found to be holding cash of Kshs.27,752,650 while the balance according to the general ledger was Kshs.30,838,650.

By letter dated 12th July 2006 Mr. R. N. Patnaik, the 1st defendant's General Manager reported the loss to the DCIO, Kisii Police Station. The letter reporting the loss is titled;

“RE: FORMAL COMPLAINT OF THEFT OF CASH, KSHS.3,086,000 FROM OUR CREDIT BANK LIMITED, KISII BRANCH AGAINST:-

- 1. GEORGE SIRO MANAGER)*
- 2. PHILIP MARITIM (OFFICER)*
- 3. TOM OKEYO (ASSISTANT MANAGER)”*

The plaintiff was arrested on 13th July 2006 in the evening from the Bank. He testified that he was arrested by two police officers accompanied by Mr. Michael Nyachae who was a member of the Credit Committee of the Bank.

Also on the same date the plaintiff was served with a letter of suspension. The reason for suspension was to facilitate investigations into the cash shortage.

Upon his arrest the plaintiff was detained in police custody until 18th July 2006 when he was charged in Kisii Chief Magistrate's Court Criminal Case No. 1343 of 2006.

By letter dated 30th April 2007, the plaintiff was summarily dismissed.

The grounds for summary dismissal was that the plaintiff *“had wilfully acted among other things carelessly and negligently as Branch Manager of Kisii Branch holding joint custody of bank's cash and valuable through which act/omission of yours, the bank lost cash to the tune of Kshs.3,061,000/=.”*

The dismissal was effective from 13th July 2006.

On 24th June 2007, the plaintiff was acquitted under Section 210 of the Criminal Procedure Code.

It is the plaintiff's averment that his dismissal was wrongful, unlawful and illegal. He seeks special damages as follows –

- i. Salary for 12 (twelve) months in lieu of notice----- Kshs.1,779,804
- ii. Loss of salary till retirement age.----- Kshs.30,256.668

iii. Salary equivalent to 12 months the plaintiff

remained unemployed-----Kshs.1,779,804

iv. Pension till retirement age----- Kshs.3,457,800

v. Accumulated leave of 53 days that is

(4,943.90 x 53)-----Kshs.262,026.70

vi. Unpaid salary up to the time of dismissal-----Kshs.739,080

He further avers that the dismissal was most capricious, humiliating and malicious. He gives particulars of malice as follows –

- a) Falsely and with malafide giving the police wrong information with the intention of having the plaintiff arrested and charged on fabricated charges.
- b) Participating on the prosecution of the plaintiff when it was evident that there was no offence committed by the plaintiff.
- c) Having or causing the plaintiff to be arrested by the police officers in the office when it was abundantly clear no investigations had been carried out internally or by the officers.
- d) Intentionally giving the police false information so as to secure a prosecution and consequential effects.

The plaintiff further avers that the 1st Defendant through its officers as agent instigated through Kisii police station and had the plaintiff charged in a court of law for false and fabricated charges of theft contrary to Section 281 of the Penal Code Cap 63, Laws of Kenya at Kisii Chief Magistrates Court Criminal Case No. 1343 of 2006 on 18th July 2006 and the said prosecution was carried out by the inspector of police station arising out of which the plaintiff has suffered both special and general damages for malicious prosecution which he claims from the Defendants jointly and severally.

He sets out the particulars of malice as follows –

- i) The police after receiving information from the 1st Defendants officers did not investigate before effecting arrest and before even confirming their truthfulness.
- ii) The information given to the police officers did not at a glance disclose any probable offence at all and indeed needed further investigation before being acted upon. Despite that fact that the first information did not disclose any probable offence and yet the plaintiff was hurriedly and detained for more than 5 days before arraigned in court.
- iii) Proceeding with the prosecution when it was apparent there was no iota of evidence to support any of the alleged offences

The plaintiff has itemised the particulars of special damages as follows –

- a) Legal fees paid to the counsel to defend the plaintiff in total of Kshs.235,000/=.

The plaintiff avers that the actions of the police officers at the instance of the 1st Defendant's officers were oppressive, arbitrary and unconstitutional and has suffered loss and damage which he claims. That he was put to full trial and a prosecuted by the Kisii police officers at the direction and instigation of the 1st defendant and the said prosecution was malicious in all its facets as it was carried out without any reasonable justification or excuse or cause and the plaintiff together with his co-accused were acquitted under section 2 10 of the criminal procedure code, CAP 75, 29.06.07 for lack of evidence.

That the 1st Defendants allegation through its officers. Agents and employees were completely malicious and defamatory and portrayed and or lowered the plaintiff's dignity in the eyes of the public and the plaintiff claims damages.

The plaintiff alleges particulars of defamation as follows –

- a) He was portrayed as an immoral person, dishonest and a thief
- b) He was portrayed as unfit to live with civilized people in the society
- c) He was portrayed as a crook, which led to his friends to avoiding him.

The 1st defendant's case is that the summary dismissal of the plaintiff was justified. It is the 1st defendant's case that it was due to the plaintiff's negligence and carelessness that it lost the sum of Kshs.3,086,000, that the loss was first discovered on 24th June 2006, but the plaintiff, as Branch Manager responsible for overall operations of the branch took no action until 10th July 2006 when he reported the loss to

the General Manager.

It is further the 1st defendant's case that the plaintiff only reported the incident because one of the staff, Mr. Maritim was going on transfer and had to hand over. It is further the 1st defendant's averment that after reporting the loss, the plaintiff failed to file a detailed report to the General Manager as directed on 10th July 2006 until the General Manager reminded him by letter dated 12th July 2006. The 1st defendant further avers that although the loss was first detected on 22nd June 2006, the plaintiff approved the sudden application for leave by Mr. Maritim from 23rd June 2006 for three days and again authorised extension of the leave on 28th and 29th June 2006.

It is the 1st defendant's case that it reported to the police to investigate the case after the report by its Auditor and Assistant General Manager and that it is the police who recommended and prosecuted the plaintiff and his co-accused Mr. Maritim and Mr. Okeyo.

For the 2nd defendant, it is submitted that according to the evidence adduced during the trial the police had reasonable and probable cause to believe that the plaintiff had committed a criminal offence, that a complaint was lodged at Kisii Police Station by letter dated 12th July 2006 by 1st defendant's General Manager, Mr. Patnaik. It is the 2nd defendant's case that it was the duty of the court to try the plaintiff to determine whether he was guilty or not, that the court proceedings were conducted fairly, that the prosecution adduced evidence and called witnesses and that the acquittal of the plaintiff does not per se give rise to a cause of action against the police. It is submitted that the evidence adduced by the plaintiff failed to prove malice or wrong doing on the part of the police and the claim against the 2nd defendant should be dismissed with costs.

Determination

I have carefully considered the pleadings and evidence on record. I have further considered the written submissions filed by the parties.

The issues arising for determination are the following –

1. Whether there was justification to dismiss the plaintiff.
2. Whether the arrest and prosecution of the plaintiff was malicious.
3. Whether the plaintiff was wrongfully arrested
4. Whether plaintiff was unlawfully detained/confirmed.
5. Whether the plaintiff was defamed.
6. Whether the plaintiff is entitled to the remedies sought.

From the manner in which the suit is framed the main issues for determination are malicious prosecution, defamation, illegal arrest, unlawful detention and defamation.

What are the ingredients of malicious prosecution?

There are four elements in 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.

In the case of **Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR** the Court of Appeal had this to say about malicious prosecution: -

“Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.

The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as

the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."

From the evidence on record the facts leading to the plaintiff's arrest are that he was arrested when some money 3,086,000/= went missing from the 1st Defendant's safe. He was arrested on the ground that he was under a duty to take care of the Defendant's assets in his capacity as the Branch Manager of the 1st defendant's Branch in Kisii.

Internal investigations were conducted and it was recommended that action be taken against the Plaintiff and 2 other employees at which point the 1st Defendant made a report to the police and the plaintiff and his colleagues were charged in Court. The 1st Defendant contends that its role in the whole matter was limited to making a complaint to the police and once the police were satisfied there was an offence they proceeded to charge the Plaintiff.

The complainant in the matter was the 1st Defendant. The prosecution ended in the Plaintiff's favour. On whether there was absence of reasonable and probable cause to commence or continue the prosecution, I find that there did exist probable cause as the Defendant which is a commercial enterprise lost money under the watch of the plaintiff who did not report the matter to any of his supervisors until after 3 weeks. The 1st Defendant was therefore justified to initiate proceedings against the Plaintiff.

The Plaintiff has not established malice as the complaint was made against him and his colleagues who had been found culpable in an internal investigation.

Wrongful arrest and false imprisonment

In **Daniel Waweru Njoroge & 17 Others V Attorney General [2015] eKLR** the court set out elements of false imprisonment as follows:

"The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:

- 1. The unlawful restraint of another;*
- 2. Against their will; and*
- 3. Without justification.*

Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying 'reasonable person' standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases."

The Plaintiff in evidence just states that he was arrested but does not belabour to set out evidence on the issue. The plaintiff does not have a leg to stand on as was stated by David Maraga, J. (as he then was) in **John Ndeto Kyalo -vs- Kenya Tea Development Authority and the Hon. Attorney General, High Court (Mombasa) Civil Case No. 502 of 1999 [2005] eKLR**, at Paragraphs 4 and 5 of his Judgment stated follows:

- a. "Claims for false imprisonment and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;*
- b. As regards a claim for false imprisonment, the cause of action would arise on the last day of the period of the alleged imprisonment;*
- c. By dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment."*

The claim was filed more than 12 months after the plaintiff was released from custody.

Defamation

The common law protects every person from harm to their reputation by false and derogatory remarks about their person though the tort of defamation. In the Court of Appeal case of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** it was stated that: -

"The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other

persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice. The defamatory words must be shown to have been published by the defendant.”

The Plaintiff contends that the malicious prosecution was defamatory and as such he should be compensated accordingly. The plaintiff did not adduce evidence to prove how the prosecution caused him to be shunned or avoided by other persons. The acts complained of as seen from the above case were not shown to have been construed by the audience as defamatory as he did not call any witnesses to state how they viewed him as a result of the aforesaid prosecution. This is aptly explained in the case cited by the 1st Defendant of **Miguna Miguna v Standard Group Limited & 4 others [2016] eKLR** where the Court stated:

“The Plaintiff’s evidence fell short of that requirement since he cannot as rightly submitted by the Defendants’ counsel, be his own witness on the issue of perception had by other people who know him on his character reputation or profession.”

The plaintiff having failed to prove malicious prosecution, defamation, illegal, unlawful or wrongful arrest and detention and/or confinement upon which the rest of the plaintiff’s claim is anchored, the claim in respect of those grounds must fail.

I must add here that the plaintiff was dismissed on 30th April 2007. This was during the regime of the Employment Act, No. 2 of 1976, now repealed. The said Act did not provide for unfair termination or compensation beyond the amount equivalent to the period of notice necessary to terminate the employment contract.

This was the position of the Court of Appeal in **KENYA REVENUE AUTHORITY -V- MENGINEYA SALIM MURGANI** and in the case of **EZEKIEL NYANGOYA OKEMWA -V- KENYA MARINE AND FISHERIES RESEARCH INSTITUTE** in which the court held that prior to 2007 (read 2nd June 2008 when the Employment Act, 2007 commenced) employers had no obligation in observing principles of natural justice in termination of contracts of employment. The courts have explained that under the old employment law in Kenya, employers could terminate contracts of employment at will, for good cause, bad cause or no cause. That at the time, employment was at the will of the employer. For these reasons the prayers for salary till retirement date, compensation for 12 months and pension till retirement date fail and are dismissed. The plaintiff did not prove malice and thus is not entitled to punitive or exemplary damages and the prayer thereof is also dismissed.

The plaintiff is however entitled to salary from the date of suspension to the date of dismissal, that is from 13th July 2006 to 30th April 2007. A letter of dismissal cannot be backdated, as expressed in the plaintiff’s letter of dismissal dated 30th April 2007 which states that the dismissal is effective from 13th July 2006.

I award him Kshs.739,080 being unpaid salary for the period between the date of suspension and the date of dismissal.

I further find that the dismissal was unlawful as it was based on wilful carelessness or negligence which was not proved during the hearing. I therefore reduce the summary dismissal to normal termination with notice and award the plaintiff one month’s gross salary in lieu of notice in the sum of Kshs.148,319.

The defendant did into deny that the plaintiff had earned 53 days leave which I award him as prayed in the sum of Kshs.262,026.70.

In sum, I enter judgment for the plaintiff against the 1st defendant in the total sum of Kshs.1,149,425.70 made up as follows –

1. Salary withheld during suspension-----Kshs.739,080.00
2. One month’s salary in lieu of notice-----Kshs.148,319.00
3. 53 leave days-----Kshs.262,026.70

Total **Kshs.1,149,425.70**

The decretal sum shall attract interest at court rates from date of filing suit. 1st defendant shall pay plaintiff’s costs for this suit.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE