

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 681 OF 2016**

OLANGO STEVEN.....PLAINTIFF

VERSUS

1. ATTORNEY GENERAL

2. KAMPALA CAPITAL CITY AUTHORITY.....DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

This plaintiff instituted this suit against the defendant for recovery of UGX 53,480,000/= being special damages, general damages and punitive damages for malicious arrest and malicious/wrongful prosecution and unlawful detention, cruel torture causing bodily harm, pain, shock, embarrassment, loss of financial ability to support family by enforcement officers of KCCA and police officers and prosecutors acting the ordinary cause of their employment.

On 31st May 2014, the plaintiff while at his home along Plot no.3 Ntinda road, Village 10, Nakawa division, he saw strange men in his backyard where he had parked his motor vehicle. He inquired from them about their identity and they said they were KCCA enforcement officers following up illegal vendors.

When he insisted on their identity cards to prove that they were employees, they became rude and started to rough him up. Later other enforcement officers in Uniform arrived in three pick-ups and he was punched in the face and he lost his conscience. He was bundled on their truck and his trousers were torn and he was told that he was under arrest.

The defendant instituted criminal proceedings against the plaintiff and others in the case of *Uganda versus Olango Stephen vide Criminal Case No.1399 of 2014* in the Chief Magistrates court of Nakawa at City Hall. The plaintiff was charged with engaging in a disorderly behavior. Contrary to Rule 7(g) and 27 of the Local Governments (Kampala City Council) Maintenance of Law and Order Ordinance 2006.

According to the joint scheduling memorandum, the parties agreed on the following facts and issues to be resolved by this court;

Agreed Facts

- The plaintiff was arrested on the 31st of May 2014 by the 2nd law enforcement officers.
- The plaintiff was charged at Buganda Road Court holden at City Hall for disorderly behavior as per the charge sheet, record of proceedings and judgment.
- The plaintiff was acquitted for the offence of disorderly behaviour.
- This court has jurisdiction to resolve the dispute between and among the parties.

Agreed Issues

1. *Whether the plaintiff has a cause of action against the defendants?*
2. *What remedies are available to the parties?*

The plaintiff decided to raise his own issues after he had agreed to the above issues. I have ignored them and this court has found it prudent to rephrase the main issue for determination as follows;

Whether the Plaintiff was wrongly arrested and maliciously prosecuted

Both parties filed written submissions which were considered by this court. The plaintiff was represented by *Opwonya Charles Darlington* while the 1st defendant was represented by *Mutuwa Rita*

DETERMINATION

Whether the Plaintiff was wrongly arrested and maliciously prosecuted?

Every person has the freedom to bring criminals to justice. But this does not mean that any innocent person should be brought to justice unnecessarily. It is in order to check false accusation of innocent persons and that is what the tort of malicious prosecution intends to protect.

The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of the minds of judicial authorities whose responsibility is to administer criminal justice.

According to *Odunga's Digest on Civil Case Law and Procedure page 5276*, the essential ingredients to prove malicious prosecution are as follows:

1. The criminal proceedings must have been instituted by the defendant
2. The defendant must have acted without reasonable or probable cause
3. The defendant must have acted maliciously
4. The criminal proceedings must have been terminated in the plaintiff's favor.

In this case, there is no doubt since it is an agreed fact that the 2nd defendant instituted criminal proceedings against the plaintiff which proceedings were terminated in the plaintiff's favor hence proving two of the essential ingredients of malicious prosecution. However, mere acquittal in the plaintiff's favour does not mean that he or she has been maliciously prosecuted. He/she must prove other conditions of malicious prosecution.

In addition, merely because the plaintiff came to be acquitted or discharged in a criminal court as the prosecution failed to prove the case beyond reasonable doubt, it does not mean that such acquittal or discharge could necessarily boomerang upon the defendant as a case for malicious prosecution.

The main issue for determination is whether the defendant acted without reasonable or probable cause.

According to *Dr. Willy Kaberuka v Attorney General Civil Suit No. 160 of 1993 [1994] II KALR 64*, Byamugisha J stated that

“ The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test and that is to say, to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution whether that material consists of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary prudent and cautious man to the extent of believing that the accused is probably guilty.”

In the present case, it is the uncontroverted evidence of the plaintiff that upon the 2nd defendant's employees/enforcement officer entering his backyard he asked them what they were looking for in his home.

They claimed they were chasing vendors and according to his testimony they did not have KCCA uniform. He had every reason to be suspicious of the persons claiming to be KCCA enforcement officers without uniform. It was later when the enforcement officers in Uniform came into his compound and he was roughed up and bundled on their truck.

The defendants however still proceeded to institute criminal proceedings against the plaintiff despite this information they had that indeed he was arrested. The plaintiff was acquitted of the charges.

Counsel for the plaintiff submitted that the prosecution of the plaintiff clearly demonstrates the proceedings leading to the arrest, detention and charging of the plaintiff demonstrated failure on the part of the 2nd defendant to conduct thorough investigation.

On the other hand counsel for the 2nd defendant submitted that prosecution of the plaintiff clearly demonstrates the proceedings leading to the arrest, detention and charging of the plaintiff was done in accordance with the law and that the same would have been done by any ordinary and prudent cautious man to institute criminal proceedings.

I have carefully read the judgment of His worship Elias Kakooza, the plaintiff was acquitted the count. The trial magistrate noted in his judgment that the accused was at his home and he wanted to know the people moving around his house, they were not in uniform which fact was alluded to by the prosecution witnesses. I find that the accused was protecting his home...but the law enforcement officers would have cooperated by producing their IDs or at least some putting on the Uniform would be moving together with ununiformed officers”

Further the proceedings also show that the hawkers merely ran through the plaintiff's compound which is 50meters from the main road. There were no hawkers in his home.

The same testimony was repeated in this court by PW1 and DW1. It is clear that the facts were capable of dispute; the accuser was under an obligation to check the facts through an inquiry.

The failure to carry out independent consultation and investigations by the 2nd defendant clouded their decision to prosecute the plaintiff in ignorance of the real facts and to appear to be appeasing their enforcement officers who had peddled lies and falsehoods. They trespassed in the plaintiff's home and he had every right to question their actions. A man's home is his castle.

A reasonable and prudent defendant prosecutor, his position would have led him to the conclusion not to arrest detain and charge the plaintiff.

On that basis I find that the 2nd defendant acted without reasonable or probable cause. The defendant's officials had all the necessary material to satisfy a prudent and cautious man not to institute criminal proceedings against the plaintiff. But they acted in a vindictive manner and wanted to show authority in their actions.

Counsel for the defendant cited the case of *Katerregga v Attorney-General [1973] 1 EA 287 (HCU)*, where it was held that malice must be proved in fact and it was their submission that, no malice was proved against it.

Counsel invited court to find that the defendant did not act with malice. According to *Gwagilo v Attorney General [2002] 2 EA 381 (CAT)*, malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the appellant could prove malice by showing for instance that the prosecution did not honestly believe in the case which they were making that there was no evidence at all upon which a reasonable tribunal could convict that the prosecution was mounted a wrong motive and show that motive.

Malice in criminal proceedings can be established by looking at the peculiar circumstances of every case or inference from circumstances and cannot be proved by direct evidence. Malice means indirect and improper motive. That is to say; intent to use legal process in question for some other than its legally appointed and appropriate purpose. The plaintiff must show that the prosecution was "motivated not by desire to achieve justice, but for some other reason". *Zainal bin Kuning v Chan Sin Mian Micheal [1996] 2 SLR(R) 858*

Malice can be established through enmity, retaliation, haste, omission to make due and proper enquiries, recklessness, harassment, personal spite, sinister motive e.t.c are some of the items which are relied upon for proving the malice.

In this case, the facts are straight forward. They entered the plaintiff's home/compound while chasing vendors and later turned against the plaintiff because he was asking for their identity cards. Instead of humbling themselves, they opted to arrest him and prefer trumped up charges of disorderly behavior.

Hon. Mr. Justice Bashaija K. Andrew in *Mugabi v Attorney General Civil Suit No. 133 OF 2002* held that

"It is my view that malice has been established as can be inferred from the Police' failure to consult the law and/ or to act as a prudent and cautious person would do, and also in acting without reasonable cause. The Police officers at Lugazi Police Station failed even in the simplest of the investigative tasks of retaining copies of the sale agreement Exhibit P III, which would have helped in ascertaining from the witnesses thereto the ownership of the motorcycle. Instead, they kept the Plaintiff reporting to Police for over twelve times without bothering to investigate until when they eventually arrested, detained and subsequently had him prosecuted. This is a manifestation of malice as it was a reckless disregard of the law and the Plaintiff's legal rights."

In the present case, the defendant's officials had ample to time to carry out proper investigations since it was the word of their law enforcement officers against the plaintiff's word. They opted to take the word of their enforcement officers as the 'gospel truth' and yet they were to blame to an extent for running into the plaintiff's compound as they tried to chase the vendors without KCCA uniforms.

There was no justification for preferring the said charges and it was malicious in a bid to show power.

The plaintiff has proved the essential elements of wrongful and malicious prosecution to the satisfaction of the court.

What are the remedies available to both parties?

Whenever a person is maliciously prosecuted by another without reasonable cause, and the court acquits him as an innocent person, he has a remedy in tort for the damage suffered by him due to such prosecution.

The plaintiff pleaded for special damages, general damages, punitive damages and costs of the suit.

The plaintiff must prove damage and such damage include damage to reputation, deprivation of liberty or damage to person or property arising from the malicious prosecution. The extent of damage to reputation would depend on the plaintiff's actual reputation and gravity of the offence for which he was prosecuted. The plaintiff's reputation should be assessed objectively rather than being focused on his personal circumstances. See *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, *Manley v Commissioner of Police for the Metropolis* [2006] EWCA Civ 879, *Calix v Attorney General of Trinidad and Tobago* [2013] 1 WLR 3283

The plaintiff came up with what he called special damages but did not prove any of them by way of documentary or oral evidence. They are not alluded to in his witness statement. In courts view these special damages were 'cooked' or imagined by counsel for purposes of bringing his suit within the jurisdiction of the High court of 50,000,000/=.

*Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See *Benedicto Musisi vs Attorney General HCCS No. 622 of 1989* [1996] 1 KALR 164 & *Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011**

It is settled law that special damages have to be strictly proved short of which they cannot be granted. The claim for special damages fails.

General damages are awarded at the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant.

In other words the whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition. Per Lord Hailsham, LC in *Cassell v Broome* [1972] 1 All ER 801 at 825

Clearly the plaintiff was inconvenienced by the malicious prosecution by the defendant but not to the tune of the inflated and exorbitant claims he seems to attach to his suffering of 600,000,000/=.

I will allow the prayer for general damages pleaded by the plaintiff. The plaintiff is awarded 20,000,000/= as general damages against the 2nd defendant.

The plaintiff also prayed for an award interest on decretal amount. An interest of 15% is awarded from the date of filing until payment in full.

As to the prayer for costs, Section 27 of the Civil Procedure Act provides that costs shall be in the discretion of the court and that costs shall follow the events unless the court has some good reasons otherwise to order.

In this case the plaintiff's case should have been filed in the Chief Magistrates court but the plaintiff's counsel “manufactured” special damages to bring his case within the jurisdiction of this court. In the plaint he sought special damages of 53,480,000/=, but in the final submissions to court he reduced his claim for special damages to 5,480,000/=.

This would mean his case should have been handled by Magistrate grade one. This unprofessional practice must be checked by denying such advocate costs or reducing the same to that very court. Otherwise such cases are causing a backlog in the High Court.

I would award the plaintiff 50% of the costs of the suit against the 2nd defendant only.

I so order.

Dated, signed and delivered by email & WhatsApp at Kampala this 15th day of May 2020

SSEKAANA MUSA
JUDGE