



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Suit 104 of 2005**

**PETER MWAURA WANJIKU.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....DEFENDANT**

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

The Plaintiff sued the Attorney General, on behalf of the Officer Commanding Ruiru Police Station, whom he claimed “*caused him to be charged*”, on 12<sup>th</sup> July 1999, “*maliciously and without any reasonable cause for the alleged murder of one Charles Maina W’Njuguna*”.

The Plaintiff was charged of murder, jointly with others, and on 8<sup>th</sup> day of September, 2004, was acquitted by court on the ground of insufficient evidence.

The Plaintiff therefore claimed general damage for false imprisonment, general damages for malicious prosecution, aggravated damage, costs and interest of the suit.

The Attorney General entered appearance and subsequently filed a defence, and in para 6 thereof averred,

***“Further in the alternative and without prejudice to the foregoing, the Defendant avers that the Plaintiff’s arrest and subsequent prosecution was for a probable and reasonable cause.”***

The Plaintiff told court that at the time of his arrest, he was the Deputy Mayor of Ruiru, and was arrested on 30<sup>th</sup> June 1999 at Ruiru Council Office. Inspector Joseph Kamunde, Corp. Maloba and others took him to Kianyaga Police Station without informing him of the reason for his arrest.

He was booked in the O.B. at the police station with instructions that no one was to be allowed to see him. That even his lawyer was denied access to him.

The Plaintiff said that on 5<sup>th</sup> July 1999, Chief Inspector Kamonde asked him to sign a statement whose contents he did not know, and on demanding to be told why he was signing the statement, he was taken to Mt. Kenya forest and tortured until he became unconscious. He finally woke up at Ngati Police station in Thika the following day.

He re-called that on 12<sup>th</sup> July 1999, Corp. Maloba and Corp. Mitau, transferred him to Thika Police

Station, from where he was taken to Thika Magistrate's Court, where he was charged jointly with the Mayor and 3 Councilors with the murder of Charles Maina Njuguna a fellow Councilor. In total, there were 9 accused persons. He produced a copy of the charge sheet as an exhibit.

From Thika the accused persons were finally charged of murder, in Murder Case No. 18 of 2000 but the trial was at first hearing declared a "**mistrial**" when the Judge who started the hearing retired and did not conclude the trial.

The accused persons were charged a fresh in Murder Case No. 230 of 2003. The plea was taken on 28.11.2003, and the Plaintiff pleaded not guilty.

The trial proceeded to conclusion after which the court found that there was no evidence to connect him with the offence, and acquitted him in a Ruling of "**No case to answer**" delivered on 8<sup>th</sup> September, 2004. A copy of the Ruling was produced as exhibit 4.

The Plaintiff complained that he had been in custody since 30.6.99, i.e. a total period of 5 years, 2 months and 8 days.

He denied murdering the deceased and explained that immediately he got information of the deceased's murder, he rushed to go and console his family and again, together with the other Councilors issued press statements condemning the murder of their colleague. They also gave a cheque of Kshs.100,000/= as a Council to assist the family, and thereafter assisted in the burial of the deceased.

The Plaintiff referred to a letter dated 29<sup>th</sup> October, 2003 which he wrote to the Attorney General together with his co-accused, telling him that there was no case against them. By that time, the trial in the High Court had started before Etyang, J (as he then was), and the same was declared a mistrial. The Plaintiff and his co-accused were asking the A.G. to institute an inquest into their colleague's murder, as they were not responsible. The letter was produced as Ex. 5.

The Plaintiff and his co-accused again wrote another letter on 23.11.2003 to the Director of Public Prosecutions, informing him that they were not involved, and they should be released. He produced this as Ex. 6. There was no response to the two letters, and to the best of his knowledge, no inquest was held. The Plaintiff also produced as Ex. 7, the statutory notice he issued before instituting a suit against the Attorney General, as required by law.

The Plaintiff testified that as a result of the torture he suffered at the hands of the Police he was hospitalized for four months at Kamiti Maximum Prison. He complained of severe pain in his legs and knee-caps and hands which are weak and become numb when the weather is cold. He also complained of pains in the back, where he had been hit by a blunt object. He produced as Ex. 8 the original treatment cards from Kenyatta National Hospital to show that he was treated from 1999 to 2001. He identified Chief Inspector Kamonde, head of the investigating team as the officer who tortured him.

The Plaintiff asked the court to consider that he was an elected Councillor of Gatong'ora ward, who was in subsequently elected the Deputy Mayor by his colleagues, who had respect for him. That again, he was an official of the men fellowship of the Presbyterian Church of East Africa, at Machini Church of Ruiru. That further, within his ward, he was the Chair of the Development Committee and an ex-officio member of all the school committees in his ward. That further still, he was the Secretary of Milikenda self help group.

The Plaintiff lost all these positions after his arrest and charge and long detention in remand. Further, people today shun him, all his political ambitions was lost. His family also suffered as his children were insulted by others at school, and their performance dropped. His wife was also insulted by her fellow women and others in the village and she was even forced to close her shop as nobody wanted to associate with her.

The Plaintiff sought aggravated damages as he argued that had the Attorney General investigated this

matter properly, he would have certainly entered a “***nolle prosequi***” because there was no evidence connecting him with the offence.

Several questions were put to the Plaintiff to which he answered that his arrest and prosecution as well as that of other Councilors was instigated by those who suspected them of having plotted the murder to block the deceased for running for the position of Mayor in the impending mayoral elections. The Plaintiff denied having shown any interest in running for the post of Mayor.

The Plaintiff answered further that he was arrested on the statement of a co-accused which was produced at the 1<sup>st</sup> trial which was not concluded, but was never produced at the second trial, as the law on confessions had changed.

The Plaintiff alleged malice in his arrest, and he pleaded so in the plaint. He was acquitted of the murder charge by Justice Rawal on 8<sup>th</sup> September 2004.

The Attorney General did not adduce any evidence in court because his defence was struck out by court.

At the conclusion of the Plaintiff’s evidence, the advocates sought to file written submissions which now form part of the records of this case.

Counsel for the Plaintiff submitted that the “***prosecution against the Plaintiff was conducted without reasonable and probable cause,***” as per Cotran, J in the case of **MURUNGA V ATTORNEY GENERAL**.

He submitted further that, “***it is clear that the prosecution levied upon the Plaintiff was founded on unestablished facts, scant and shoddy investigations, conjuncture, wild suspicious and incredible evidence***”

The advocate further submitted that the Plaintiff’s evidence that the police did not conduct any investigations remained uncontroverted, and the court was asked to accept it. A portion from Judge Rawal’s ruling was quoted, at page 24.

On whether the Defendant was actuated by malice in prosecuting the Plaintiff, the advocate submitted that the actions of the officer who was in charge of investigations, Chief Inspector Kamonde and Sergeant Maloba, an investigating officer, together with others under their command, ‘***were not convectional and professional but were littered by malice unrebutten evidence of torture visited upon the Plaintiff after his arrest, inhuman treatment, humiliation and ridicule was adduced, which is our humble submission constitutes prima facie evidence of malice.***’ The court was asked to find that the actions of the Police in arresting, confining and prosecuting the Plaintiff were malicious and that the Plaintiff’s claim for general damages for malicious prosecution was therefore established.

On the damages to be awarded, the advocate went through a number of cases decided by the High Court in awarding damages for malicious prosecution, damages for false prosecution, aggravated damages, damages for false imprisonment etc etc.

Counsel for the Defendant, on the other hand submitted that the Plaintiff failed to comply with the provisions of O. VI r 8 which required the Plaintiff to plead particulars of his claim i.e. particulars of malice. That in the absence of this, the court would find it difficult to assess the damages payable to the Plaintiff for malicious prosecution.

Counsel for the Defendant submitted further that, “***the Plaintiff’s arrest and subsequent prosecution was for a probable and reasonable course, the Plaintiff having been suspected on reasonable grounds to have committed an offence –***”, and again, that the police were “***lawfully carrying out a duty entrusted to them to maintain law and order.***”

According to the Defendant's Counsel, the Plaintiff was acquitted on "**technicality**" which does not render "**his arrest, imprisonment and prosecution unlawful**". Furthermore, his acquittal *per se* is not sufficient basis to ground a suit for malicious prosecution without proving spite or ill-will against the prosecutor.

On torture, it was submitted that the Plaintiff failed to summon the doctors who treated him for "**the numbness and weakness of the legs arising out of the alleged torture**".

On injury to business and reputation, the submission was that there was no proof of this, and on aggravated damages, it was submitted that there was no evidence to prove that the injuries he sustained were as a result of the alleged torture by the Police.

Having summarized the Plaintiff's oral evidence as well as the submissions filed by both advocates and considered **all** the authorities quoted, I am now in a position to focus on the prayers put forth by the Plaintiff to establish liability, and in so doing, I will start with prayer (a), where the Plaintiff seeks "**general damages for false imprisonment**". Here he testified that there was no evidence to connect him with the offence, all along, and he should take therefore not been arrested to begin with.

It was unfortunate that I did not have the benefit of explanation from both the arresting as well as the investigating team who prosecuted the Plaintiff. That notwithstanding, I will consider the laid down legal principles along side the Plaintiff's evidence, and in this respect, consider the finding in the High Court decision of **MURUNGA V ATTORNEY GENERAL** which the Plaintiff's Counsel quoted and I believe, relied on in this respect. In that case, the Judge scrutinized the conduct of Inspector Ouma, who appeared to have been both the arresting as well as the investigating officer, and found that his imprisonment of the Plaintiff, George Masinde Murunga, was "**unjustified false and unlawful**".

In the Court of Appeal decision of **JOSEPH KARUGA KIIRU v ATTORNEY GENERAL & 2 OTHERS CIVIL APPEAL NO. 171 OF 2000**, the Court found that the burden was on the Defendant to prove that they had reasonable cause for suspecting that the Appellant had committed an offence.

In the case before me, the Defendants witnesses did not have a chance to explain why they arrested the Plaintiff because their defence was struck out, leaving the defence to rely on submissions.

Be that as it may, the Plaintiff's evidence in my view amounted to him saying that he was arrested too soon after having been mentioned by a co-accused in a statement, so the Police could not have possibly had sufficient time to conduct proper investigations. If this be so, then I understand him to have challenged his subsequent and continued imprisonment, when, according to him, there was no proper investigations. The Plaintiff also raised the issue of his first trial which was declared a mistrial, yet the police continued to detain him with no proper evidence.

Having gone through the evidence on record, both the Plaintiff's oral evidence and the further evidence adduced, ***I have come to the conclusion that the Plaintiff's initial arrest and detention was on reasonable suspicion that he was connected or involved in the murder of the deceased Charles Maina because Julius, a co-accused, had implicated him in the murder of the deceased. The statement from Julius was recorded before the Plaintiff was arrested, and infact, it led to his arrest. The said statement was finally accepted by the first trial Judge, Etyang, J (as he was) and produced as an exhibit in that trial. Upto that point, I do not find that the Plaintiff's arrest was false, as the prosecution had evidence which the court accepted.***

It is what happened subsequently that changed the scenario in this case. The Law was amended, the Evidence act, which outlawed confessions of accused persons whilst in custody of police officers. The amendment to the Evidence Act was contained in the Criminal Law (amendment) Act, 2003 No. 5 of 2003, whose date of commencement was 25<sup>th</sup> July 2003.

The amendment reads "**A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in**

**court.”**

According to the Plaintiff, he was charged a fresh after the 1<sup>st</sup> trial was declared a “**mistrial**”, and once more arraigned in court on 28<sup>th</sup> November, 2003 on the basis of the same confession statement by a co-accused. He pleaded not guilty, and the trial commenced, once more.

My observation here is that by this time, the law on confessions of accused persons taken whilst in police custody had been amended and the Defendant, was aware of it or ought to have been aware. This amendment affected the **only** evidence the Defendant had against the Plaintiff, a confession of a co-accused in a statement to the Police that the Plaintiff was connected with the offence.

The charge of murder could not have been sustained against the Plaintiff without the statement of his co-accused. So the question I would pose at this stage is, why then was he charged a fresh to face the murder charge when the Defendant had no evidence against him after the amendment of the Evidence Act which outlawed the only evidence they had? No wonder the Defendant’s attempt to produce that statement was rejected by Rawal, J because such evidence was no longer applicable. I therefore consider the period from the date of the 2<sup>nd</sup> plea, namely 28<sup>th</sup> November, 2003 to the date of the Ruling by Rawal, J namely 8<sup>th</sup> September, 2004, to have been a period of “**false imprisonment of the Plaintiff**”, by the Defendant’s agents whom I find liable, and the Plaintiff is entitled to damages on this head.

In the Court of Appeal decision of **JOSEPH KARUGA KIIRU V JOSEPH MWAMBURA & 2 OTHERS**, the authority produced and relied on by the Defendant, the Court of Appeal found as follows on malicious prosecution; “**To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably, is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonable lies on the person prosecuting**”.

In this case, it was the Plaintiff’s evidence that he did not murder the deceased Councillor, and further that the **only** evidence the prosecution adduced against him before the 1<sup>st</sup> trial Judge, Etyang, J, was a confession statement under caution, recorded from his co-accused, whilst in police custody. The Plaintiff’s evidence to this effect was not challenged by the Defendant who did not call witnesses to say in court whether they had any other evidence against the Plaintiff in the murder case, other than the confession of his co-accused. I therefore accept that the Plaintiff’s evidence that the only evidence adduced against him in the murder trial was his co-accused’s confession statement. With that evidence no longer applicable, why then did the Defendant proceed to charge the Plaintiff afresh, and take him through a trial, when they knew that the law had been amended, and they could no longer rely on the confession statement of the Plaintiff’s co-accused to prosecute him? This, I find was malicious, and amounted to “**malicious prosecution**” by the Defendant whom I find liable for this. The Plaintiff is therefore entitled to damages on this head.

Because I have found that the Plaintiff’s second prosecution was “**malicious**” after having suffered ‘**false imprisonment**’ for the period I have pointed out above, it is my further finding that the Plaintiff is entitled to aggravated damage in these circumstances.

So what quantum of damages shall I award the Plaintiff for “**false imprisonment**”, “malicious prosecution” and under the head of “**aggravated damages?**”

This will differ from one case to another because no two cases can have the same facts and circumstances.

In this case, for example, the Plaintiff detailed the physical injuries he suffered as a result of the arrest, torture and detention by the Police. He named the Police officers who tortured him and the circumstances under which the torture occurred. The named officers did not come to court to refute or accept this evidence which remained uncontroverted, and I accept it. These incidents, according to the Plaintiff occurred whilst he was in both Police custody and prison remand. The torture by the Police resulted in

his admission into hospital at Kamiti Maximum Prison for 4 months! The Plaintiff still suffers as a result of those pains, when the weather is cold.

Though this evidence was criticized in the submissions filed by the Defence Counsel who said that the Plaintiff did not comply with Order VI R8 in his pleadings, I find that mere submissions cannot controvert the Plaintiff's oral evidence which gave details of the injuries he suffered as a result of Police torture whilst he was in their custody. The Plaintiff also produced original cards from Kenyatta National Hospital where he was treated for some time whilst in custody.

There was the further evidence of how the Plaintiff lost his job, reputation ambitious etc etc as a result of the arrest and prosecution, and how his family too suffered.

Taking all this into consideration, and doing the best I can in the circumstances, I find Judgment for the Plaintiff against the Defendant and proceed to award the Plaintiff a sum of Kshs.400,000/= for false imprisonment, another sum of Kshs.400,000/= for malicious prosecution, and Kshs.200,000/= as aggravated damages.

This amounts to Kshs.1 million, (one million) plus court costs and interests.

**Dated at Nairobi this 30<sup>th</sup> Day of November, 2007.**

**JOYCE ALUOCH**

**JUDGE**