



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

Civil Suit 194 of 1998

JOSPHAT MACHARIA NGARE.....APPELLANT

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

On 16th January 1997, at about 2.00 p.m. which was on a Sunday, the plaintiff, then a school leaver, was strolling outside his uncle's house at Kariobangi Estate, Nairobi. Suddenly, he heard gun shots and he saw some people running towards him. Other people were running in different directions. He decided to lie down. He was then shot on the right leg by police officers from the flying squad. He was thereafter bundled into the boot of a police car and driven around the city as he bled. He was taken to several police stations within Nairobi and police officers at those stations tried to identify him without any success. At around 7.00 p.m., he was taken to Thika General Hospital where he was admitted. A medical report was produced in court and it showed that the plaintiff suffered compound comminuted fracture of the right femur and soft tissue injuries. The Medical report also showed that in the right knee there were signs of osteoarthritis.

After some time the police arraigned the plaintiff before the Thika Senior Principal Magistrate's court in Criminal Case No.760 of 1997 and charged him with the offence of preparation to commit a felony contrary to **Section 308(1) of Penal Code**. In the said case, the prosecution called only one witness, a police officer, who gave insufficient evidence against the accused and the trial magistrate held that no prima facie case had been established against the accused to warrant being placed on his defence and proceeded to acquit him under **Section 210** of the **Criminal Procedure Code**.

The plaintiff filed this suit claiming general damages for the injuries that he suffered as well as damages for malicious prosecution. He also prayed for special damages which he incurred by way of medical expenses due to the injuries that he suffered and legal fees in the aforesaid Criminal Case.

The defendant filed a defence and denied the plaintiff's claim in its entirety. He further alleged that if the plaintiff was shot at by the police as alleged, it was during the carrying out of official duties by the police during which the plaintiff resisted arrest and/or attempted to escape from lawful custody. The defendant further denied that the prosecution of the plaintiff was actuated by malice.

Although the plaintiff's case was filed out of time, subsequent to its filing, the plaintiff, by an application brought under **Order XXXVI rule 3C(2)** of the **Civil Procedure Rules**, sought an extension of time to institute the suit and further prayed that the suit be deemed to have been filed within time. In

her considered ruling, Lesiit J. granted the said application and stated her reasons for so doing.

When the matter came up for hearing the defendant did not call any witness to support its defence. Mr. Bitta, State Counsel, had indicated that the defendant would call one witness but that was not to be. The plaintiff's evidence was therefore uncontroverted.

It is not in dispute that the plaintiff was unlawfully injured by the police. It was not explained why the police shot at the plaintiff or the circumstances under which he was shot. In the absence of any explanation from the defendant, this court must accept the plaintiff's version of his story that he was shot by the police when he was taking an evening stroll around his uncle's house in Nairobi. It appears that the police decided to cover up their illegal act by taking the plaintiff all the way to Thika District Hospital where he was admitted for treatment. The police went on to charge the plaintiff with a criminal offence in a charge of preparation to commit a felony. The trial magistrate was satisfied, and I believe rightly so, that there was insufficient evidence upon which the police brought up the case as against the plaintiff. Only one police officer testified in that case and after granting the prosecution several adjournments, they were unable to call other witnesses as they had indicated to the court.

The plaintiff testified that he paid a sum of Kshs.15,000/- as legal fees to C. K. Mwhia & Company advocate who defended him in the aforesaid case. He produced receipts which were issued to him by the said firm of advocates.

The plaintiff also claimed a sum of Kshs.2,400/- on account of a medical report which was prepared by Mr. Angelo D'Cunha, a Consultant Surgeon. He produced two receipts (Exh.11) which were issued by the said doctor. They were for Kshs.2,000/- and another one for Kshs.400/-. The plaintiff further claimed a sum of Kshs.9,207/- on account of medical expenses. However, the amount that was proved was Kshs.1,095/=. He further claimed a sum of Kshs.7,280/- which he incurred on transport and subsistence. He produced a bundle of receipts which were collectively marked as Exh.13. They showed a figure of Kshs.8,080/-. The court can only award a sum of Kshs.7,280/= which was claimed in the plaint. I will therefore allow the sums that were proved by the plaintiff as hereinabove stated and they amount to Kshs.26,575/-.

Turning to the claim for general damages for the injuries that the plaintiff sustained, Mr. Kahiga for the plaintiff urged that this court to award a sum of Kshs.600,000/-. He relied on several authorities. In ***ISAYA MAGUMBA KIRAMBI VS JOHN KIPNGETICH KOECH AND 2 OTHERS HCCC No.5141 of 1991*** at Nairobi (unreported) the plaintiff suffered compound fracture of left tibia and fibula with osteomyelitis infection and soft tissue injuries. The court awarded general damages for pain, suffering and loss of amenities in the sum of Kshs.250,000/-. The judgment was delivered on 8th February 2001. In ***PETER NJANGARA KARANJA VS GEORGE WAINAINA NJENGA AND ANOTHER HCCC No. 2348 of 1995*** at Nairobi (unreported), the plaintiff suffered compound fracture of the right tibia and Ang'awa J. awarded general damages in the sum of Kshs.100,000/-. The decision was given on 31st January, 2002. In this matter, I am of the view that a sum of Kshs.400,000/- would be reasonable compensation for pain, suffering and loss of amenities.

Turning to the plaintiff's claim for damages for malicious prosecution, it is not in dispute that the plaintiff was arrested and charged in Criminal Case No. 760 of 1997, at Thika Senior Principal Magistrate's court as earlier stated. It is trite law that for a plaintiff to succeed in a claim for malicious prosecution he has to show that he was prosecuted at the instance of the defendant, that the criminal case was terminated in his favour, that the defendant had no reasonable or probable cause to prosecute him and that the defendant was actuated by malice in the prosecution, see ***MURUNGA VS THE ATTORNEY GENERAL [1979] KLR 138***. Whether there was reasonable and probable cause for the

prosecution is a matter that is determined by the court on the basis of the facts and the evidence that is laid before it. It was so held in **KAGANE AND OTHERS VS ATTORNEY GENERAL & ANOTHER [1969] EA 643**. In this case, it was not denied that the plaintiff was prosecuted by the Kenya Police. It is also not in dispute that the prosecution terminated in the plaintiff's favour. What has to be determined by this court is whether the prosecution was instituted without reasonable and probable cause and whether it was actuated by malice. In **MURUNGA VS THE ATTORNEY GENERAL** (supra) it was held that the test as to whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence. It is therefore imperative that the evidence that was tendered by the prosecution in the criminal case be considered. The police called one Inspector Patrick Musyoki who told the court that he and several colleagues from Makuyu police station were led by a suspect to Mukuru garbage area in Nairobi. That suspect identified to the police a gang of about twenty people. The gang fled on seeing the police but the police gave chase and managed to arrest four suspects. The plaintiff was said to have been one of the four suspects who were so arrested. The witness proceeded to state that a toy pistol was allegedly recovered from one of the suspects, but not the plaintiff. Nothing else was said about the plaintiff. The trial magistrate was not impressed by that evidence and he remarked that a serious case as the one that had been preferred by the police against the plaintiff and his co-accused ought to have been conducted seriously. He wondered why other police officers who were said to have been important prosecution witnesses did not avail themselves to testify so as to corroborate the evidence of Inspector Musyoki. I would, with respect, agree with those sentiments. Given the evidence that was given by the plaintiff regarding his shooting and arrest and contrasting the same with the evidence that was tendered by Inspector Musyoki before the trial court, one would conclude that the prosecution was instituted without reasonable and probable cause. It would appear to me that the police, upon realising that they had shot and injured the wrong person, they engaged in a cover up exercise. While it is appreciated that in doing their difficult work of combating crime, the police may occasionally shoot or arrest an innocent person, particularly if they are chasing an armed suspect, it is unprofessional for them to subject such a person to unnecessary prosecution so as to cover up their mistake. I therefore hold that the prosecution of the plaintiff by the police was done maliciously and the plaintiff is entitled to damages for malicious prosecution.

The plaintiff's advocate urged this court to award a sum of Kshs.700,000/- as damages for malicious prosecution. Doing the best I can, I award a sum of Kshs.500,000/- as general damages for malicious prosecution. The sum total of the awards made in favour of the plaintiff is as follows:-

- (a) Special damages - Kshs.26,575/-
 - (b) General damages for pain, suffering
and loss of amenities - Kshs.400,000/-
 - (c) General damages for malicious prosecution - Kshs.500,000/-
- TOTAL - Kshs.926,575/-

The plaintiff will also be entitled to interest on the aforesaid sum and the costs of the suit.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Miss Kagondu for the plaintiff and N/A for the defendant.

D. MUSINGA

JUDGE



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