

Mukesh Shukla v Attorney General
[2023] UGHCCD 346 (13 November 2023)

Representation

Learned Counsel David Mushanga appeared for the Plaintiff while Learned State Attorney 30 Clare Atukunda was for the Defendant. Written submissions have been filed by counsel as directed by Court, although the Defendant did not present any witnesses to court.

Issues framed for trial are: -

- 1. Whether the Plaintiff was unlawfully arrested?
- 35 2. Whether the Plaintiff's arraignment and prosecution was malicious?
- 3. Whether the Defendant is liable for the resultant loss?
- 4. What remedies are available to the parties?

Resolution of issues

Issue 1: Whether the Plaintiff was unlawfully arrested?

40 Plaintiff's submission

Counsel for the Plaintiff submitted that an arrest becomes unlawful when it is carried out without any factual basis. That in this case, the police based on allegations made by the late Dr. Katatumba and without carrying out their independent investigations, decided to charge and prosecute the Plaintiff in court on allegations of conspiracy to kill the late Katatumba.

45 Counsel explained that there was no evidence that such conspiracy was ever put in motion which is a key ingredient of the offence of conspiracy to commit a felony under the law. He relied on exhibit P.1, the prosecution charge sheet and the cases of Walubi & Anor. –v-Uganda, CACA No. 152 of 2012, R –v- Shannon (1974) 2 ALLER 1009, Pg. 1020-21 and Arvind Patel –v- Uganda, SCCA No. 36/2002 and submitted that in this case, the Plaintiff was arrested 50 unlawfully and without justifiable cause. He prayed that this court finds that the Plaintiff was unlawfully arrested by the agents of the Defendant.

Defendant's submission

In reply, counsel for the Defendant submitted that Police is mandated under Article 212 of the 1995 Constitution of Uganda Sections 4 (1) & 23 of the Police Act, Cap 303 to preserve law 55 and order and to enforce the laws of Uganda. That in enforcing these laws, Police officers have the power to arrest any person even without a warrant or order of Court if there is a reasonable cause to suspect that the person has committed or is about to commit a cognisable offence as provided under S. 10 of the Criminal Procedure Code Act, Cap 116. That S.1 of the Criminal Procedure Code Act defines a cognisable offence as; -

60 "an offence which on conviction may be punishable by a term of imprisonment for one year or more; or which on conviction may be punished by a fine exceeding four thousand shillings."

The learned State Attorney averred that the offence of conspiracy to murder under S. 208 of the Penal Code Act, with which the Plaintiff was charged, carries a penalty of 14 years' imprisonment on conviction and this brings it under the ambit of S. 10 of the Criminal

65 Procedure Act.

The State Attorney further relied on Article 23 (1) (c) of the Constitution which states that; -

"No person shall be deprived of personal liberty except for purposes of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda"

70 She explained that on page 2 of the Plaintiff's submissions and during cross-examination, the Plaintiff admits that the Police did not act on its own accord to arrest him but was moved to do so after it had received a complaint from the late Katatumba and as such there was sufficient reason to cause suspicion that the Plaintiff could have committed a cognisable/chargeable offence. That the implication of the Plaintiff's evidence is that his arrest 75 was lawful and that this court should find so.

Analysis.

Black's Law Dictionary, 10th Edition at page 131 defines unlawful arrest as;

"the taking of a person into custody either without a valid warrant or without probable cause to believe that the person has committed a crime."

80 Section 23(1) of the Police Act Cap 303, provides that;

"a police officer may, without a court order and without a warrant, arrest a person if he or she has reasonable cause to suspect that the person has committed or is about to commit an arrestable offence".

An "arrestable offence" is defined under the Police Act as an offence which on conviction may 85 be punished by a term of imprisonment of one year or more, or a fine of not less than one hundred thousand shillings or both.

Page 3 of 12

Under Section 25(1) of the same Act, it is provided that a police officer on arresting a suspect without a warrant, he/she must produce the arrested person before a magistrate's court within forty-eight hours except where the person has been earlier released on police bond.

90 In Magezi Raphael-v-Attorney General HCCS No. 977 OF 2000, Court noted that:

"An arrest becomes wrongful, when the same is carried out in absence of a complaint before one is arrested and, subject to some exceptions, in absence of an arrest warrant."

In this case, the Plaintiff states in paragraph 3 of his witness statement as follows;

"sometime in early 2013, a one Bonney Mwebesa Katatumba made a complaint to the police 95 stating that I had conspired with a one Hassan G. M Wandera to murder him. The allegation against me was therefore conspiracy to commit murder. The police upon investigations of the matter, made a report to the Director of Public Prosecutions who sanctioned the charges. On the 8 th January, 2013, through my lawyer, Augustine Kibuka Musoke, I was summoned to the police at Kampala Metropolitan Police Headquarters the following day in connection with

- the charges of conspiracy to commit a felony. The following day, on 9 th 100 January, 2013 when I reported to the police pursuant to the summons, I was promptly arrested and detained at Central Police Station Kampala for the entire day until I was driven to Makindye Chief Magistrate's Court and was arraigned and charged on the count of Conspiracy to murder Dr. Bonney Mwebesa Katatumba in Makindye criminal court number MAK 1286 of 2012"
- 105 From the above Plaintiff's evidence this court notes that before the Plaintiff was arrested;
- i. there was a complaint against him by Dr. Bonney Mwebesa Katatumba.
- ii. the matter was forwarded to the DPP where the file was sanctioned
- iii. the Plaintiff was summoned to Police through his Lawyer
- iv. while at police he was detained and arraigned in court within 48 hours.
- 110 Applying the law to the facts of this case, I find that the plaintiff's arrest was lawful and as such, I would answer this issue in the negative.

Issue No. 2: Whether the Plaintiff's arraignment and prosecution was malicious?**115 Plaintiff's submissions**

Counsel for the Plaintiff while relying on the cases of Mohammed Tumusiime -v- Uganda Revenue Authority, CS No. 480 of 2016 [2019], Hannington Mpala & 2 Ors -v- the Attorney General, CS No. 116 of 2012 [2019] and Mbowa -v- East Mengo District Administrator (1972) EA 352 at 352 submitted that the four essential elements of the tort of malicious prosecution 120 are set out to be that; (i) the criminal proceedings must have been instituted by the Defendant, (ii) the Defendant must have acted without reasonable or probable cause, (iii) the Defendant must have acted maliciously and the criminal proceedings must have been terminated in the plaintiff's favour.

He explained that in this case, on the first element, the Plaintiff has demonstrated that it is the 125 late Dr. Boney Katatumba, who is now deceased and cannot be made party to the present proceedings, who reported a case to police which, together with the office of the Director of Public Prosecution commissioned charges against the Plaintiff.

On the second ground that the Defendant must have acted without reasonable and probable cause, Counsel for the Plaintiff while relying on Articles 120 (3) (a) & (b), 120 (5), 120 (6) of 130 the Constitution of Uganda and the case of AH –v- AB [2009] EWCA Civ 1092 contended that

the Office of the Director of Public Prosecution is an independent office that is not under the control or direction of anyone. That it has a duty to act professionally, ethically and within the guidelines of the law to secure justice. He relied on the case of Dr. Willy Kaberuka –v-Attorney General, CS No. 160 of 1993 [1994] II KALR 64 where Byamugisha, J, (as she then 135 was), 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 140 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."

Counsel further cited the case of Kagane & Ors –v- Attorney General & Anor (1969) EA 646 of the High Court of Kenya where court noted that; -

- 145 "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."
- 150 In regards to malicious intent, counsel relied on the cases of Gwagilo –v- Attorney General [2002] 2 EA 381 (CAT), Zainal bin Kuning –v- Chan Sin Mian Micheal [1996] 2 SLR (R) 858 and Magabi –v- Attorney General, CS No. 133 of 2002 where Hon. Mr. Justice Bashaija K. Andrew held that; -

"It is my view that malice has been established as can be inferred from the police' failure to 155 consult the law and/or to act as 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 160 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"

He explained that the 1st and 2nd plaintiff witnesses in this case testified that the plaintiff and the late Boney Katatumba had business rivalry issues and that the police was aware. That in light of 165 this, greater caution and exercise of restraint should have warranted a stricter and more professional approach rather than the one employed, to have the plaintiff arrested and prosecuted for nothing. That the prosecution of the plaintiff was motivated by malice and the prosecution wilfully disregarded the plaintiff's right to a fair treatment under the law and due process.

170 On the ground of the case being terminated in the plaintiff's favour, Counsel relied on the case of Egbema –v- West Nile District Administartion (1972) EA 60 and Exhibit P.5 which is a withdrawal form signed by the Director of Public Prosecutions discontinuing the proceedings against Captain Hassan Wandera and Mukesh Shukla on the charges of conspiracy to murder.

Defendant's submissions.

175 In reply, counsel for the Defendant relied on the case of Erieza Kaggwa –v- Christine Kagoya & Anor, Civil Suit No. 397 of 2014 and Odunga's Digest in Civil Case Law and Procedure page 5276 where the essential ingredients to prove malicious prosecution were laid out and submitted that the prosecution of the plaintiff was based on reasonable grounds that the prosecutors would secure a conviction based on the evidence gathered from the witnesses by 180 the investigating police officers. That indeed, the plaintiff was prosecuted based on that evidence until a time when the complainant, the late Boney Katatumba lost interest in the case and requested the DPP to withdraw the charges against the Plaintiff resulting into discontinuation of proceedings against the plaintiff and his co-accused on the 30th June, 2014 and 8th July, 2014 respectively. The State Attorney referred this court to Article 120 (3) (d) of 185 the Constitution of Uganda and Section 134 of the Trial on Indictments Act which gives the DPP powers to enter a Nolle' Prosequi.

Counsel further referred to Constitutional Reference No. 11 of 2014, and submitted that when the DPP entered a Nolle' Prosequi in respect of criminal proceedings against the plaintiff, she was exercising her powers within the law.

On the question whether the 2 190 nd Defendant acted without reasonable or probable cause, the Learned State Attorney relied on the cases of Dr. Willy Kaberuka –v- Attorney General, CS No. 160 of 1993 [1994] II KALR 64 & Oketch Oloya Peter –v- AG and Nebbi District Local Administartion, HCCS No. 7 of 2012, and submitted that in the instant case, it is clear that the plaintiff was charged on receipt of a complaint from Dr. Katatumba. That there was reasonable 195 and probable cause to have the plaintiff prosecuted because there existed a criminal case that had been reported at police by Dr. Katatumba.

As regards malicious prosecution, she submitted that the plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill will or improper motives as stated in *Katerega -v- Attorney General* [1973] 1 EA 287. That in this case, no evidence has been adduced that there was malice on the part of the Defendant. That the Defendant acted within the law to prosecute the plaintiff while relying on Sec 23 of the Police Act, Cap 303 and the case of *Gwagilo -v- AG* (supra) and *Oketch Oloya -v- AG* (supra).

Counsel prayed that this Court answers issue 2 in the negative.

Analysis

205 Black's Law Dictionary, 10th Edition defines Malicious Prosecution as;

"the institution of criminal or civil proceedings for an improper purpose and without probable cause."

In *Gitau -v- East Africa Power & Lightening Co. Ltd* (1986) KLR 365, Schofield, J, held inter alia that: -

210 "In order for a claim of malicious prosecution to succeed the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendants and that there existed malice and which malice he must prove."

In the case of *Erieza Kaggwa -v- Christine Kagoya & Attorney General*, Civil Suit No. 397 of 2014, court held that;

- 215 "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 judicial authorities whose responsibility is to administer criminal justice. According to Odunga's Digest on Civil Case Law and Procedure at page 5276, the essential ingredients to prove malicious prosecution are as follows:
- 220 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 favour."

The plaintiff must satisfy all of the above elements in order to succeed in obtaining an award of damages against the Defendant. In the present case, it is undisputed that the plaintiff was arrested, detained, and charged in court by the agents of the Defendant. Further, on the 15 th of July, 2014, the case against the plaintiff was withdrawn against the Plaintiff by the DPP. So, the 1 st and 4th ingredient are fulfilled so to say. I will give a brief detail on each ingredient.

1. Criminal proceedings must have been instituted by the Defendant.

- 230 In this case, the late Dr. Katatumba complained to police against the Plaintiff. The Police then referred the matter to the office of the Director of Public Prosecutions where the file was sanctioned and the Plaintiff was charged in court with the offence of conspiracy to commit a felony.
- Under Art. 120 (3) (a) and (b) of the 1995 Constitution of Uganda (as amended), it is a 235 function of the ODPP to direct the police to investigate any information of a criminal nature and to institute criminal proceedings against any person or authority in any court other than a court martial.

Under Article 120 (3) (d), the ODPP has the mandate to discontinue at any stage before judgment any criminal proceedings. This is what happened as per exhibit P.4 (withdraw of the 240 case by the DPP) in this case.

Suits by or against the government are handled by the Attorney General under Article 119 (4) (c) of the 1995 Constitution (as amended) and Section 10 of the Government Proceedings Act. In the case of Douglas Odhimbo Apel & Another –v- Telkom Kenya Limited; CA No. 115 of 2006 court held that: -

245 "...in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution the proper defendant is always the Attorney General."

This is why in this case, the Attorney General and not the Police or Office of the Director of Public Prosecutions, is the Defendant.

2. The Defendant must have acted without reasonable or probable cause

The Black's Law Dictionary (10th 250 Edition) defines 'reasonable' as: -

- i) Fair, proper or moderate under the circumstances; sensible
- ii) According to reason

"Probable Cause" on the other hand has been defined as;

"A reasonable ground to suspect that a person has committed or is committing a crime"

The terms "reasonable and probable cause" were further defined in the case of Glinsk –v-Mclver [1962] AC 726 by Lord Devlin, as follows: -

"reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the 260 probability of conviction..."

- In this case, Dan Muhumuza, the General Manager of Shumuk group of companies which belong to the Plaintiff, informed court in paragraphs 3 (s), (t), (u) and (v) of his witness statement that the late Katatumba and the Plaintiff had entered into sale of land and

buildings at Blacklines House in Kampala and Hotel Diplomate in Muyenga. That after they had 265 completed the sale of the said properties, the late Katatumba reneged on his agreement and did all he could to recover his properties which he had actually sold to the Plaintiff and the Plaintiff's companies. That as a measure of applying pressure over the Plaintiff, the late Katatumba began to make allegations that the Plaintiff wanted to kill him in cohorts with others. That he did this to tarnish the name of the Plaintiff and the Plaintiff's companies.

- 270 Godfrey Kato, the Financial Director of Shumuk group of companies also informed court that there were business transactions between the Plaintiff and Katatumba concerning sale of Katatumba's Hotel Diplomat and Blacklines House which turned sour and Katatumba took legal action against the Plaintiff.

The plaintiff in his evidence in paragraph 3 (nn) admits that he had business differences with 275 Katatumba which were the cause of the allegations that Katatumba made against him. He also confirms this in cross examination when he states that he had done business with Katatumba and the business had gone bad.

A reading of the above evidence presented the Plaintiff and his witnesses confirms that there was strife between the Plaintiff and the Late Dr. Katatumba who then reported a case/ 280 complaint to police. Considering the kind of property that caused the strife between the Plaintiff and Dr. Katatumba, I find that there was sufficient ground for the Police and the DPP, after receiving the complaint to come up with the finding that the Plaintiff was probably conspiring with other cohorts to murder Dr. Katatumba so that he takes his property. Therefore, I find that there was reasonable and/or probable cause for the Police and DPP's 285 action of arraigning the Plaintiff before court on the charges of conspiracy to murder.

3. The criminal proceedings must have been terminated in the plaintiff's favor.

In the case of *Erieza Kaggwa -v- Christine Kagoya & Attorney General* (supra), court noted that acquittal per se of the plaintiff does not mean that he or she has been maliciously prosecuted.

290 In *Nzoia Sugar Company -v- Fungututu* (1988) KLR, 399, Court observed that: -

"acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of illwill or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Company."

Page 11 of 12 In this case the charges were withdrawn by the DPP on the 15th 295 /7/2014, before court delivered its ruling on a case to answer. There is a letter dated 19th June, 2014 written by Dr. Boney Katatumba addressed to the DPP, vide; CRB 259/2021 A criminal case against A1 Capt. Hassan Wandera and A2 Mukesh shukura, where Katatumba informed the DPP that he had many civil cases in court with A2 (Mukesh Shkura). That they were trying to settle those cases out of court 300 and that Mukesh had requested that Katatumba first drops the criminal charges against

him before any negotiations could go on. In that letter, Katatumba says that it is in this spirit that he decided to drop the charges against the accused persons and requests the DPP to discontinue the charges against the Plaintiff. There is a receiving stamp of this letter by the office of the DPP and a hand written directive on the letter to withdraw the charges. This court notes that charges were withdrawn on the 15th 305 /7/2014 after this letter was received in the office of the DPP on the 24th /6/2014. I have already established that the Plaintiff had business differences with Dr. Katatumba (see paragraph 3 (nn) of the Plaintiff's witness statement, paragraph 3 (s) and (t) of PW2's evidence and paragraph 3 (a) and (b) of PW3's statement), all referring to business transactions between the Plaintiff and Dr. Katatumba having gone sour. I believe, on 310 the balance of probabilities that Dr. Katatumba was truthful to the DPP when he wrote stating that the Plaintiff had given him a condition that the pending criminal charges should first be withdrawn against him if they are to negotiate and settle their business disputes before the civil courts properly and I'm convinced that this is why the DPP withdrew charges against the Plaintiff. Therefore, I would find in this case that much as the charges were determined in 315 favour of the Plaintiff, it does not mean in this case, that the Plaintiff was being maliciously prosecuted by the Defendant. The termination of the charges was conditional so as to try and enable the Plaintiff and Katatumba settle their disputes over property in the civil court.

4. The Defendant must have acted maliciously.

Counsel for the Plaintiff submitted that the evidence presented against the Plaintiff in court was 320 baseless and the office of the DPP withdrew charges against the Plaintiff.

I have explained circumstances under which charges were terminated against the Plaintiff. I have also explained how the Plaintiff was arraigned before court. There is evidence of strife between the Plaintiff and Dr. Katatumba over property that Katatumba was said to have sold to the Plaintiff. I have already established that there was reasonable cause for the Police and 325 the ODPP to arrest and charge the Plaintiff in court. I find that the Plaintiff has not

demonstrated that there was malice by the officers of the Defendant against in the process of his arrest and arraignment before court. This ground therefore also fails.

In the whole therefore, I find that the Plaintiff has failed to prove a case of malicious prosecution against him by the officers of the Defendant. I would find no merit in this case 330 which I do hereby dismiss from court and order that the Plaintiff pays costs to the Defendant.

I so order.

Dated, signed and delivered by mail at Kampala this 13th day of November, 2023

335 Esta Nambayo JUDGE 13th /11/2023.

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Prepared on 14 October 2026 · Esheria