



Reproductive Health Services & 3 others v Attorney General (Civil Case 610 of 2006) [2022] KEHC 14051 (KLR) (Civ) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14051 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 610 OF 2006
JK SERGON, J
OCTOBER 19, 2022

BETWEEN

REPRODUCTIVE HEALTH SERVICES 1ST PLAINTIFF
JOHN MUCHAI NYAMU 2ND PLAINTIFF
MARION WAMBUI KIBATHI 3RD PLAINTIFF
MERCY KAIMURI MATHAI 4TH PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The 1st, 2nd, 3rd and 4th plaintiffs in the present instance filed the plaint dated June 9, 2006 and sought for judgment against the defendant in the following manner:
 - a. Special damages for Kshs 53,900,540.25
 - b. General damages,
 - c. Punitive/exemplary damages,
 - d. Interest on (a), (b) and (c) above,
 - e. Costs of the suit.
2. The 2nd, 3rd and 4th plaintiffs pleaded in the plaint that they at all material times worked at the 1st plaintiff clinic, with the 2nd plaintiff being one of the directors of the 1st plaintiff whereas the 3rd and 4th plaintiffs served in their respective capacities as Managers of the 1st plaintiff.



3. The plaintiffs also pleaded in the plaint that on or about May 26, 2004 some 15 fetuses were found dumped along Mombasa Road in Nairobi area and that thereafter on the June 14, 2004 the defendant maliciously laid information against the 2nd to 4th plaintiffs before the High Court at Nairobi vide Criminal Case No, 81 of 2004 thereby charging them with the offence of murder contrary to Section 203 as read with 204 of the *Penal Code*, cap. 63 Laws of Kenya. The particulars of malice are laid out under paragraph 9 of the plaint.
4. It is pleaded by the plaintiffs that their prosecution ended in the dismissal of the charges against them and their consequent acquittal.
5. According to the plaintiffs, following their arrest they suffered immense loss of business, including the temporary closure of the 1st plaintiff's clinics situated at Afya Centre and Eastleigh areas.
6. Upon service of summons, the defendant entered appearance and put in its statements of defence to deny the averments made in the plaint.
7. At the hearing of the suit, the 2nd to 4th plaintiffs testified and called one (1) other witness whereas the defendant called one (1) witness.
8. The 2nd plaintiff who was PW1 adopted his signed witness statement and testified that on the material date, he and his counterparts were told to visit Langata Police Station to record statements in respect to the discovery of the fetuses and that they were later charged with the criminal offence of murder before being acquitted on a no-case to answer basis.
9. The 2nd plaintiff testified that in the process, the plaintiffs suffered loss of business resulting from their malicious prosecution contrary to the evidence which was presented to explain the manner of death of the fetuses since there was nothing to show that the fetuses were either born alive to begin with or that they were linked to any of the plaintiffs.
10. In cross-examination, the 2nd plaintiff gave evidence that the fetuses were discovered along Mombasa Road near Ngong River and that following their acquittal on the murder charges, they were again charged with the offence of killing an unborn child in relation to the fetuses vide Criminal Case No 1294 of 2005 but which charges were later withdrawn.
11. The 2nd plaintiff further gave evidence that following the arrest and charge, he lost income and experienced societal stigma which negatively impacted on his professional standing as a doctor. He also stated that he and the other plaintiffs incurred various expenses including legal fees and payment of employees.
12. It is the testimony of the 2nd plaintiff that the 1st plaintiff is still operational.
13. In re-examination, the 2nd plaintiff stated that the equipment belonging to the 1st plaintiff and which was discovered at the scene alongside the fetuses could not have been used to procure abortions.
14. The 3rd plaintiff who was PW2 also adopted her executed witness statement as evidence and stated that she is a trained nurse and continues to practice in such capacity, also as a director of the 1st plaintiff.
15. She stated that on the material date, she together with her counterparts were summoned at Langata Police Station where they were questioned in relation to the discovery of the fetuses and thereafter recorded statements.
16. It is the testimony by the 3rd plaintiff that during the course of the criminal trial against her and her counterparts, she remained in custody while pregnant and that she delivered her baby while in prison.



17. It is also the testimony by the 3rd plaintiff that there was no evidence to link her to the dead fetuses.
18. The 3rd plaintiff stated that she incurred numerous expenses resulting from her arrest and prosecution, and that she eventually left the country in search of better employment opportunities.
19. In cross-examination, the 3rd plaintiff gave evidence that there are times where she would carry out family planning works but that she was not responsible for the disposal of medical waste since she had an employee attend to that.
20. The 3rd plaintiff further gave evidence that on occasion, patients would attend the 1st plaintiff clinic to seek abortions and that she would refer them to the doctor.
21. It is the testimony by the 3rd plaintiff that some of the documentation discovered alongside the dead fetuses bore the details of the 1st plaintiff.
22. It is similarly the testimony by the 3rd plaintiff that she suffered loss of earnings during the time of her arrest.
23. In re-examination, she testified that her job at all material times was purely administrative.
24. The 4th plaintiff who was PW3 also adopted her signed witness statement and gave evidence that she worked as a nurse and a director of the 1st plaintiff, with managerial duties in family planning services and counseling.
25. She gave evidence that following her arrest and prosecution, she suffered great stigma and that the prosecution was malicious since she did not commit the murders.
26. She further gave evidence that during the investigations, equipment from the 1st plaintiff clinic was taken for comparison analysis with the equipment found at the crime scene and that results showed that there was no correlation between the two, and yet the police proceeded to charge the plaintiffs herein.
27. In cross-examination, the 4th plaintiff testified that she would at times assist the doctors in offering family planning services but that she mostly undertook administrative work at the 1st plaintiff clinic.
28. The 4th plaintiff also testified that there are times patients would visit the 1st plaintiff with the intention of procuring abortions and that she would refer them to the doctor, and that she was not privy to what would happen thereafter.
29. In re-examination, PW3 gave evidence that the arrest and prosecution of the plaintiffs was unjustified and that since her acquittal, she has been unable to earn as much as she did before.
30. Njoroge Obadia Kimani who was PW4 stated that he worked as an accountant at all material times and that he was hired by the 2nd plaintiff to undertake audits for the 1st plaintiff between 2002 and 2004.
31. The witness stated that the 1st plaintiff had been thriving in its business but that following the closure of its two (2) clinics, it incurred losses.
32. In cross-examination, the witness testified that he was not informed of the reasons for closure of some of the clinics of the 1st plaintiff but that he came to learn of the criminal charges preferred against the directors of the 1st plaintiff.
33. PC Joseph Mwangi who was DW1 adopted his signed witness statement as evidence and stated that on the material date, he was at Langata Police Station when he was sent out together with other police



officers to the scene, where they found 8 fetuses lying on the side of the road alongside some black polythene bags containing related waste material.

34. The police officer stated that they also discovered documentation bearing the letter-head of the 1st plaintiff at the scene.
35. It is the testimony of DW1 that the 2nd to 4th plaintiffs were charged in relation to the discovery of the fetuses due to the evidence found upon investigations, coupled with the belief that the plaintiffs were connected to the disposal of the fetuses.
36. In cross-examination, the police officer testified that it was appropriate to charge the plaintiffs with the offence of murder based on the evidence discovered and further testified that he was not aware of the second criminal case involving the plaintiffs.
37. The police officer gave evidence that while he was present at the scene on the material date and took part in the transportation of the fetuses to Nairobi City Mortuary, he did not take part in the investigations on the matter or in the subsequent arrest of the plaintiffs.
38. It is the evidence by the police officer that there was no malice on the part of the police, against the plaintiffs.
39. In re-examination, DW1 stated inter alia, that the documents which were linked to the 1st plaintiff and discovered at the scene were wet, and that he also discovered a medical journal bearing the portrait of the 2nd plaintiff.
40. Upon close of the hearing, the parties put in their respective submissions.
41. On their part, the 1st, 2nd and 4th plaintiffs contend that they are satisfied the ingredients of malicious prosecution have been proved as laid out in the case of Stephen Gachau Githaiga & another v Attorney General [2015] eKLR thus:

“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 fueled 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."

42. The plaintiffs submit that the prosecution was initiated by the defendant herein and that the same terminated in their favour, by way of an acquittal and withdrawal of the separate criminal cases.
43. The plaintiffs further submit that there was no reasonable or probable cause for their prosecution and hence the action by the representatives of the defendant in charging and prosecuting them were purely based on assumptions.
44. According to the plaintiffs, the evidence tendered by the Government pathologist at the criminal trial showed that the fetuses in question had been born dead and hence the charges against them were unsustainable.
45. It is the submission by the plaintiffs that in choosing to arrest and charge them before investigations had properly been conducted, the representatives of the defendant acted with malice.
46. On damages, the plaintiffs are of the view that they are entitled to an award of special damages in the sum of Kshs 24,906,490/= for the 1st plaintiff; the sum of Kshs 11,780,000/= for the 2nd plaintiff; and the sum of Kshs 7,656,000/= for the 4th plaintiff.
47. The plaintiffs also sought for general and punitive/exemplary damages for malicious prosecution.
48. In her submissions filed separately, the 3rd plaintiff echoed the sentiments of her counterparts on the satisfaction of the ingredients for malicious prosecution and that there was no basis for preferring charges against her.
49. The 3rd plaintiff cites *inter alia*, the case of James Karuga Kiiru v Joseph Muamburi & 2 others [2001] eKLR in which the court held thus:

"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 reasonably, lies on the person prosecuted."

50. On damages, the 3rd plaintiff sought for the sum of Kshs 9,180,000/= being the cost of hiring legal counsel, medical expenses and loss of earnings.
51. In response, the defendant contends that while it is not in dispute that the plaintiffs' arrest and prosecution were instigated by the police and that the prosecution terminated in favour of the plaintiffs, there was no malice or ill-will on the part of the police.
52. The defendant contends that the prosecution of the plaintiffs was based on credible evidence and with probable cause.
53. On quantum, it is the submission by the defendant that the plaintiffs are not entitled to any award on damages since they have not proved their respective claims for malicious prosecution.
54. It is also the submission by the defendant that if this court is to find that the plaintiffs have proved their case for defamation, then they are entitled only to the special damages which have been proved.



55. Consequently, the defendant urges that the plaintiffs' suit be dismissed with costs.

56. I have considered the respective submissions alongside the authorities relied upon and the evidence tendered at the trial.

57. The key issues for determination therefore are as follows:

- i. Whether the plaintiffs have made a case for malicious prosecution against the defendant; and
- ii. Whether the plaintiffs are entitled to the reliefs sought.

58. In respect to the first issue above, the term 'malicious prosecution' was well defined by the court in *Stephen Gachau Githaiga & another v Attorney General* [2015] eKLR cited in the respective submissions by the 1st, 2nd and 4th plaintiffs and whose definition I choose to borrow from as follows:

"Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without Probable Cause and for a purpose other than that of bringing the alleged offender to justice...Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution."

59. Further to the foregoing, the elements to be established for a claim of malicious prosecution succeed were articulated in the case of *Kagane v Attorney General* (1969) EA 643 cited in the defendant's submissions and further cited by the court in the case of *Kenya Power & Lighting Co Ltd v Maurice Otieno Odeyo & 2 others* [2017] eKLR as hereunder:

- a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;
- b) That the prosecution terminated in the plaintiff's favour;
- c) That the prosecution was instituted without reasonable and probable cause; and
- d) That the prosecution was actuated by malice."

60. It is therefore incumbent upon the plaintiffs to establish the presence of the above ingredients collectively in order for them to succeed on their claim.

61. On the first ingredient, it is not in dispute that the arrest and prosecution of the plaintiffs were instigated by the police and the prosecution who represent the State in the criminal process. Furthermore, the law sets out that the Attorney General, being the defendant in this instance, shall represent the State in civil proceedings. Resultantly, this ingredient has been established.

62. Concerning the second ingredient, upon my perusal of copies of the criminal court rulings in Criminal Case No 81 of 2004 and Criminal Case No 1294 of 2005, it is evident that the criminal proceedings terminated in favour of the plaintiffs by way of an acquittal under Section 210 of the *Criminal Procedure Code* and a withdrawal of the charges, respectively. There is therefore no contention that this ingredient has equally been proved.

63. The third ingredient touches on the subject of probable/ reasonable cause.



64. I appreciate that the burden of proving the absence of probable cause ultimately lies with the plaintiffs. In the case of *Kagane v Attorney General* (supra) the court sought to define what constitutes reasonable or probable cause:

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...”

65. It therefore follows that relevant material and facts ought to be clearly set out prior to the institution of a criminal case and which material and facts would lead any prudent person; including the police and subsequently, the prosecution; to the belief that the person charged is guilty of the offence.

66. Upon my examination of the evidence tendered, I note that credible evidence was tendered by the defendant to demonstrate the manner in which the investigations were carried out; including the taking down of statements from the 2nd to 4th plaintiffs; and to show how the decision to arrest and prosecute the plaintiffs was arrived at.

67. In particular, it is apparent from the record that various documents belonging or associated with the 1st plaintiff were found at the scene and no reasonable explanation was given as to how those documents found their way there.

68. It is also apparent that the 2nd to 4th plaintiffs were all directors of the 1st plaintiff and hence liable or otherwise responsible for its actions.

69. Upon my further perusal of the record, it is not in dispute that the 1st plaintiff offered services pertaining to reproductive health matters and this could plausibly explain the decision to arrest and charge the plaintiffs in relation to the discovery of the fetuses.

70. For the foregoing reasons, I am of the view that notwithstanding the fact that the court in Criminal Case No 81 of 2004 found that no sufficient evidence had been availed to support the charges preferred against the plaintiffs, I am of the view that the plaintiffs have not shown by way of credible evidence that there was no probable cause behind their arrest and prosecution.

71. In close reference to the above is the ingredient of malice. Honourable Mr Justice Mativo in the case of Stephen Gachau Githaiga (supra) correctly articulated that an acquittal in a criminal case does not automatically connote malice; he went further to reason that malice can be determined from the circumstances of the case. The judge ultimately held that in the absence of evidence as to the facts relied upon in the prosecution thereof, there was presence of malice.

72. Upon my examination of the pleadings and evidence on record, following from my findings above, I am of the view that notwithstanding their acquittal and subsequent withdrawal of the charges later preferred against them, I am not satisfied that the plaintiffs have tendered credible evidence to support their argument that their prosecution was actuated by malice on the part of the police and the prosecution, especially noting that the standard of proof in civil cases is lower in comparison to that in criminal cases.

73. Consequently, I find that the plaintiffs have not proved their case for malicious prosecution on a balance of probabilities and their claim is hereby dismissed on that basis.



74. I will now address my mind to the second issue on whether the plaintiffs are entitled to the reliefs sought in the plaint.
75. Having found that the claim for malicious prosecution has not been proved, I find that the plaintiffs are not entitled to an award of general damages on the same. However, I am enjoined to make a finding of the sums I would have awarded under different circumstances.

a. General damages for malicious prosecution:

76. Under this head, I note that none of the parties made any proposals, though the 3rd plaintiff referenced some authorities in her submissions, including the case of *Crispus Karanja Njogu v Attorney General & another* [2008] eKLR where the court awarded the sum of Kshs 800,000/= under this head, and the case of *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another* [2005] eKLR where the appellants were awarded the respective sums of Kshs 500,000/= on general damages for malicious prosecution.
77. From my study of the record, I observed that the 2nd to 4th plaintiffs were at all material times medical practitioners and directors of the 1st plaintiff.
78. Upon taking into account and the experiences the plaintiffs underwent as a result of the prosecution and upon further taking into account comparable awards made in cases involving plaintiffs in a relatively similar standing in society as the plaintiffs in this instance, I would have awarded the sum of Kshs 600,000/= under this head to each of the 2nd to 4th plaintiffs, upon considering the case of *Lucas Omoto Wamari v Attorney General & another* [2017] eKLR where an award was made in the sum of Kshs 500,000/= and the case of Julius Okang'a Omulando v The Attorney General, Nairobi CMCC No 1663 of 2016 where the court in the year 2018 awarded the sum of Kshs 310,000/= on general damages for malicious prosecution to the plaintiff who was a Chief Accounting Officer.
79. I would not have made any award under this head in respect to the 1st plaintiff upon considering the nature of the claim.

b. Punitive/exemplary damages

80. In respect to punitive/exemplary damages, such award of damages is deemed to apply in instances where there has been some arbitrary or calculated conduct by the defendant or where the actions by the defendant are calculated to grant some benefit. Upon considering the evidence on record vis-à-vis the nature of damages sought herein, I would not have been satisfied to make any award under this head.

c. Special damages

81. Upon considering the nature of the claim, being that of malicious prosecution, I would have been hesitant to make any award under this head in respect to the 1st plaintiff.
82. Concerning the 2nd plaintiff, upon considering the sums proposed and indicated hereinabove, I would have awarded the 2nd plaintiff the sum of Kshs 12,800/= for medical expenses incurred; and the sum of Kshs 800,000/= for legal expenses incurred, totaling the sum of Kshs 812,800/=.
83. In respect to the 3rd plaintiff, I would have awarded her the sum of Kshs 73,030/= for medical expenses incurred as well as the sum of Kshs 800,000/= being legal expenses incurred, bringing the total award to the sum of Kshs 873,030/=.
84. For the 4th plaintiff, I would have made an award in the total sum of Kshs 852,400/= constituting the sum of Kshs 52,400/= for medical expenses and the sum of Kshs 800,000/= for legal costs.



85. In the absence of any evidence to support the claim for loss of income or loss of lifetime income, I would have declined to make any such award to any of the 2nd to 4th plaintiffs.
86. Upon my finding above, nevertheless, I hereby make an order that the claim for malicious prosecution is hereby dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
19TH DAY OF OCTOBER, 2022.**

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the 1st, 2nd and 4th Plaintiffs
..... for the 3rd Plaintiff
..... for the Defendant

